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The Rule of Law and the Eastern Enlargement of the EU

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Degree of Doctor of Philosophy

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2001



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Title: The Rule of Law and Eastern Enlargement of the EU

This thesis examines and analyses the 'rule of law' concept and its importance to the enlargement of the European Union to include Central and Eastern European countries. The main focus of the thesis, revolves around the argument that the differences in conception of the rule of law within the European Union (both member states and institutions), is problematic to further transition and development of this important principle in Central and Eastern European countries seeking EU membership. The rule of law has been identified by the EU as a fundamental principle and criteria with regard to the current enlargement process. In addition to this, the European Union has not defined what it means by 'rule of law' and has instead stated its belief that new members will develop their own 'brand' of rule of law and democracy that takes into account individual cultures, histories and experiences. Despite such declarations, the EU have made suggestions for the reform or formation of particular institutions and procedures within prospective member states, that suggest particular understandings of what the rule of law is and stands for. This conflicting message to prospective members has left many of them in the situation where they are making changes to their institutions and practices so as to mirror 'Western European' countries, but without the knowledge of how to utilise such things. The situation is also potentially problematic for the European Union, as it calls into question its own practices relating to reform and enlargement, such as how does the EU decide whether prospective member states have met the criteria of having established the rule of law, when there is no formal consensus on what establishing the rule of law entails or how the principle is defined.

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NOTE ON METHODOLOGY OF THESIS

This thesis takes a broad approach encompassing the utilisation of primary European Union documentation, secondary literature, and supplemented by interview material. The primary EU documentation and secondary literature were gathered from library, internet, EU documentation centre, and other sources. The interview material while noted within the thesis does not identify specific individuals/sources, as they have asked to remain anonymous. However, with regard to these sources, they were selected for their knowledge and understanding of the EU enlargement and accession processes and/or of the applicant countries involved in this process, and their potential understanding of the rule of law within these contexts. Others were selected on the basis of recommendations of other sources from EU institutions, with which the author had contact during an initial round of interviews. Sources from outside of the EU institutions were specifically selected for their knowledge of applicant country perspectives, understanding of the rule of law, or for their knowledge of programmes and projects created to establish and support the rule of law in transition countries. Again, some of these contacts were established on the basis of contact details and recommendations from previous interviewees.

Upon selection of potential contacts, a list of questions was established, focused upon similar ideas/lines - the rule of law, democracy, enlargement and accession, rule of law programmes and projects - but with different emphases dependent on the interviewees in question. These questions were drawn up and discussed in detail with a number of individuals with whom the author has had numerous discussions about interviews and interviewing and the overall thesis plan. The list of questions was meant as a guide for the interviewer, rather than a checklist of questions to ask. It assisted in gathering information on understandings of the rule of law with regard to the

enlargement and accession processes, whilst also gauging whether interviewees were receptive to more detailed and specific questions related to points of interest, and their own specific work in light of these points.

INTRODUCTION

The purpose of this study is to gain a better understanding of the role the rule of law has within the wider context of European Union enlargement eastwards. Its focus is two-fold, firstly, to understand what the rule of law *is* and *means* to the European Union (both member states and institutions), since it has been repeatedly stated as an important principle to which countries within the Community and those proposing to join it, should be committed. Secondly, it is intended to demonstrate that the EU's commitment to the rule of law has not extended to actually defining this principle. This lack of definition is problematic for the EU, especially with regard to its further enlargement to include countries that have little recent experience of democratic values and ideas.

The intention of this work has not been to develop yet another definition for the rule of law, (which should be utilised by the European Union), but to demonstrate that understandings of the rule of law are diverse. The diverse understandings reflect the fact that the rule of law is a contested concept¹, as is evident from the work of other authors covered, such as Habermas, Shklar, Craig, and Walker². More importantly the thesis will illustrate and highlight some of the ambiguities and deficiencies associated with various conceptualisations of the rule of law. It will do so through review and outlining of different conceptualisations of the rule of law and its affect on the development of modern legal and economic systems across the European Union. This is relevant, as understandings of the rule of law greatly influence the shape of legal systems, and at the same time, legal systems have an impact on the continued development of this fundamental principle in many countries.

Why the rule of law? Mainly because it has been identified in EU documentation - as a 'fundamental principle' for ensuring democracy and democratic institutions and structures. For instance, a notable ambiguity covered in chapter one of this thesis, deals



with the conflation of the rule of law and democracy. The relationship between these two important concepts is a complex one.³ Chapter One will cover the conflation of these concepts and will demonstrate that the conflation of these concepts neglects the fact that there are three possible ways of looking at the relationship between the rule of law and democracy. The three ways in which one can contemplate this relationship are 1) democracy is important for the effectuation of the rule of law; 2) that the rule of law can also be judged as a retardant to the development of democracy; or 3) that democracy itself, can be used to justify suppressing the rule of law.⁴ The importance of this review is to demonstrate that the ambiguities alluded to, (described in earlier parts of this thesis), have not been dealt with sufficiently to-date, by current EU member states and institutions.

This will be illustrated through review of EU documentation and the utilisation of interview material to supplement the documentation. What these sources of information seem to allude to, is that the European Union currently lacks any formal universal understanding of the rule of law. Throughout EU documents there is mention of the term 'rule of law', but this term, usually connected with democracy and human rights, has not been defined in any of the Community's documentation. What is more interesting with regard to this term is the fact that despite lacking a definition for the principle, the EU claims the rule of law to be a fundamental principle upon which member states and the European Union itself are based.

This poses an interesting situation for the Community, as will be discussed later, that the term rule of law was not specifically mentioned as a pre-requisite for previous enlargements, despite it being cited as a fundamental principle of the European Union. In previous enlargements, it was assumed that countries applying for membership shared similar ideas and conceptions of important values, so no formal set of procedures or

criteria for enlargement existed. There were informal procedures and practices for enlarging the Community, without a formal or specific set of guidelines listing procedures, practices, criteria. It is only with the Copenhagen summit and the development of the Copenhagen criteria for the current enlargement discussions, that the rule of law is mentioned specifically, although again, without a definite sense of what is meant by use of the term.⁵

There are, however, some significant reasons for the lack of development of a uniform conception within the European Union that will be covered in chapter two. The historical and cultural differences and experiences between various member states, is one reason for national differences in the understanding and defining of the rule of law. For example, differences between British, French and German notions of the rule of law⁶ have been shaped by each country's historical and cultural developments and experiences. These have shaped their understandings of law - its role and the basis of its legitimacy, as well as their understandings of the relationship between individuals and the government. In turn, these have been important factors in the development of democratic institutions, procedures, and values in these member state countries. These differences, which are a part of the entire culture and society of individual member states, makes it difficult to see member states developing a uniform definition of the rule of law that would satisfy all without anyone having to make specific changes to their governing and legal systems. This is the underlying reason for the rule of law remaining vague in definition. Further discussion of these influences are covered in chapters two and four.

Such discrepancies and variations have led to problems that are beginning to appear which can be attributed to variation in understandings of the rule of law. Differences in defining the rule of law had an impact upon the various levels within the Community. For example, three key issues examined with respect to this were a)

potential challenges to the Community legal order; b) different attitudes to judicial discretion; and c) citizenship, taken at the three different levels of decision-making in the EU.⁷ The variation in perspectives on such issues as citizenship or judicial discretion, or the issue of primacy of Community law, will be reviewed in chapter two and serves to illustrate the existent problems and difficulties that a lack of uniformity produces. These problems exist even before compounding the problem with a further expansion of the Community to include countries with different legal systems, and some would say, less developed legal cultures.

The understanding of the rule of law within countries from Central and Eastern Europe are in general, not as developed as in western European countries. Assessment of a few of these countries will be made in chapter three of this thesis. The reasoning for the lack of a developed understanding of this principle by citizens and government officials can be attributed to several factors. Two of the main factors identified and supported by comments from interviewees, are the focus on improving economic conditions and situations, and the past abuse of the rule of law by previous regimes.⁸ These are some of the common problems experienced by ordinary citizens, which impede the development of understanding the rule of law. Opinion polls conducted in several Central and East European countries seem to confirm the prevalence of these problems.⁹ Therefore, in order for rule-of-law reform to succeed in such countries, reform must get at the fundamental problem of 'leaders who refuse to be ruled by the law.'¹⁰

However, these difficulties seem to be compounded by the EU's inconsistency. On the one hand the EU has encouraged these states to develop their own 'brand' of the rule of law.¹¹ Discussion of this in chapter two (section three on a lack of uniformity and its implications), chapter three, and chapter four (returns to problem of lack of uniformity in the EU), support perceptions that the EU's inconsistent policy towards the

rule of law seems to fit in with the status quo within the current EU, which is characterised by diversity of approaches to the rule of law. However, the major difficulty this inconsistency causes are approaches to reform and development of institutions and procedures that are not necessarily productive to states that lack the experience and traditions of the rule of law. The pre-requisite of the rule of law without a definition, EU encouragement of developing 'own brand' or forms of rule of law, and then the added assistance of modelling their approaches to the rule of law on 'partner' states of the existing EU¹², cause confusion and discrepancies to occur in many prospective member states.¹³ However, the inconsistency of the EU in its treatment of the prospective new members while important, is not however the main problem. The main problem is that enlargement to include these countries threatens to exacerbate the existing problem of diversity that the EU has refused to face up to this point.

Such differences in understandings will be discussed throughout the thesis. These differences have already led to differences in the implementation of the same law across the current Community of fifteen states. Problems of differentiation in application of law and understanding of the relationship between Community and national domains are beginning to appear within the European Union. Discrepancies regarding laws in direct conflict with parts of national constitutions and laws have occurred in some member states.¹⁴ The problems illustrated within a Community of fifteen states has the potential to become magnified with the further enlargement of the European Union to include countries as diverse as those from Central and Eastern Europe. This is of particular significance as it demonstrates some of the real and potential problems the European Union faces from its lack of a formal, shared understanding of the rule of law.¹⁵ The reluctance to respond to the problems of diversity the European Union desires, is also at odds with the deeper integration plans it is seeking to implement.¹⁶ The issue of further

integration is one that will not be easily solved. This is set to become worse with a larger number of diverse member states involved in the process.

This thesis investigates merely one aspect - one principle (the rule of law) considered to be an important aspect and criterion for determining future European Union membership. Study of the rule of law within the wider context of European Union enlargement eastwards is both timely and of significance, as the European Union continues with the integration process - taking another step forward economically with the single currency. At the same time, it continues its discussions and plans to enlarge the Community to encompass another twelve countries. The rule of law is significant in this period of transition, as it has been identified as an important principle upon which economic, legal and political systems should be based in the European Union.

¹ Chapter Two, Section One, best illustrates the diverse conceptions of the rule of law which exist across European Union member states. Here, it will examine the understanding of the rule of law held by Britain, Germany and France. These three member states were focused upon for two reasons. Firstly, they illustrated Dyson's Anglo-Continental dichotomy of the rule of law (Britain and Germany); Germany and France were examined because although Dyson's dichotomy was useful, it was also limited in the fact that it did not account for differences in understandings of the rule of law held by different Continental countries. And secondly, these three were countries were chosen in particular, as they illustrate the differences in traditions and form a natural point of reference for smaller countries (especially those in Central and Eastern Europe seeking EU membership).

² This list of authors here are not conclusive, but merely a short list of a few of the writers examined and whose work will be utilised within this thesis.

³ See Chapter One, Section Two. This section outlines in detail, the ambiguities and concerns related to the relationship between the rule of law and democracy. Most problematic in this relationship is the fact that the two terms have at times been used interchangeably, whilst neglecting the contradictions that crop up between what the two ideas mean and the manner in which they have traditionally and contemporarily been understood.

⁴ See Chapter One, Section Two, for further detailed discussion about the conflation of the rule of law and democracy.

⁵ The Copenhagen criteria, developed out of the European Council's meeting in Copenhagen in June 1993, was the 'first clear rules for membership of the EU, and continue to form the basis for all negotiations with applications.' The European Committee of the American Chamber of Commerce in Brussels, *Guide to the Enlargement of the EU*, The EU Committee, 1998, p.7. Prior to this criteria, previous enlargement procedures were derived from ongoing practices, following Article 98 of the ECSC Treaty, Article 237 of the EEC Treaty, Article 205 of the EAEC Treaty, and Articles O and F of the Maastricht Treaty (Treaty on European Union).

⁶ Dyson's dichotomy will be used with additional materials to compensate and explain differences that existed even within Dyson's dichotomy of Anglo-Continental differences in understanding of concepts like the rule of law.

⁷ Chapter Two, Section Two discusses the impact of different legal cultures on three particular issues: 1) the potential challenges to the Community legal order; 2) examination of the different attitudes towards the idea of judicial discretion; and 3) looking at the issue of citizenship from the three different levels of decision-making existent in the European Union (Community level, national level, and individual level).

⁸ Statements from interviewees from EU institutions and from a few of the associated countries (conducted between March 1998 and June 2000), will be utilised to further discuss this issue.

⁹ Surveys/Opinion Polls were presented in the *New Democracies Barometer* and in Richard Rose, *Survey Measures of Democracy*, Studies in Public Policy no.294, University of Strathclyde, Glasgow, UK, 1996. Research and surveys were conducted by the Centre for the Study of Public Policy, University of Strathclyde, Glasgow, UK.

¹⁰ Comments that arose during various interviews suggested and stated that particular associated countries modelled their legal systems and laws on current EU member states, while taking into account differences between themselves and these member states. It was also acknowledged that it would take more than the mere transfer of institutions and ideas from western European countries, implanted into Central and East European countries for the rule of law to be developed and supported. This was also reiterated in the work of Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, vol.77, no.2, March-April 1998, pp.95-106.

¹¹ Comments similar to this one, were made during Interviews A and C conducted in Brussels on the 5 and 6 May 1998.

¹² Chapter Three of this thesis will emphasise the diversity of conceptualisations that exist across prospective member states in Central and Eastern Europe. What this provides is a glimpse at the reasons behind particular developments regarding the rule of law in this region. For example, the chapter illustrated how the Czechs seem to be developing their own 'idea' of the rule of law, but are unsure of what it should do. While the Hungarians on the other had, have developed an understanding of the rule of law similar to the German conception discussed earlier in Chapter Two. Then there are the Poles, who have shown more positivist inclinations in their conceptualisation of the rule of law. All of these illustrate the differences in understandings which exist in the region.

¹³ What this illustrates is the lack of uniformity and diversity that the Community is emphasising on the one hand, while at the same time, it is prescribing that prospective members include certain institutions or procedures that are connected with a more uniform understanding of the rule of law. This demonstrates the uncoordinated developments that have been taking place across the Community. It supports the conclusion, that while the Community is saying one thing, its actions are 'saying' the opposite. They want to encourage diversity and have stated that prospective countries will develop their own 'brand' of rule of law that is culturally sensitive. What this is supporting it seems, is the support of the status quo in the Community - that current member states can have variations in their understandings of the rule of law. This has potential implications on the integration process of the Community, that is only beginning to come to light.

¹⁴ Examples of this can be cited from France and Germany. This will be covered in detail in Chapter Two- in examination of member states' understandings of the rule of law.

¹⁵ In much of its documentation containing the term 'rule of law', the European Union has linked it with the idea of democracy - linking the two terms as synonymous or invariably intertwined and necessarily connected. This perspective does not take into account that the two concepts are at times, at odds with one another and contradict what the other proposed to stand for.

¹⁶ For example, the EU has criticised some associated countries for lacking the proper implementation of particular institutions and procedures. (Signs from the Community have pointed to their move towards placing more emphasis on the proper implementation of institutions and procedures and not just with having them in place.) They are concerned with the operation of these in practice in prospective member states, but perhaps have overlooked the fact that within the current Community, there are some member states who perhaps either lack these same institutions or who have them, but lack proper implementation of them, which has been sometime 'required' by prospective members in the enlargement process.

Chapter One: The Rule of Law

The purpose of this chapter is to demonstrate the complexity of the concept of the rule of law and its contested nature. It is also meant to illustrate some of the ambiguities in various approaches to the rule of law, as discussed by writers such as Judith Shklar, Geoffrey de Q. Walker, and Paul Craig. There is a need for a more complex understanding of the rule of law, than is currently offered by many writers. Because of this need, this first chapter will focus on the relationship between the rule of law and the ideas of democracy, the judiciary, and a market economy. Focus upon these particular relationships are of relevance and importance because many conceptions and understandings of the rule of law have developed with reference to one or more of these ideas. The distinctions made in this first chapter serve as foundations for subsequent chapters, and are important for the subsequent consideration of approaches to the rule of law by particular European Union institutions, member states and associated countries. Overall in Europe, development of diverse ideas and understandings of the rule of law is illustrative of the ambiguities that exist.

The first section of this chapter will examine the rule of law. This will entail discussion of two main distinctions made in defining the rule of law: 1) of the rule of law as a way of life (values oriented) as compared to a set of institutions; and 2) the formal or substantive conceptions of the rule of law. The first distinction, referring to the rule of law as a way of life or in terms of institutions, is one that was made by Shklar.¹⁷ The second distinction in defining the rule of law has been put forward by both Paul Craig and Maria Esteban.¹⁸ The importance of this particular distinction between formal and substantive conceptions of the rule of law, is that it is crucial 'in determining the nature of the specific legal precepts which can be derived from the rule of law.'¹⁹ Each of these meanings is of importance because each implies particular sources for the derivation of

law, which in turn, has particular implications regarding the role of government, the extent of individual rights, and the way in which law is perceived and applied. The distinctions drawn out each dictate the existence of a specific hierarchy between values and the institutions that have been created to protect these values. Examination of this distinction is of importance as it will provide a more 'well-rounded' understanding of the concept 'rule of law', and its complexity. These distinctions made in defining the rule of law will be examined in more detail later in the first section of this chapter.

The chapter will then continue with a section (section 2) on democracy. This section will only focus on the two main descriptions of democracy. The first definition is of it as direct or participatory democracy, and the second as representative democracy. The importance of examining these two different definitions of democracy is that each implies a specific type of relationship between government and individuals.

After examining the two main understanding of democracy, the section will then centre on the relationship between the principle of the rule of law and the contemporary conception of democracy, i.e. representative democracy. This is of importance as it concerns what the relationship is between the rule of law and democracy, terms that are often presented as interchangeable.²⁰

The third section of this chapter (section 3) examines the relationship between the judiciary and the rule of law. The judiciary has been established, among other things, to provide individuals with the means by which to hold the government accountable for its actions. However, the judiciary has the task of serving as judge of law and at the same time, it is subject to the law.²¹ The role of the judiciary, especially the role and powers of judges, is directly affected by the way in which the rule of law is defined or interpreted. This determines the shape of the judiciary and the idea of judicial review. This can be

illustrated with reference to examples of current member states, and to the EU, through the Court of Justice.²²

The last section of this chapter (section 4) focuses on the problems or contradictions inherent in the relationship between the rule of law and building a market economy. The main conflict with this relationship is that the building and constant support of a market economy demands actions (intervention by government) that contradict what some understand the concept of the rule of law to represent. According to some, the rule of law supports the idea of limited government intervention in society, while others believe a market economy demands the intervention of government to assist and ensure competition and the regulation of the market²³ (such as in the U.S.- Microsoft case and other high profile merger cases reviewed by the European Union in recent history).

Section One - The Rule of Law

This section examines the various ideas in defining the term 'rule of law'. The term 'rule of law' is relevant for formulating a general understanding of the development of legal systems of European Union member states, of associated member states of the EU, and of the EU institutions that have been created and developed. This understanding is of importance to the overall thesis, as the thesis undertakes to examine how the rule of law is defined, understood, and utilised within the enlargement process of the European Union, specifically, enlargement eastwards. The overall relevance of the term 'rule of law', is that it has been identified as a main democratic principle upon which the EU institutions are based, upon which current EU member states are based, and upon which associated countries should be based, if they aspire to EU membership in the future.

According to Judith Shklar, the term originally 'referred to either an entire way of life, or merely to several specific public institutions.'²⁴ Geoffrey de Q. Walker makes a similar distinction- examining the rule of law in terms of values and institutions. The former meaning of the rule of law, as a way of life, 'equates the Rule of Law with the rule of reason', which Fallon attributed to Aristotle.²⁵ Shklar, also acknowledged its origins as 'very Aristotelian', when she stated that the rule of law is 'nothing less than the rule of reason'.²⁶ There are then arguments for defining the rule of law according to the idea that it is a way of life, as compared to defining it along institutional lines. Accepting this meaning of the rule of law implies a particular view of individual rights, the role of government, and of the law.

It implies that authority and sovereignty are vested in the population. The implication is that there are particular values and norms that are accepted by all individuals without having to be stated, and that laws originate or are created from these values. The problem with this conception is that this meaning is dependent on the idea that individuals are rational, reasonable, and able to practice self-restraint. The rule of law as a 'way of life', can be conceived of as the way in which individuals are expected to behave, (reasonably, showing self-restraint, ethically), as members of a society, by knowing how laws will affect them. The implication here is that there is a right and a wrong 'way', and that the right way is the only acceptable way. According to Shklar, it also implies that there will always be those members of society who are unable to meet the ideal of what an individual should be. This definition relies on the few individuals who are sane, intelligent and ethical in character, 'to persuade others to practice some degree of self-restraint and to maintain the legal order that best fits the ethical structure of a polity.'²⁷ This view of the rule of law acknowledges that there is subservience of the individual and individual rights to a higher order- in this case, societal norms rather than

the government.²⁸ The conception of the rule of law in this manner, deriving its legitimacy from societal norms, makes the assumption that these norms are derived from an authority above society and the government, be it God or Nature. Individual rights are secondary to what is considered to be important or best for the entire society.

Walker shares a similar perspective in his 'values approach' to the rule of law. He writes of 'the forces, drives, or purposes' behind the creation of the legal and government institutions and which these institutions serve, rather than focusing on the institutions themselves.²⁹ This view is shared not only by Shklar in her 'way of life' conception of the rule of law, but it is also shared by the International Commission of Jurists, in their 'holistic' conception of the rule of law.³⁰

Raz points out the problem with this idea that the rule of law should be conceived of as a 'way of life'.³¹ He believes that to follow this line of argument would be detrimental to the idea of what the rule of law stands for, and that it is often used to cloak and justify the decisions reached and robs it of any independence. The problem for Raz, 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 any useful independent function for the following reason. There is a wealth of literature devoted to the discussion of the meaning of a just society, the nature of rights which should subsist therein, and the appropriate boundaries of governmental action. ... To bring these issues within the rubric of the rule of law would therefore have the effect of robbing this concept of any function *independent* of such political theories.³²

Approaching the rule of law as set of institutions has different connotations. This, Shklar sees 'as those institutional restraints that prevent governmental agents from oppressing the rest of society'.³³ Walker identifies an approach similar to the one offered by Shklar. In his 'institutional approach' of the rule of law there is the inclusion of not just the institutions whose main function is to maintain and support the rule of law, but

also the principles and procedures involved. This approach focuses on the 'principles of legal organisation of the society.'³⁴

This conception of the rule of law implies a limitation on government agents and institutions. Justification for this view of a limited role for government, was expressed by Montesquieu. He argued that the rule of law was meant to protect individuals from the coercive and oppressive actions of government and to regulate mutual relations between members of a society. The rule of law stands for a limited number of protective arrangements for the 'benefit of every member of society'.³⁵ Similarly, A. V. Dicey presents the principle as 'presupposing the absence of arbitrary power', and as providing the 'assurance that the individual can ascertain with reasonable certainty what legal powers are available to government if there is a proposal to affect his private rights'.³⁶ Hayek makes similar claims, that the rule of law should restrict government 'only in its coercive actions', from using its powers to coerce individuals 'except in the enforcement of a known rule'.³⁷ He states that while these are important, it is also worth noting that 'these [activities] will never be the only functions of government'.³⁸ Moreover the limitation of governmental powers and actions, is the needed to ensure legal certainty. Legal certainty requires that 'true laws be known and certain', as this is 'important for the smooth and efficient running of a free society'.³⁹ But even this, for Hayek, is not enough. It is not enough that the rule of law requires legality in all government actions and activities, for it is necessary 'that all laws conform to certain principles'.⁴⁰ This is not to say that he believes procedural safeguards such as *habeas corpus* or trial by jury, are of little importance to the conception of the rule of law. What Hayek is saying, is that although the rule of law can be defined in terms of institutions, institutional and procedural restraints on government actions, there is still the issue of the ideals behind these institutions and procedures. He believes that the rule of law needs to be a part of

the 'moral tradition of the community', despite the potential problem this can lead to, such as the fact that such an ideal is what 'we can hope to approach very closely, but can never fully realise'. This is problematic, as when individuals cease to strive for the realisation of such ideals, upon which the government's institutions and procedures are built, then 'society will quickly relapse into a state of arbitrary tyranny.'⁴¹

A similar perspective of the idea of the rule of law is presented by T.R.S. Allan. The centre of his conception of the rule of law is that the law provides the most secure means of protecting individual liberty. In this case, the rule of law 'constitutes a standard by which a legal order can be measured and assessed.'⁴² Similar to Hayek and Dicey, Allan believes that the rule of law requires that the 'nature and limits of official government infringement on the liberties of citizens, be clearly stated in advance of any action taken by the state against the citizen.'⁴³ This is an important aspect because it illustrates how the rule of law is central to the setting of a framework in which relations between individuals, and between the government and its citizens, are to be regulated and understood.

Formal conceptions of the rule of law 'do not seek to pass judgement upon the actual content of the law itself', they are interested in 'the manner in which the law was promulgated; the clarity of the ensuing norm; and the temporal dimension of the enacted norm.'⁴⁴ What this definition of the rule of law is mainly concerned with is whether laws are authorised properly, are sufficiently clear for everyone to understand, and whether they are 'prospective or retrospective'.⁴⁵ It has been claimed that the problem with this particular definition of the rule of law, is that because it is not concerned with the content of laws, it does not differentiate between good or bad laws. Although to legal positivists there is essentially nothing wrong with the creation of bad laws so long as they are properly created and implemented, it seems from the opposing perspective, that the value

of law is diminished. The value of law seems to be diminished if any law, whether good or bad, as long as authorised by the proper authority and in a correct and clear manner, is considered to be a law.⁴⁶

Furthermore, as Walker articulated, the problem with this kind of conception of the rule of law [a legal positivist conception] which focuses on 'quantity and position rather than with *quality*,' is that it has 'left legal science without any tools for dealing with questions of value or meaning.'⁴⁷ This has 'led lawyers complaisantly to recognise as 'law' the decrees of totalitarian rulers [such as the example of Nazi Germany and Hitler], so long as such regimes clothe their commands in some formal legal garb.'⁴⁸ Nazi Germany was widely cited because here was an example of a regime implementing a rule, such as the Nuremberg Laws, which many considered immoral, but did so according to proper procedures and by an authorised authority. According to Hart and other legal positivists, this would be considered a law, just a 'bad law'.

Therefore, there is the potential for bad laws to be implemented, or worse still, for governments to implement laws which are clear and properly authorised by the legislature, but which go against basic ideas of how individuals should be treated. Such experiences induced Gustav Radbruch to suggest that law, 'after the experience of Hitler, must be more than simply rules and commands.'⁴⁹ According to a 'formula' devised by Radbruch,

The conflict between justice and legal certainty should be resolved in the positive law, established by enactment and by power, has primacy even when its content is unjust and improper. It is only when the contradiction between positive law and justice reaches an intolerable level that the law is supposed to give way as a 'false law' [*unrichtiges Recht*] to justice. It is impossible to draw a sharper line between the cases of legalised injustice and laws which remain valid despite their false content. Where justice is not even aimed at, where equality- the core of justice- is deliberately disavowed in the enactment of a positive law, then the law is not simply 'false law', it has no claim at all to legal status.⁵⁰

Proponents of a positivist conception of the rule of law, who see law as something separate from morals, and are not concerned with the content of law, claim, as Hart did, that 'Because a law is immoral, it does not make it any less a law. It simply becomes a bad law.'⁵¹ This is because legal positivists have drawn 'a sharp distinction between positive law [laws created and 'presupposed to be sufficiently reasonable ones'⁵²] and its moral roots.'⁵³ Although positivist approaches to law have been accused of issuing in a naïve supposition, that the judge or constitutional lawyer is merely the mouthpiece of the law, self-avowed positivists have not necessarily accepted this limitation. Interestingly, that is true of some of the most prominent self-avowed positivists of Weimar Germany. The Weimar period is especially illuminating for it was then that the vices of positivism were supposedly so cruelly exposed. More specifically, legal positivism was said to have proven itself impotent in the face of authoritarian critics of democracy, and most importantly, in the face of the Nazi party which held the reins of power. Yet it has been observed that it was precisely the legal positivists who proved to be the staunchest defenders of Weimar democracy.⁵⁴

These same constitutional lawyers acknowledged that purely formal and strict deduction was often impossible. Thus Richard Thoma notes that 'The legal dogmatist, be he a theorist or a judge who is obliged to reach a decision, is rather dogged by problems for whose solution contradictory but in themselves logically unobjectionable constructions and conclusions offer themselves.'⁵⁵ In these cases the theorist or judge had to refer to values or wider tendencies in order to reach a decision. In fact, as Craig states, 'formal conceptions of the rule of law are themselves based upon substantive foundations, namely ideas of moral autonomy and the respect for the individual. Given that this is so, it is unrealistic or implausible to preserve the dichotomy between form and substance.'⁵⁶ There were, of course, dangers in opening up a strict positivist approach.

Thoma noted that it was precisely these dangers that induced another prominent positivist, Hans Kelsen, to acknowledge these non-deductive features of law only to banish them from the realm of the science of law.⁵⁷ Indeed, Kelsen's suspicions and fears were well-founded. Commenting on those who argued that there were vital national interests which overrode positive law, Kelsen sarcastically replied that 'Behind such guileless reassurance that the state must "live", lies mostly only the ruthless will that the state must live in the manner which those who avail themselves of the justification of a 'state right of emergency' regard as right.'⁵⁸

It has also been argued that the implementation of law in National Socialist Germany relied not only upon iniquitous positive law but also upon highly elastic indeterminate principles. Thus Otto Kirchheimer emphasised the role played by the notion of the 'sound feelings of the people' in jurisdiction, both where such terminology was incorporated in relevant legislation and where it was not.⁵⁹

Self-avowed positivists have also argued more generally that it is precisely their position that captures the essential ambiguity of the rule of law, that it contains elements of the ideal or normative and elements of an enforced positive legal order. The implication is that to attempt to deny or escape this ambiguity is to undermine the reality of the rule of law. It is this position which is evident in Hans Kelsen's conclusion that 'The problem of the *positivity* of law consists precisely in this, that it figures simultaneously as both "ought" and "is", although these two categories logically exclude each other.'⁶⁰

Substantive conceptions of the rule of law on the other hand, go beyond formal conceptions. According to Craig, 'Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as a foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and

“bad” laws which do not.⁶¹ This conception focuses on the content of laws. The problem with this conception of the rule of law, is that it is inter-linked with the formal conception which itself is based on morals and values, whether acknowledged or not.

According to Dworkin's conception of the rule of law, there is an assumption,

that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognised in positive law, so that they may be enforced *upon the demand of individual citizens* through the courts or other judicial institutions of the familiar type, so far as this is practicable.⁶²

His argument for defining the rule of law according to a substantive 'rights' conception, not only opposes a division between formal and substantive conceptions, but it also 'requires the articulation not simply of general concepts of liberty, equality and the like. It demands that the particular conception of these broader concepts be revealed.'⁶³ However, there are differing ideas of what these concepts mean, though all are based on the moral values and ideas of society, derived from a higher order or nature itself.

Summary

The consequences of these divergent approaches are substantial. As presented in Craig's article, Dworkin's own argument 'serves to emphasise that the very meaning of the rule of law will be inextricably linked with one's definition of law itself and with the proper adjudicative role of the judge.'⁶⁴ Thus the dispute over how the rule of law should be defined, evident in disagreement amongst theorists such as Hart, Habermas, Allan, and Dworkin, concerns whether there should be and is a division between law and morals. Legal positivists have argued that there is and should be a distinction between the two. The absence of a distinction would lead to the rule of law becoming prone to political influences. By this, they meant that if laws and morals were too closely associated, any changes in perspectives of particular morals, for example abortion, could then influence

laws made with regard to this particular moral, leading the rule of law to be politically influenced. However, critics have argued that the distinction made by legal positivists is also problematic, as it leads to the possibility of totalitarian or other regimes, making immoral rules by the proper procedures and authority, thereby making 'bad laws'. The problem, as even advocates of legal positivism have sometimes conceded, is that these bad laws become difficult to change because they have been created through proper procedures. The main disagreement between the two sides, can ultimately be attributed to a fundamental disagreement about the way in which legal norms are identified, and concerns the 'very nature of law'.⁶⁵

This fundamental disagreement about the nature and source of legitimacy of law, and hence the rule of law, has implications for the practice and support for this principle. In practice, approaches to the rule of law can be divided along the lines of what method is seen as best for supporting and protecting it- making it a way of life through instilled societal norms, or through the creation and development of particular government institutions. As will be seen further along in this chapter, the 'practice' of the rule of law is affected by the inherent assumptions regarding sources of its legitimacy and authority. This has an effect on the relationship of this principle to ideas associated with it, such as democracy- which the next section will examine.

Section Two - Democracy and the Rule of Law

Although there are many conceptions and approaches of democracy, the two long-standing conceptions that are usually cited are direct (or participatory) democracy and representative democracy. The significance of distinguishing between these two main conceptions of democracy, is that each implies a specific kind of role for both government and individuals. This distinction will then provide a foundation for

documenting the relationship between democracy and the rule of law. It will also illustrate the potential problems with this relationship, namely the conflation of these two terms. The conflation of the rule of law and democracy in theory and practice is problematic as it seems to neglect the existence of diverse conceptions of the rule of law. This will be dealt with in more specific terms later in the thesis, with further details of the potential problems this has in the context of the European Union, and with its enlargement to include countries from Central and Eastern Europe.

Democracy

There are varying definitions of what is meant when referring to a state as a democracy. In the Little Oxford Dictionary, democracy is defined as a 'government by the whole population, usually through elected representatives; state so governed.'⁶⁶ This definition of democracy can be identified as 'representative democracy'. Similarly, Kaldor and Vejvoda, in their article 'Democratisation in Central and East European Countries', described democracy from an institutional perspective. They described it as a 'set of formal institutions and a way of redistributing power.'⁶⁷ Georg Sørensen offers a discussion of democracy that reiterates what Kaldor and Vejvoda have stated. In his discussion, he focuses particularly on the conception of representative democracy as understood by Joseph Schumpeter. He states that Schumpeter formulates a 'narrow conception of democracy', defining it as 'simply a political model, a mechanism for choosing political leadership.'⁶⁸ In Schumpeter's words, "The democratic method is the institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote."⁶⁹

Weale, although holding a similar idea of democracy, places emphasis on representation and representatives, rather than on the method or institutional model. He

believes that the central principle of this form of government is 'that major decisions should be taken by political representatives meeting in a legislative chamber, who reflect in their characteristics and opinions a wide variety of views and experience.'⁷⁰ This illustrates an understanding of democracy as representative democracy. Individuals choose representatives through procedures and institutions, and representatives make decisions on behalf of individuals. His reasoning for this particular formation of government is based on 'various reasons largely to do with size', and the claim that 'we should not expect the people to rule directly, but nevertheless policy choices should still reflect opinions that are representative of a broad swathe of opinion in society.'⁷¹ These descriptions of democracy have focused on the redistribution of power, illustrating the idea of a representative form of democracy based upon the creation and development of particular institutions that distributes power without full direct participation of the masses, but participation nonetheless.

In contrast to the definitions of democracy offered above, Hutchinson and Monahan, in their book *The Rule of Law: Ideal or Ideology*, defined a democracy to mean the 'greatest possible engagement by people in the greatest possible range of communal tasks and public action.'⁷² What Hutchinson and Monahan were referring to was direct or participatory democracy.

Jean Hampton offers another description for the term 'democracy'. According to Hampton, the use of the term 'democracy' refers to a style of government.⁷³ What Hampton was implying in her understanding of democracy, was that it was a structure of government based on the idea of individual will. Hampton's understanding of democracy has also been shared by Rousseau in his conception of direct democracy. This however, is where the similarity ends between Hampton and Rousseau, and the two become distinct. The distinguishing factor between the two ideas is the emphasis. While

Hampton focuses on individual will, Rousseau has taken this a step further, emphasising the necessity of a collective will - although individual participation is still a fundamental aspect of democracy, as it is for Hampton.

For Rousseau, the idea of a direct or participatory form of democracy was based on the underlying value of autonomy of the individual and the idea that government needed to be founded upon this for it to be considered legitimate. What he meant by participation was 'participation in the making of decisions'.⁷⁴ His conception of democracy demanded that citizens are able to 'determine for themselves the rules and laws that they will be obliged to follow', as without this participation in what he termed 'determination of the general will', 'there would be no legitimate way of making public decisions'.⁷⁵ What distinguishes Rousseau's idea from Hampton's, can be illustrated clearly in his argument that '...sovereignty, being nothing other than the exercise of the general will, can never be alienated; and that the sovereign, which is simply a collective being, cannot be represented by anyone but itself- power may be delegated, but the will cannot be'.⁷⁶

David Held provides another perspective similar to what has already been discussed. He developed a principle of autonomy on which his conception of democracy stands. He believed that this principle of autonomy required 'both a high degree of accountability of the state and a democratic reordering of society.' His principle states that:

Individuals should be free and equal in the determination of the conditions of their own lives; that is, they should enjoy equal rights (and, accordingly, equal obligations) in the specification of the framework which generates and limits the opportunities available to them, so long as they do not deploy this framework to negate the rights of others.⁷⁷

Democracy based on the rule of human will, as defined by Rousseau, Hampton, and Sørensen, emphasises the rule by individuals, according to individuals' interests and desires. There is an element of unpredictability to this type or form of democracy, because the 'human will' could give rise to arbitrary actions. This conception of democracy is narrowly focused on the individual, where it defines democracy as a 'direct, not representative system', and does not conform to classical democratic theory definitions, such as those put forth by Schumpeter.⁷⁸ The relationship between direct democracy and the rule of law will be discussed further, later in this section.

In contrast to these ideas is the idea of democracy as a set of institutions. This idea has its own problems and limitations. Most importantly, this definition of democracy (as a set of institutions), gives rise to a larger role for the government, as the source of authority and legitimacy rests with the institutions and procedures developed. These institutions and procedures were developed to ensure the protection of individual rights and liberties, but in this pursuit, it accords government institutions the power to override *an individual's* rights in the name of protecting the rights of all individuals. This puts forth the possibility of threats to any individuals' rights.

Reviewing the various perspectives, definitions, and uses of what is meant by the term 'democracy', provide some general and common themes. Writers from Rousseau to Hutchinson and Monahan to Hampton or Kaldor, have taken democracy to mean a type of government based on either 1) the idea of individual participation or 2) a set of formal institutions. These definitions of democracy imply particular ideas about the sources of authority and legitimacy, as well as limitations. The implications have far reaching effects, such as the role assigned to both government and individuals; the extent of individual rights granted; and most importantly, entails the perception and application of

law. Each of these definitions of democracy, each prescribes a particular notion of the rule of law, as will be examined further.

Democracy and the Rule of Law

The main focus of this sub-section will be to consider the nature of the relationship between Democracy and the Rule of Law - are they synonymous and interchangeable or are there inherent contradictions between the two. This section will focus on two separate arguments. Firstly, it will briefly present and clarify the point that different conceptions of democracy tend to go together with particular conceptions of the rule of law. Secondly, this sub-section will review how the conflation of these two terms (democracy and the rule of law) in theory and especially in practice, employs a more narrow view of the rule of law and ignores tensions between democracy and the rule of law. This is of significance, as the conflation of these terms has particular implications. It affects: a) the role both the state apparatus and individuals within the state, b) the manner in which the state is governed, and c) the legitimate source of authority- in the government (through laws) or in the people (through morals and beliefs).

Connections Between Various Understandings of Two Terms

As noted above, there are particular forms of democracy that tend to be associated with particular conceptions of the rule of law. For example, participatory (direct) democracy tends to be associated with the conception of the rule of law as a way of life; and representative forms of democracy are associated with more formal conceptions of the rule of law.

Direct or participatory democracy and the rule of law (conceived of as a way of life), tend to be associated with one another because of the main ideas which they both

serve to support. The reasoning for this association is that both support the idea of individual autonomy and participation, and emphasise, as was noted earlier, the 'central importance of the individual'. The manner in which each concept attempts to achieve this overriding goal may differ slightly. However, the fact is that this 'shared' goal is based on participation of individuals, where participation is an accepted part of life in a society. Review of this relationship identifies one of the potential problems with its emphasis on the individual. As was stated previously, the focus or emphasis on the individual in this relationship, allows room for variations based on individual interpretations of what both 'democracy' and 'the rule of law' encompasses.

Representative democracy on the other hand has tended to be associated with a more formal or institutional conception of the rule of law. In the seventeenth century and subsequently, despite modifications, the rule of law has been defined in an "institution-type" manner which has become associated with representative democracy.⁷⁹ Similarly, as was discussed earlier in this section, representative democracy has been defined as the 'institutional arrangement' for making political decisions and distributing power. These two conceptualisations (rule of law and representative democracy) are readily associated with one another because both are seen as methods for the practical participation of individuals in the decision-making process, through the distribution of powers.⁸⁰ Martin Diamond illustrates this association of meanings further, in his definition of democracy. He believes that protecting individual liberty is the main objective and that democracy is merely an instrument or method in which to safeguard individuals' freedom and rights.⁸¹ In this case, association of democracy (in its representative form) and formal conceptions of the rule of law, can be seen as providing a framework for the more efficient organisation of power, while ensuring that individual

liberties are protected from being overridden by the 'harmful effects of collective decision-making'.⁸²

András Sájó phrased it another way when he stated that, 'representative government- the expression of the general will in elections and people's sovereignty' gives precedence to collective decisions or majority rules, but there also needs to be the protection and opportunity for the 'minority voice' in the process⁸³, and this is what the rule of law provides. From this, it can be concluded that the rule of law assists in strengthening the concept of democracy by ensuring that the governing authority's actions stay within the rules adopted.⁸⁴ The rule of law is important to democracy, as it provides protection of individual rights and guarantees self-determination, which are sometimes overlooked in modern democracies, where individuals entrust those chosen to represent them, with taking part in the governing of the state. Dworkin believed that in the end what was most important was the protection of individual rights, and that the notion of public good should take a secondary seat to these rights. Theorists and writers, such as Ronald Dworkin, concur that the rule of law "enriches democracy by adding an independent forum of principle".⁸⁵

From another perspective, T.R.S. Allan believes, in agreement with others on the topic, that the rule of law 'represents a limit on the scope of parliamentary authority and the imposition of constraints on the political power of the sovereign body in the interests of minorities or for the protection of individual liberties is the essence of constitutionalism'.⁸⁶ It is seen as assisting 'in preventing the subversion of the political sovereignty of the people by manipulation of the legal sovereignty of Parliament'.⁸⁷ The term stands as 'the basic constitutional principle' providing a 'powerful breakwater, if not an impenetrable dam, against encroachment on important rights and liberties by means of statutory authority'.⁸⁸ Therefore, it can be stated that in this instance, the rule of law is

serving as an instrument for the realisation and the reinforcement of democracy and associated ideas. It does this by providing a frame of reference for the protection and realisation of individual rights within this form of government.

Conflation of Terms

Historically, the terms, democracy and the rule of law have been conflated due to the general understanding that the two terms represent similar ideals. Democracy is generally understood as a governmental structure of institutions, checks and balances, separation of powers, to both ensure limits on government actions and by the institutional design, to promote protection and support for individual rights and autonomy. There has been general agreement that democracy is 'generally seen as a combination of institutions (free elections, political rights, independent judiciary), political values (accountability, toleration, participation), and a propitious political context (a wide availability of alternative sources of information, an ability to meet the basic needs of individuals, an educated population).'⁸⁹ The rule of law is understood in general terms, as the protection of individual autonomy and rights, and the limitation of government powers and actions. In essence, both of these terms, have in historical and contemporary uses, been conflated. They have been conflated based on general understandings which have shown them to both be based on the 'central importance of the individual', ensuring that 'policies applied, and legislative provisions' are interpreted with respect to civil and political freedoms which are considered fundamental in society.⁹⁰ In his work, Timothy Kenyon reiterates similar reasons for this occurrence. He states that 'the rule of law has been closely identified with what might be termed a 'procedural view of democracy' whereby emphasis is placed upon protecting the rights and liberties of citizens from the illegitimate interference of government.'⁹¹

Despite the use of the two concepts interchangeably, the nature of the relationship between variations in ideas of the rule of law and democracy, is a complex one. The conflation of these two terms generally, has obscured these variations and their links. The general use and conflation of democracy and the rule of law has obscured the fact that forms of democracy are linked to particular conceptions of the rule of law. For example, direct or participatory democracy has been linked with the rule of law as conceived as a way of life. Similarly, representative democracy and its association to the formal/institutional conception of the rule of law are neglected by the general conflation of the two concepts.

It has been generally understood that the rule of law can exist without democracy, but that democracy cannot exist without the rule of law. Both of these generalisations will be further expanded upon. Starting with the first generalisation - the rule of law can exist without a democracy. If by use of the term democracy, it is taken to mean the contemporary idea of democracy as exists today, then the governing system, which existed in Eighteenth Century England, illustrates the existence of the rule of law without a democracy. Despite widespread acceptance of Dicey's ideas about the rule of law, and a belief that Britain was in fact based on the rule of law, Britain lacked democracy.⁹² Similarly, Wilhelmine Germany in the early 1900s provides another illustration of this. The government in Germany at this time was formed on a system that supported autonomy of the monarch and a lack of responsibility on the part of the Chancellor to the *Reichstag*. Germany at this time, like Britain, lacked democracy in its modern sense. Another example of the a system in which the rule of law existed, but which would not be considered a democracy by today's standards, is the system which existed in France in the late Eighteenth Century. The country had a system which was based on the 'rule-of-law principle of the supremacy of law', whereby the king (as a state

organ) governed by the law and 'it is only in the name of the law that he can demand obedience.'⁹³

While there are examples to illustrate that the rule of law can exist without a democracy, a democracy is said to need the rule of law in order to satisfy the requirement of participation in government by individuals, either directly or through representation. Hutchinson reiterates and emphasises this when he quotes from Chemerinsky⁹⁴, '...democracy in any real sense of the word cannot exist without the rule of law.'⁹⁵ The rule of law is important in a democracy because it implies that individuals have the ability to exercise their right to participate in the governing of their state, as defined earlier, that democracy is a state governed through the sovereign will of the people.⁹⁶ From this perspective of the relationship between democracy and the rule of law, it can be said that the rule of law is a foundation for developing a democracy. This is because democracy supported or based on the rule of law, is seen as a state which enables individuals to best utilise their rights to ensure the protection of them from the arbitrary and coercive actions of others. This is one view of the rule of law and democracy, which sees the rule of law as a necessary component to democracy. There is another approach to this relationship, one which views the rule of law as a 'clear check on the flourishing of a rigorous democracy'⁹⁷, thereby illustrating the complexity of this relationship between democracy and the rule of law.

The basis for the above perspectives rest upon the fact that there are inherent contradictions between the two concepts, based on their definitions. This exists notwithstanding the general understanding of the two terms as synonymous, interchangeable, or inter-linked.⁹⁸ Despite some evidence to support the conclusion that democracy and the rule of law can be described as synonymous, the 'opposite often seems to be true: the Rule of Law has functioned as a clear check on the actual impact

and expansion of a rigorous democracy.¹⁹⁹ Dworkin makes a similar point, alluding to the possibility that democracy may not be a good form of government for the rule of law. He argues that individual rights should take precedence over the public good, and that the rule of law is a “system of universal freedom and equality, but that it is perverted by the development of the state.”¹⁰⁰ From this perspective, it can be concluded that the development of the state into a democracy actually suppresses the concept of the rule of law. The rule of law is suppressed by the development of the state because ideas of the public good are given greater credence. This is because democratic decisions could override the rights of the individual, thereby allowing for the majority to decide to sacrifice the minority for the supposed greater good. In practice today, the development of democracy has precluded the relinquishment of certain levels of control of individual liberties to a selected group of individuals for the governing of the state. Thereby providing a restraint on the promotion and utilisation of political rights, and diminishing the influence of the rule of law to protect individual liberties from arbitrary and coercive actions taken against an individual or group of individuals.

Historical development of different forms of democracy have shown themselves to be a 'by-product of a preoccupation with private autonomy' and that the rule of law has served as a principle to effectively 'check the indulgent abuse of power by the few over the many.'¹⁰¹ This is because 'the Rule of Law is premised on the ideal of limited government; it has stood as a constitutional barrier between governors and the governed, between power and people. The existence and extent of democratic governance is only justified insofar as it better serves the enhanced liberty of individuals.'¹⁰² Therefore, the rule of law stands for limited government (be it by direct participation, representation, or acknowledgement of a 'collective will' - in the interest of enhancing the rights and liberties for all individuals. This illustrates the conflicts within this relationship between

forms of democracy and conceptions of the rule of law. Although there have been 'recent valiant attempts to reconcile the Rule of Law with democratic theory', writers like Hutchinson and Monahan have shown that the rule of law has acted as a clear check on the further development of democracy¹⁰³ and that it 'has served to inhibit the flourishing of any governmental system of direct democracy.'¹⁰⁴

Thus, it has been suggested that while the rule of law is an instrument for the realisation of democracy, it has also been seen as a restraint upon democracy. It has also been argued earlier that the rule of law can exist without democracy. Despite these assumptions, democracy, in contemporary usage, has been assumed to be the 'most consistent' form of government for the utilisation of the rule of law.¹⁰⁵ This is because 'adherence to the Rule of Law has come to be synonymous with compliance with a liberal scheme of governance'.¹⁰⁶ It has been observed that 'some form of representative democracy has become a modern component of this model [of governing]', and that the 'history of the Rule of Law's theory and practice reveals that it is more an optional extra than an essential condition.'¹⁰⁷ By this it is meant that despite tendencies towards linking the rule of law and democracy exclusively, there are those writers such as Monahan and Hutchinson, who have also pointed out that the rule of law is can still be seen as optional and not essential to democracy.

Habermas takes a very opposing view to the one offered above by Hutchinson and Monahan. He argues that both the rule of law and democracy are both equally necessary and mutually dependent on one another. Sájó supports and illustrates Habermas' argument that democracy and the rule of law are mutually dependent. Democracy can be seen as necessary to the rule of law, as it would alleviate some of the extremes caused by the strict application of the rule of law. This is because, as Sájó states, 'strictly applied, the rule of law allows no consideration of equity or the human

condition.¹⁰⁸ It restricts not only the 'will of the authorities, those that use force, and those that hand out benefits-safeguards citizens, at the same time it puts them at the mercy of government's impersonal and mechanical forms.¹⁰⁹ Therefore democracy, as a form of government, would assist in balancing this inherent inequality and inflexibility that is a part of the rule of law.

The picture is further complicated by the existence of theorists who accept the historical and empirical discrepancy between the rule of law and democracy, but simultaneously argue that the two ideas complement one another. Again, Jurgen Habermas is the most prominent representative of this approach. He accepts the historical and empirical possibility of the separation of the rule of law and democracy—that the 'rule of law may exist without democratic forms of political will-formation.'¹¹⁰ However, he argues from a normative stance, that both democracy and the rule of law must be implemented together. The reasoning behind this is that there needs to be protection of individual rights, in order for individuals to be able to make use of these rights within a democratically governed state.¹¹¹ Habermas put this another way when he stated that "The private autonomy of equally entitled citizens can be secured only insofar as citizens actively exercise their civic autonomy."¹¹²

Summary

As the differing perspectives of the relationship between the rule of law and democracy have suggested, this relationship is a complex one. The general understanding of what each of these terms mean, involves the conflation of them with a disregard or unawareness of the implications involved. The understanding of the rule of law developed within such a framework (conflated with the understanding of democracy), is one which does not take into account the complexity and variations in defining the rule

of law. In conflating these two terms and treating them as synonymous, there has been a lack of understanding as to the complexity of the relationship of the two ideas. The rule of law has in historical, but more importantly in contemporary uses, been described as necessary for the development of democracy. What this restricted perspective of their relationship has done, is to neglect the fact that it can also be argued that 1) democracy is important for the effectuation of the rule of law; 2) that the rule of law can also be judged as a retardant to the development of democracy; or 3) that democracy itself, can be used to justify suppressing the rule of law. To subscribe to the view that the rule of law and democracy are synonymous or to conflate these two ideas is to subvert the complexity and variations of relations between these two ideas. It subverts the distinctions made - firstly, of the rule of law as a way of life with direct or participatory democracy, as distinct from the rule of law as a formal/institutional model associated with representative forms of democracy. This is because the conflation of these terms reinforces and emphasises a conceptualisation and defining of each term in relation to one another. It provides a restricted understanding of the rule of law, as a method of protecting individual rights and limiting government actions (the protection of the private and public spheres). At the same time, it views democracy similarly, as a means and method of limiting government in the pursuit of protecting individual rights and autonomy, from any illegitimate and oppressive actions of the government.

Section Three - The Rule of Law and the Judiciary

Within this section, the focus turns to setting out what affect various conceptualisations of the rule of law have on the judicial system. Variations in the conceptualisation of the rule of law affect perceptions of both the issues of judicial discretion and judicial review. The relevance for focusing upon this relationship is two-fold. Firstly, because the

judiciary and judicial system are regularly associated with understandings of the rule of law, it is useful to examine this relationship to attain a better understanding of it. Secondly, as will be illustrated in the next two chapters, the judiciary and examination of the judicial system is an important part of the enlargement process for the European Union. The judiciary is seen as an important institution for supporting, protecting, and ensuring the rule of law in countries, as the judicial system is supposed to be unbiased, and its foremost task is to ensure the protection of individual rights.

To illustrate the conflicts and disputed claims made about the relationship between this ideal (rule of law) and particular institution (the judiciary), the section will begin with an overview of the two main understandings of the rule of law (the rule-book and the rights-based conceptions). A brief overview of the main differences between these two understandings will be followed by the main arguments and connections associated with subscribing to a rule-book/positivist understanding of the rule of law. Contentious points relating to this definition will conclude with a review of some of the concessions and criticisms associated with the rule-book conception. Non-positivist and rights-based conceptualisations of the rule of law are then presented. Linkages between these ideas and the issue of judicial discretion and the role of judges can then be made.

Rule-Book versus Rights-Based Conceptions of the Rule of Law

There exists within the literature on the relationship of the rule of law and the judiciary, conflicts and disputes illustrating the fact that differing conceptions of the rule of law have been associated with certain perceptions of judicial interpretation and discretion. Over the past few years, there has been debate over the judiciary's use of interpretation and discretion. Current debate has centred on the use of this power by judges for reviewing government decisions and legislation.

The two different conceptions of the rule of law, which can be associated with views on the use of judicial discretion, are the 'rule-book' conception and the 'rights-based' conception. The first conception ('rule-book'), 'insists that, so far as is possible, the power of the state should never be exercised against individual citizens except in accordance with rules explicitly set out in a public rule book available to all.'¹¹³ The second, 'rights' conceptualisation of the rule of law, 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.' In this case, the rule of law is seen as the 'ideal of rule by an accurate public conception of individual rights.'¹¹⁴ These two conceptions of the rule of law, have the effect of providing 'very different advice on the question of whether judges should make political decisions in hard cases', and subscribes to a different ideas of law, as well as the legitimacy and authority of laws. Which idea of the rule of law a state subscribes to, will determine its attitude towards judicial discretion and interpretation.¹¹⁵

Rule-Book Conception as Positivist Rule of Law?

The 'rule-book' conception of the rule of law can be linked to a positivist conceptualisation of the rule of law -this will be further defined and discussed, and the connections between them drawn out below.

First, it is necessary to define and distinguish what the positivists' view the rule of law is, in comparison to the non-positivists' perspective. According to the general legal positivist conceptualisation of the rule of law, 'principles and rules which are not embodied in legal texts - e.g. rule of justice or rationality principles - are not sources of law, so our legal rights and duties may not be derived safely from them.'¹¹⁶ The other prevalent understanding of legal positivism 'holds that the standards for legality and for morality *can be* distinct.'¹¹⁷ Another perspective of legal positivist theory offered by Ian

Ward, states that 'positivist theory seeks to analyse the legitimacy of law by locating sources of constitutional legitimacy and sovereign authority.'¹¹⁸ This branch of conceptualisation of the rule of law can be traced back to the nineteenth century, which saw it in its 'most mature and comprehensive form'. Legal positivism broke with tradition (Old Roman legal tradition), 'according to which rules of justice are intrinsic and immanent components of every legal order, even if a legislator did not explicitly refer to them.'¹¹⁹ This conceptualisation of the rule of law, is very limited and considered to be low-risk, as the sources of law are limited to those 'norms embodied in official legal texts', such as 'statutes, acts passed with the authorisation of statutes in civil law countries'.¹²⁰ The notion of law reduced to referring only to statutes and all normative acts authorised by statutes, was the product of German Positivism - whereby *das Recht* is equal to *das Gesetz*.¹²¹ Here, 'traditional statutory positivism' is a 'method of interpretation which is just based upon the written legal texts.'¹²² It rejects the idea that law is based on 'moral or other evaluative judgement' and states that law instead, is based on 'social facts'.¹²³

In comparison to this perspective of the rule of law, the non-positivistic perspective was premised on three main ideas. The first point of difference is that 'the source of law and thus of our legal rights and duties may be not only norms embodied in official legal texts but, in exceptional situations, also extra-textual norms'.¹²⁴ Secondly, 'legal norms may be repealed not only by statutes or precedents but may also lose validity if they violate extra-textual rules in extreme and intolerable ways'.¹²⁵ Lastly, 'in exceptional situations extra-textual norms may justify departures from legal norms (acts of civil disobedience are admissible or at least tolerable in certain circumstances).'¹²⁶ Those who reject positivist notions, do so on the assumption that 'positivists believe that

legal materials resolve a great deal, leaving little to the moral sense of judges', but are wrong to do so.¹²⁷

The main difference between positivist and non-positivist views of the rule of law is that the latter allows for an expanded notion of what can be considered to be sources of law than the former. The other main difference between the two perspectives, is how each resolves the conflicts and questions of the relationship between law and morality. Legal positivists take the view that 'the law was what someone had posited for individual circumstances, not what was morally right.'¹²⁸ This position supports the view that even 'unjust laws' or 'immoral laws', if they are properly created and implemented, would still be considered law. Legal positivists have been challenged on their position of unjust laws as laws. They have however, stood by their position on the basis that the injustice of some laws is not sufficient for these 'unjust' laws to be disregarded by officials or citizens. The reasoning for this steadfast position by legal positivists, has been that to disregard some laws as unjust, would be to make a judgement that they are unjust, which is potentially problematic as there are variations in ideas of justice.

The legal positivist perspective of the rule of law as shown above, can be described as narrowly conceived, and prescriptive, leaving little room for discretion in determining law. This is similar to the 'rule-book' conception. To re-state this perspective of the rule of law in more general terms, it 'is a set of negative safeguards against the abuse of power.'¹²⁹ It is considered by Selznick to be 'a negative, limited, low-risk understanding of the rule of law'.¹³⁰ This is reiterated by Raz, who states that 'the rule of law is ... merely designed to minimise the harms to freedom and dignity which the law may cause in pursuit of its goals however laudable these may be...'¹³¹ This conception is labelled as limited and low-risk as it is designed to limit, or as Selznick describes it, 'to chain down' officials by 'constitutional constraints, procedural rules,

including rule of evidence, and institutional arrangements, such as a hierarchy of courts.¹³²

The rule-book and legal positivist versions of the rule of law, hold to the idea of 'autonomous law'¹³³ which holds that all officials bound to uphold and to be accountable for, 'sustaining respect and obedience' to the law. Sustaining and supporting the idea of autonomous law 'directs judges to try to form semantic theories', so that judges are able 'in good faith, to discover what the words in the rule book really mean.'¹³⁴ There is an insistence or distinguishing between lawmaking and adjudication - leaning more towards acceptance of the rule of law as 'a "law of rules" - rules that sharply limit judicial discretion.'¹³⁵ The rule-book limits judicial discretion as it forces judges to focus on questioning the intention behind the particular piece of law and delves for the legislators' intention when they conceived the particular piece of legislation in question. It is believed that the judges who in difficult cases, question the intention of the law made, 'is at least doing his best to follow the rule-book model and therefore to serve the rule of law.'¹³⁶

Despite the theoretical divide that has long existed between legal positivists and non-positivists, this divide has been confused and clouded over in recent times, as some positivists stray from the hard-liners' position on the relationship between law or legality, and morality.¹³⁷ The conceptualisation of the rule of law in limited terms, referring only to official legal texts such as statutes and acts authorised by statutes as sources of law, has undergone some changes as concessions have been made by positivists to this understanding. Even Hart, (considered to be one of the 'most influential modern positivists in the English-speaking world'), who despite rigidly clinging to 'the basic positivist idea that we must "distinguish, firmly and with the maximum of clarity, law as it is from law as it ought to be" in an article in 1958',¹³⁸ has made a modest concession to

his positivist position. As Greenawalt put it, Hart 'made a very modest concession to natural law positions, acknowledging that as a matter of "natural necessity" the substantive principles of any society's morality and legal system would contain some basic overlapping content.'¹³⁹ Generally, Hart felt that the 'typical positivist assertion' that "there is no necessary connection between law and morals" would be a denial that within all legal systems, there is an overlap between morals and laws developed.¹⁴⁰ This is especially the case in the face of such examples as laws upholding the belief that wanton killing and theft is punishable. Another ground on which some positivists have made concessions to their position, has been on whether unjust laws are laws. According to Neil MacCormick,¹⁴¹ "laws we judge unjust or detrimental to the public good are on that very account laws we judge essentially deficient examples of the genus to which they belong."¹⁴² MacCormick's agreement with Finnis on this issue is a big concession in the mainstream positivist perspective of unjust laws- as mentioned earlier in Hart's argument that unjust laws are still laws. MacCormick went as far as to claim that 'every proper understanding of law includes a sense that an unjust law fails in some basic essential of lawness, though it may none the less be a valid law.'¹⁴³

However, this leaves open the question of whether 'law and morality are necessarily connected in more powerful ways, most importantly whether standards of law will include moral criteria.'¹⁴⁴ Other positivists have not even gone as far as MacCormick has. They have refused to concede any connection between law and morality, stating that 'moral quality has nothing to do with 'lawness'.¹⁴⁵ For some theorists such as Jules Coleman, one way to support the thesis that law or standards of legality are separate from morality, 'is as a denial that moral criteria will inevitably be standards of legality in every imaginable legal system.'¹⁴⁶

CLS and Non-Positivists' Quandaries

Despite concessions made by legal positivists in general, there is still much criticism of positivism for its belief in the separation of law and morality, especially by those who are characterised as belonging to the Critical Legal Studies (CLS) movement. The critical legal studies movement, it has been suggested by Mark Kelman, is 'dedicated to 'trashing' the various mythologies of liberal legalism, particularly notions of adjudicative neutrality.'¹⁴⁷ One of the main criticisms made of positivists by the critical legal perspective, is that positivists often deny that 'legal judgement is intertwined with moral and political judgements.'¹⁴⁸

CLS scholars strongly disagree and reject claims made by positivists 'that issues can often be settled by language chosen in advance and that reason can discover what legal materials indicate in instances when that is not obvious.'¹⁴⁹ They are critical of legal positivism because the indeterminacy of law and existing legal materials allows 'for very substantial creativity by the judge who sees clearly that law is politics.'¹⁵⁰ CLS has its own ideas about law and the nature of law that clashes with positivists' more limited notion of the sources of law. One of the main assumptions made in rejecting positivism, has been on moral grounds- that law and morality are inter-linked or overlap, so that a clear distinction between the two is a false perception. The other assumption is that 'legal positivism just is (definitionally) the attitude of blind obedience to law.'¹⁵¹ Another criticism of positivism 'refers to the fact that the positivistic rule of law does not meet rationality requirements of modern interventionist states and the ideology of the welfare state.'¹⁵²

These arguments often push to the limits, the essence of what the rule of law is, thereby undermining it. The CLS scholars argue that the written law cannot account for everything, so to rely on it alone would be insufficient. Despite this argument, CLS

scholars are also critical of the fact that the indeterminacy of law allows judges to make what are considered to be 'political' decisions. On the one hand, the CLS criticises legal positivism for its reliance on a limited conceptualisation of what is law, and at the same time, it criticises the other possibility - of law as indeterminate, because it allows for judicial discretion, which they consider to be inappropriate. Arguments like those presented above have led proponents of the critical legal studies movement to be sidelined. It has also led the approach in its bid to decry and criticise legal positivism, to undermine the rule of law itself instead.

While CLS arguments have focused on positivism, the movement has also been known to denounce rights-based (non-positivist) conceptions of the rule of law. They have criticised rights as 'illusions' or 'myths' that have been designed to mask fundamental social, political and economic inequalities within a system of government. The CLS itself is a source of controversy, at times contradicting some of its own main and general foundations, weakening its criticism of both positivist (rule-book) and non-positivist (rights-based) conceptions of the rule of law.

On the Role of Judges- Judicial Discretion Reviewed

Having previously reviewed the differences and quandaries of both the rule-book and rights-based conceptions of the rule of law, judicial discretion and the role of judges can now be undertaken.

First, the role of judges. The role of judges is one that is heavily debated by legislators, academics, and judges themselves, in many countries. Much of the debate stems from questions of authority and power - between the courts and the legislature. Habermas quotes M.J. Perry when he states that the role of judges is to provide protection for a community based on the 'way of life' conceptualisation of the rule of law.

Specifically, he was highly critical of M. J. Perry's view of constitutional judges as 'prophetic teachers' who through interpretation of the 'divine word of the Founding Fathers', would protect and continue the traditions which the society and state were founded upon.¹⁵³

More generally, judges have the roles of defining the limits of power (of both the state and individuals) as well as regulating the balance of powers between the various institutions of the state.¹⁵⁴ This is done, Habermas states, as judges must play the role of reviewer of governmental actions and decisions, sometimes invoking judicial discretion. One of the main points of contention on this issue of judicial discretion, is whether judges are merely interpreting the law in line with the intentions with which the law was made, understanding of the general public feeling on the law in question, or whether they are making new law by the judgements they pass.

As discussed earlier in this section, rule-book or positivist conceptualisation of the rule of law, prescribes a particular view of what law is, and where law is derived from. If a state subscribes to such a conception of the rule of law, judicial discretion will be severely limited to interpreting legislation according to legal texts and the intentions of those who have drafted and passed the legislation in question.

In contrast, is the view taken by rights-based theorists who advocate judicial discretion. Theorists of the rights-based conceptions have often sought to maintain the rule of law without reverting to tying themselves to positivist conceptions and ideas. The rights-based conceptualisation of the rule of law 'assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole.'¹⁵⁵ In this case, the rule of law is seen as the 'ideal of rule by an accurate public conception of individual rights.'¹⁵⁶

Rights theorists have been distinguished from rule-book supporters, in that the rights conceptualisation of the rule of law 'supposes that the rule-book represents the community's efforts to capture moral rights and requires that any principle, rejected in those efforts has no role in adjudication.'¹⁵⁷ They do however, share some common points with contemporary communitarian followers. The two main points shared are, the central idea of participation by individuals and making participation a way of life. Returning to the definition set out earlier in this section, the rights-based/way of life conceptualisation of the rule of law is seen as rule by participation of individuals in conceiving of their moral and political rights. This seems to draw upon the main idea of both classical and contemporary communitarianism - where the 'common good lies in a preparedness [by individuals] to contribute to the government.'¹⁵⁸

Both communitarianism and the rule of law encourage individuals to make commitments through participation in the governing process, as the governing process is a reflection of their values and ideas. Thomas Paine had similar notions of the value of 'empower[ing] individuals so that they could cultivate their own personal morality as well as define their role as citizens within a democratic community.'¹⁵⁹ It is through these 'collective' values and ideas, that Habermas believes a sense of community will be restored and founded, mainly through law.¹⁶⁰ Others share his view that active citizenship will assist to develop a 'sense of affinity within a political community'. This development is very much 'dependent upon an image of ideal government' which the citizenry have, as it feels it makes a difference within the whole governing process through its participation.¹⁶¹ Restoration will, Habermas states, depend on the 'establishment of new forms of participation and arenas for deliberation into the decision-making process of the administration itself.'¹⁶²

The fact that the sense of community will be dependent on laws created, was not overlooked by Habermas. He stresses the importance of the role of courts in assisting with the building of a community, especially as it is their duty to protect the community established.¹⁶³ Despite his commitment to the development of a political community based upon citizen participation and values, Habermas was in fact, 'enormously suspicious of the kind of moral or theoretical totalitarianism which underpins so much contemporary communitarianism.'¹⁶⁴ As noted by Habermas, the use of judicial discretion is a means of applying the rule of law concept through review of governmental actions and decisions.¹⁶⁵ In general, there are three grounds on which the judiciary may review government actions and decisions. The three grounds are illegality, procedural impropriety, and irrationality (or unreasonableness). In implementing any of these grounds, judges are applying different aspects of the rule of law.¹⁶⁶ The judiciary's main reason for using judicial discretion is to protect the rights, freedoms, and liberty of individuals from arbitrary and coercive actions of both government and other individuals. According to Sájó, judges may invoke the use of judicial discretion if the laws produced fall short of meeting the conditions of rationality, equity, non-discrimination, and permitting judicial legal redress.¹⁶⁷ The application of the rule of law here, is meant to achieve justice, to ensure that there is consistency in the application and further development of the law, and to restrict government from abusing its authority and power. From this definition of the rule of law, judicial review is extended until the application of certain principles is satisfied, regardless of whether these principles were written into the applicable laws.

This has been part of the problem with the debate on judicial discretion. As Dworkin sees it, 'the debate neglects an important distinction between two kinds of political arguments on which judges might rely on, in reaching their decisions.'¹⁶⁸ The

difficulty with this debate, as supported by critics of judicial discretion, is that there seems to be confusion, as cases of procedural impropriety are sometimes mistaken as instances of judicial interference in policy outcomes.¹⁶⁹ Dworkin helps to clarify and identify the problem with this debate, when he makes a distinction between the two types of 'political arguments' which can be utilised by judges in making their decisions. The distinction is between 'arguments of political principle that appeal to the political rights of individual citizens, and arguments of political policy that claim that a particular decision will work to promote some conception of the general welfare or public interest.'¹⁷⁰ The distinctions Dworkin draws out on the issue of judicial discretion, illustrates the use of more rights-based conception of the rule of law. This is tied to the idea of the rule of law as a 'way of life'. Along these lines, judicial discretion has been used not merely along the lines of strictly examining the legal texts and intentions behind legislation. Judicial discretion has attempted to bridge the gap, making the connection between law and morality which rule-book theorists and positivists alike, reject.

Summary

As earlier sections have shown, the variations in the understanding of the rule of law has an effect on what is considered as sources of law and their legitimacy. This chapter illustrated the extent of the affect of particular understandings of the rule of law on the organisation and functioning of the judicial system and the role in which judges have within a country's judicial system. The three conceptions focused upon in this section are 'rule-book', 'rights-based', and the CLS movement.

The 'rule-book' conception has been considered synonymous with the legal positivist conceptualisation of the rule of law. This conception (rule-book/positivist) of the rule of law is reliant on principles and rules embodied in legal texts as sources of law.

Positivists claim that their approach is conducive to impartiality of law and consistency of law. They also claim that this approach avoids confusion with morality.

In opposition to this perspective, those who consider positivism as limited, do so on the basis that reliance only on texts for basing judgements does not make allowances for taking into account changes in society that have not yet become expressed in the legal texts. Writers such as Radbruch, supported this non-positivist (rights-based) perspective of the rule of law - looking beyond legal texts for law and the legitimacy for creating the laws of a country. Rights theorists claim that there must be higher norms that guide judges in 'hard' cases and typically argue that these must in turn be veiled in a moral consensus. Rights and CLS theorists (as discussed below) deny that the positivists' understanding of the rule of law is what judges actually do.

Another important perspective that has been considered in this section, has been the CLS movement. The CLS¹⁷¹ claim that the legal systems (especially as construed in the positivist manner), systematically conceal and distort political and social choices to the detriment of poorer sections of society. More specifically, they claim two things: firstly, that the legal system ascribes an 'essential' meaning to words which they do not possess (i.e. legal indeterminacy); and secondly, that the legal system relies on a notion of legislative intent which is a myth. This movement is of relevance as it provides an alternative not only to positivist ideas, but also non-positivist ideas. This perspective provides an interesting contrast for discussing the ideas of judicial discretion and the role of judges. These two topics are heavily debated in many countries, because it relates to issues of the legitimacy and the sources of law of a country. It is also important to note that the contemporary CLS movement¹⁷² reflects a progressive or left wing bent, while the principle of legal indeterminacy has also been used by right wing critics of the rule of law.

The significance of these disputes and diverse interpretations is that they all, albeit in different ways, reveal potential threats to the wider legitimacy of the rule of law. Historically, positivist approaches have been seen as both corresponding to several changes and as veils for the perpetuation of privilege. Yet, the major alternatives also reveal risks. Rights-based conceptions of the rule of law rely on a moral consensus whose existence is disputed by the other approaches and may be especially hard to discern at times of rapid social change. The CLS approach easily carries criticism of positivism to the point where little is left of the rule of law as it dissolves in the sea of social choice and political conflict. Even Habermas' nuanced defence of the rule of law retreats to a minimalist position and is reliant on processes of discursive will formation which, by his own account, are threatened by contemporary forms of political and economic organisation.

These differences are of importance as subsequent chapters focused on the European Union and on associated countries, will examine the understanding of the rule of law which a state subscribes to, as this will determine its attitude about the judiciary, the role of judges, and the use of judicial discretion.

Section Four - The Rule of Law and Economic Systems

This section will review the question, 'Is there any necessary connection between the rule of law and a particular type of economy?' The main reason for this focus is the prominence of the issue within the enlargement debate. On the one hand is Hayek's perspective on this question, that there is a necessary connection between the rule of law and a market economic system. The other side denies that any such connection exists. This dichotomy of pros and cons, serves to illustrate not only the various ideas about what particular economic systems need, but also provides evidence of the contested

relationship that exists between the concept of the rule of law and the development or existence of an economic system.

A Necessary Connection – As Constructed by Hayek

Starting firstly with Hayek, the section will explore whether there is a necessary connection between the rule of law and a particular type of economic system and the reasons behind this viewpoint. It would therefore be useful to briefly outline Hayek's main ideas of the rule of law. Following this, a survey of the connection he makes between the rule of law and a market economy will be presented.

Hayek describes the rule of law as a method to “protect infringement of the private sphere” from the coercive and arbitrary actions of government authority or of other individuals.¹⁷³ In defining the concept this way, he makes the point that the rule of law should restrict government “only in its coercive activities”, thereby restricting it from using its powers to coerce individuals “except in the enforcement of a known rule.”¹⁷⁴ This is based on his belief that “government in all its actions is bound by rules fixed and announced beforehand”.¹⁷⁵ It is in the protection of the private sphere from infringement, that Hayek states that the rule of law curbs the discretionary powers of the administrative authority as a whole. At the same time, it is the knowledge and understanding of the criteria which the rule of law provides, that enables individuals to make decisions within a framework that protects their liberty while enabling them to exercise their use of liberty for their own purposes.¹⁷⁶ The basic assumption made here, is that the rule of law is a concept that forms the basis for the protection of individual liberty in all spheres, including in the area of economic affairs.¹⁷⁷ According to Ward, ‘the free market is necessary as a means of preserving wider political liberties.’¹⁷⁸ Therefore, according to him, ‘if the market remains free then we can all continue to

enjoy a greater measure of choice, and the responsibility that goes with it. In turn, political and legal institutions can only be legitimated if they preserve the free market and the moral order of liberty.¹⁷⁹

In relation to economics and the economic market, Hayek takes the notion of protection of the individual and private sphere from infringement, to mean something different from other theorists. He takes a less extreme view of government involvement than some of his contemporaries, who believed that the role of the state in the economic sphere, should be non-existent and objected to any governmental interference in the economy.¹⁸⁰ This is because they believe that any decisions made by a government ultimately will lead to discrimination against particular individuals or groups. The underlying reason behind this belief of non-interference is the desire to protect the economy from any arbitrary and discriminatory governmental interference, as well as provide a framework and incentives for individuals to pursue their interests and participate in economic matters. Hayek specified that individuals should have the means to enable them to pursue any plan of action and that the means to act “should not be in the exclusive control of one other agent.”¹⁸¹ By other agent, Hayek was referring to government authority.

Hayek believed that government, (in its limited but working capacity), provides a framework and the means for individual decision-making in the pursuit of individual purposes. To Hayek, ‘freedom of economic activity had meant freedom under the law, not the absence of all government action.’¹⁸² He expected that there would be some government involvement in the economic sphere, as a ‘functioning market economy presupposes certain activities on the part of the state’.¹⁸³ This conception of the economy is based on the classical liberal conception of the state in relation to the economy, (market economy).¹⁸⁴ The underlying fundamental principle of this type of

economy is that the government ensures that individuals are able to pursue their individual economic interests, (without much interference from the government).

There are some of the viewpoint that ‘government’s economic responsibilities should be restricted to creating conditions within which market forces can most effectively operate.’¹⁸⁵ It is the belief that the rule of law sets the framework in which government and individuals act. While the market provides the forum for using individual knowledge in order to pursue individual objectives, it has been argued by classical liberals, that ‘individuals should enjoy the widest possible liberty and have therefore insisted that the state be confined to a minimal role.’ The role they envisaged for the state was to ‘provide a framework of peace and social order within which private citizens can conduct their lives as they think best.’¹⁸⁶ As stated by Hayek, the main criterion regarding liberty is not the number of courses of action available to the individual, but whether the individual can “expect to shape his course of action in accordance with his present intentions.”¹⁸⁷ The structure of a market economy allows for this individuality and it is also founded upon it. The protection of the individual and private sphere from infringement is made possible through the development and structuring of the economic system to incorporate legal rules which assists individuals in determining their rights and identifies a framework in which they are able to pursue their interests. Hayek agreed with this broad idea of a market economy. He believed that given an ‘appropriate framework individual pursuits could be of benefit to society.’ Hayek suggests that this idea of a market economy ‘presupposes a clear legal and moral framework within which individual objectives should be pursued.’¹⁸⁸ Scheuermann put forward similar ideas, stating the ‘the rule of law renders the activities of power-holders predictable and thereby makes an indispensable contribution towards individual freedom.’¹⁸⁹

In this light, Hayek is likened to Adam Smith, whereby the framework the government produces, “translates a pattern of individuals’ pursuit of their own ends into a sustainable social order, as long as it is not disrupted by overextended government.”¹⁹⁰ To Hayek, Smith’s ‘social order’ is the economic market. Hayek depicts the economic market as a “spontaneous order”. By this, Hayek meant that the market was not the “product of human design”, but nevertheless imposed order on individuals. Hayek considered the market to be a “spontaneous order” that “imposes order on life by allowing individuals freedom to use their own knowledge in pursuit of their own objectives.”¹⁹¹ Scheuermann states that “Weber makes this connection between modern capitalism and the rule of law. He believes that both counter “unnecessary unpredictability”, making life both in the legal and economic spheres, predictable.”¹⁹²

The relationship between the rule of law and a market economy is a complex one. There will be activities co-ordinated by the government that is both compatible and incompatible with the working and functioning of a market economy. As Hayek puts it, ‘a government that is comparatively inactive but does the wrong things may do much more to cripple the forces of a market economy than one that is more concerned with economic affairs but confines itself to actions which assist the spontaneous forces of the economy.’¹⁹³ What he means by all of this is that an inactive government is as bad for a market economy as an overbearing one. This is because at both extremes you have the repression or repulsion of the rule of law. In each case here, individual liberty is no longer protected by the rule of law, and this begins to deteriorate the conception and existence of a market economy, as it is based in many ways on the protection of individual freedom and protection of this freedom. As Hayek states, ‘the observation of the rule of law is a necessary, but not yet a sufficient, condition for the satisfactory working of a free economy.’¹⁹⁴

Despite the fact that Hayek believed that the rule of law was a necessary but insufficient condition, he has also come to recognise that there is a fundamental conflict between democracy as conceived of in contemporary terms, and the idea of a market economy. Belatedly, he states that he has come to agree with Joseph Schumpeter,

there is an irreconcilable conflict between democracy and capitalism – except that it is not democracy as such but the particular forms of democratic organisation, now regarded as the only possible forms of democracy, which will produce a progressive expansion of governmental control of economic life even if the majority of the people wish to preserve a market economy.¹⁹⁵

What Hayek and Schumpeter were claiming above, is that there is a contradiction that exists within this necessary connection between the rule of law and a market economy. An example to illustrate this internal contradiction is development and protection of various forms of ownership. Within the framework of an economy based on market ideas, the state has a duty to create and ensure that conditions favour the development and protection of the various forms of ownership.¹⁹⁶ Private ownership is the one type of the three mentioned by the Council of Europe¹⁹⁷, that is highly favoured within an economy based on market values and ideas. This is because it supports competition between firms and provides incentive to improve which triggers more competition and improvement. This occurs until the market reaches a point where competition has only a few firms left to monopolise the sector, as was the case when state-owned firms were the only types in existence. The problem of monopolies within a market economy becomes a threat to the protection of the individual and is where democratic values and ideas begin to clash with the ideas on which a market economic system is based. It pits the rule of law against itself- whereby on the one hand it attempts to protect individual rights through limited governmental interference in the economic

sphere, but at the same time, the use of governmental intervention in the economic sphere becomes necessary to ensure that individual rights are protected.

Hayek states that there is a necessary connection between the rule of law and a market economy. This he says, is based on the fact that the rule of law is compatible with the ideas and structures of a market economy- focusing on the individual. The individual is of vital importance for the development and continued support of a market. If individuals do not feel secure or feel they have reasonable means of recourse against wrongs done to them, this stunts market development. At the same time, a market economy, as seen by Hayek and others like him, seems to be the economic system most compatible with ideas of the rule of law and assists in the actualisation of individuality within a structure for economic relations. This account of their relationship has recently been supported by financial economists who have produced evidence that illustrated how ‘financial markets contribute to economic growth and legal institutions contribute to the growth of financial markets.’¹⁹⁸

Despite this recent evidence, there still seems to be some internal controversy and conflict at some level, between protection of individual rights through limitation of governmental interference by means of the rule of law, and promotion of individual rights- especially with regard to a market economy.¹⁹⁹ The rule of law’s necessary connection with a market economic system can be characterised as due to the evolution of liberalism in conjunction with capitalism. They developed together and therefore became necessarily intertwined with each other. However, as Marxists have argued, ‘the formal equality which the rule of law proclaims contrasts, ... with social and economic inequalities...’²⁰⁰ This clearly illustrates the contradiction that exists between the ideas of a market economy and the rule of law.

While both advocates and critics of market economies have accepted the connection between markets and at least formal, procedural law, the very connection has been questioned by the CLS.

An Unnecessary Connection – The Critical Legal Studies Movement

Many writers associated with the Critical Legal Studies movement such as Roberto Unger, have responded negatively to the question of there being a necessary connection between the rule of law and a particular type of economic system. The CLS scholars believe that the 'successive failures to find the universal legal language of democracy and the market suggest that no such language exists.'²⁰¹ This is because the reason for the connection between the rule of law and a particular type of economic system - in this case a market economy - is based on the contemporary fixation and 'commitment to a democratic republic and to a market system as a necessary part of that republic.'²⁰²

Unger, like other CLS scholars, does not accept that the two ideas are necessarily connected, but instead, believe that contemporary societies have chosen to connect the two because of the institutions chosen and the manner in which these institutions have been organised.²⁰³ In their way of thinking, the economic system could be either a market-based, command-based, or a combination of these two, in what is termed a "mixed economy". Any of these would suffice, except that the contemporary idea of an economy is the form that has become 'more or less tactically identified with the particular market institutions that triumphed in modern Western history.'²⁰⁴

The main criticism the CLS scholars have of theorists like Hayek, who support the thesis that the rule of law is necessarily connected to a market economy, is that 'the current content of public and private law fails to present a single, unequivocal version of democracy and the market.'²⁰⁵ Unger for instance, states that contrary to the idea that

the law presents a single idea of democracy and the market economy, it 'contains in confused and undeveloped form the elements of different versions'. This allows for larger variations in contemporary doctrine than theorists like Hayek suggest with their necessary connection theories.²⁰⁶

Summary

From both Hayek and the CLS perspectives, it has been illustrated that in response to the question of whether there is a particular type of economic system which is necessarily connected to the concept of the rule of law, there are varying views. The underlying fundamental problem here is whether there is a necessary connection between the rule of law and a market economy. Hayek argues for the necessary connection between the rule of law and a market economy.²⁰⁷ The CLS on the other hand, claim that there is no necessary link between a market economy and the conception of the rule of law.

The ongoing debate between the two perspectives illustrates that there is no one answer, and in fact, throughout time, it has been this balance between protecting and promoting individual rights, which has prompted the variation in ideas about what type of economic system is necessarily connected with the concept of the rule of law. As pointed out earlier, it is perhaps preoccupation with the development of a market economy and its promotion of individuality that has streamlined contemporary theorists to follow in Hayek's shoes. This has prompted many to promote the thesis that the rule of law is necessarily connected to a market economic system and that any other economic system would not support the rule of law ideals as this particular system would.

Conclusion

Throughout this chapter, the contested nature of the rule of law has been outlined and examples have been provided to substantiate this claim. The variations of definitions for the rule of law have been echoed by the numerous understandings regarding its relationship to concepts such as democracy, judicial independence and discretion, and formation of a market economy.

From examination of the rule of law and its relationships with democracy, the judiciary, and a market economy, it can be said that these relationships are complex. One main definition for the rule of law was meant to provide for the protection of individual freedoms from the arbitrary and coercive actions of others, but especially of the government authority. Despite this, at the heart of the variation in conceptions is a fundamental disagreement about the source of legitimacy and the very nature of law itself. This has been found to have a profound impact on the perceived relationship the rule of law has with other important ideas and reflects the contested nature of the rule of law. For example, its relationship to democracy illustrates its contested nature, influencing the form and structure of democracy that views the rule of law as either a fundamental support for the development of democracy, or as a retardant to development of democracy.

Similarly, the manner in which the rule of law has been understood and defined has also affected the manner in which other issues - development of a market economy, judicial independence and judicial discretion, are viewed and understood. A market economy is said to need the rule of law in order to protect individual interests - but complexly, it can do this by both limiting government intervention and utilising government intervention, further illustrating the complexity of this principle. Judicial independence and discretion are treated in a similar manner. The rule of law emphasises

judicial independence that seems to dictate discretion, however in some countries, as will be discussed in the next two chapters, judicial discretion is not necessarily associated with independence. In fact, in some countries such as Germany, judicial independence from government is emphasised, but judicial discretion is seen as going against the idea of the rule of law. The rule of law here is perceived as rule-book based, and therefore, the lack of judicial discretion is the result.

¹⁷ This distinction was made by Judith Shklar in her chapter on 'Political Theory and the Rule of Law', in Hutchinson and Monahan's edited book titled: *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987.

¹⁸ This distinction was made by Paul Craig in his article 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, vol.42, no.3, Autumn 1997, pp.467-487; and by Maria Luisa Fernandez Esteban, Chapter Three: 'Rule of Law versus Rechtsstaat and Règne de la Loi', in *The Rule of Law in the European Constitution*, The Hague: Kluwer Law International, 1999.

¹⁹ Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', p.467.

²⁰ This can be illustrated from the comments and remarks made during interviews conducted in both Brussels and Budapest, as well as from European Union documentation- which show these two terms are often conflated.

²¹ Richard H. Fallon Jr. '“The Rule of Law” as a Concept in Constitutional Discourse', *Columbia Law Review*, v.97, no.1, January 1997, pp. 7-10.

²² See the interviews conducted in Brussels, which will be covered in detail in a later chapter; as well as Maria Esteban's book-, *The Rule of Law in the European Constitution*.

²³ This will be discussed in a later chapter, focusing especially on the case of Eastern European countries, where the current transition process to a market economy system demands that the government retain control over certain aspects of the market in order to smooth over transition difficulties and disputes.

²⁴ Shklar, 'Political Theory and the Rule of Law', p.1.

²⁵ Fallon, '“The Rule of Law” as a Concept in Constitutional Discourse', p.1.

²⁶ Shklar, 'Political Theory and the Rule of Law', p.1.

²⁷ *Ibid*, p.3.

²⁸ This will be discussed in the next section (section 2) on democracy and the rule of law, as it is significant to discussions regarding the relationship between the rule of law and the idea of representative democracy.

²⁹ Geoffrey de Q. Walker, *The Rule of Law. Foundation of Constitutional Democracy*, Melbourne, Australia: Melbourne University Press, 1988, p.11.

³⁰ The International Commission of Jurists have stated: "The Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realised." taken from Howard B. Tolley, Jr., *The International Commission of Jurists. Global Advocates for Human Rights*, Philadelphia, USA: University of Pennsylvania Press, 1994, p.68.

³¹ Even for someone like Hayek, who takes a more narrow view of the rule of law, there are disputes regarding the distinction of the rule of law as a 'way of life'. Gottfried Dietze reiterates and quotes Hayek as having said, that "Law is not only much older than legislation or even an organised state: the whole authority of the legislator and of the state derives from pre-existing conceptions of justice, and no system of articulated law can be applied except within a framework of generally recognised but often unarticulated rules of justice." (Taken from Gottfried Dietze, 'Hayek on the Rule of Law' in Fritz Machlup (Ed.) *Essays on Hayek*, New York: New York University Press, 1976, p.123; originally from Hayek, 'The Results of Human Action but not of Human Design', in *Essays in Philosophy, Politics and Economics*, p.102.)

³² Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', p.468. This is an interpretation of what was said by Joseph Raz in 'The Rule of Law and its Virtue', *Law Quarterly Review*, vol.93, 1977; or in Joseph Raz, *The Authority of Law*, Oxford: Clarendon Press, 1979.

³³ Shklar, 'Political Theory and the Rule of Law', pp.1-2.

³⁴ Walker, *The Rule of Law*, pp.9-11.

³⁵ Shklar, 'Political Theory and the Rule of Law', p.2.

³⁶ A. V. Dicey, *An Introduction to the Study of the Law of Constitution*, London: Macmillan Press Ltd., 1979, pp. Cx, 193.

³⁷ Friedrich A. Hayek, *The Constitution of Liberty*, London: Routledge & Kegan Paul, 1960, pp.205-206.

³⁸ Hayek, *The Constitution of Liberty*, p.206.

³⁹ *Ibid*, p.208.

⁴⁰ *Ibid*, p.205.

⁴¹ *Ibid*, p.206.

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- ⁴² T.R.S. Allan, 'Legislative Supremacy and Rule of Law: Democracy and Constitutionalism', *Cambridge Law Journal*, v.44, 1985, p.114.
- ⁴³ Allan, 'Legislative Supremacy and Rule of Law', p.117.
- ⁴⁴ Craig, 'Formal and Substantive Conceptions of the Rule of Law', p.467; Esteban, *The Rule of Law in the European Constitution*, p.91.
- ⁴⁵ Craig, 'Formal and Substantive Conceptions of the Rule of Law', p.467.
- ⁴⁶ This is reiterated by Joseph Raz, when he admits 'that the rule of law could be met by regimes whose laws are morally objectionable, provided that they comply with the formal precepts which comprise the rule of law.', Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework', *Public Law*, vol.42, no.3, Autumn 1997, p.469.
- ⁴⁷ Walker, *The Rule of Law*, p.142.
- ⁴⁸ *Ibid*, p.143.
- ⁴⁹ Ian Ward, *An Introduction to Critical Legal Theory*, London: Cavendish Publishing Limited, 1998, p.23.
- ⁵⁰ Quoted in Robert Alexy, 'A Defence of Radbruch's Formula' in David Dyzenhaus (Ed) *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford and Portland, Oregon: Hart Publishing, 1999, Chapter 2, pp.15-16.
- ⁵¹ Ward, *An Introduction to Critical Legal Theory*, p.23.
- ⁵² John Finnis, 'The Truth in Legal Positivism', in Robert P. George, *The Autonomy of Law. Essays on Legal Positivism*, Oxford: Clarendon Press, 1996, Chapter 7, p.196.
- ⁵³ Walker, *The Rule of Law*, p.141.
- ⁵⁴ Hans-Dieter Roth, *Positivismus und Demokratie*, Duncker and Humblot: Berlin, 1981, p.146.
- ⁵⁵ Richard Thoma, 'Gegenstand-Methode-Literatur' in Gerhard Anschütz and Richard Thoma, *Handbuch Des Deutschen Staatsrechts*, Vol.1, Tübingen: J. C. B. Mohr, 1930, p.4.
- ⁵⁶ Craig, 'Formal and Substantive Conceptions of the Rule of Law', p.481.
- ⁵⁷ *Ibid*, pp.6-7.
- ⁵⁸ Hans Kelsen, *Allgemeine Staatslehre*, Berlin: Julius Springer, 1925, p.157.
- ⁵⁹ Otto Kirchheimer, 'Criminal Law in National Socialist Germany', in William E. Scheuerman (Ed.), *The Rule of Law Under Siege*, Berkeley, USA: University of California Press, 1996, p.175.
- ⁶⁰ Kelsen, *Allgemeine Staatslehre*, p.157.

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- ⁶¹ Craig, 'Formal and Substantive Conceptions of the Rule of Law', p.467.
- ⁶² Quoted in Craig, 'Formal and Substantive Conceptions of the Rule of Law', pp. 477-478, which was taken from the original work by Ronald Dworkin - *A Matter of Principle*, Cambridge, Massachusetts: Harvard University Press, 1985, pp.11-12.
- ⁶³ Craig, 'Formal and Substantive Conceptions of the Rule of Law', p.478.
- ⁶⁴ *Ibid*, p.479.
- ⁶⁵ *Ibid*, p.487.
- ⁶⁶ Maurice Waite (Ed), *The Little Oxford Dictionary of Current English*, 7th Edition, Oxford: Clarendon Press, 1994, p.166.
- ⁶⁷ Mary Kaldor and Ivan Vejvoda, 'Democratisation in Central and East European Countries', *International Affairs*, v.71, n.1, 1997, p.63.
- ⁶⁸ Georg Sørensen, *Democracy and Democratization. Processes & Prospects in a Changing World*, Second Edition, Oxford: Westview Press, 1998, p.9.
- ⁶⁹ *Ibid*, p.10.
- ⁷⁰ Albert Weale, *Democracy. Issues in Political Theory*, Basingstoke and London: Macmillan Press Ltd., 1999, p.31.
- ⁷¹ *Ibid*, p.31.
- ⁷² Allan C. Hutchinson and Patrick Monahan, 'Democracy and Rule of Law', in Allan C. Hutchinson and Patrick Monahan (Eds.) *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, p.119.
- ⁷³ Jean Hampton, 'Democracy and the Rule of Law' in Ian Shapiro (Ed) *The Rule of Law*, New York: New York University Press, 1994, p.13.
- ⁷⁴ Carole Pateman, *Participation and Democratic Theory*, Cambridge: Cambridge University Press, 1970, p.24.
- ⁷⁵ Jean-Jacques Rousseau, *The Social Contract*, Translated and Introduced by Maurice Cranston, London: Penguin Books, 1988, p.69; Pateman, *Participation and Democratic Theory*, p.22.
- ⁷⁶ Rousseau, *The Social Contract*, p.69.
- ⁷⁷ Sørensen, *Democracy and Democratization*, p.10.
- ⁷⁸ Pateman, *Participation and Democratic Theory*, p.22, footnote no.1.
- ⁷⁹ Walker, *The Rule of Law*, p.23.

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- ⁸⁰ Weale, *Democracy. Issues in Political Theory*, pp.31-32. In this sentence, the rule of law and representative democracy are viewed as practical methods for individuals to participate. However, it must also be noted that these 'practical' methods are also limited in their capacity for individual participation in the decision-making process.
- ⁸¹ Hutchinson & Monahan, 'Democracy & The Rule of Law', p.105.
- ⁸² Weale, *Democracy. Issues in Political Theory*, p.32.
- ⁸³ András Sajó, *Limiting Government. An Introduction to Constitutionalism*, Budapest: Central European University Press, 1999, pp.57-58.
- ⁸⁴ Allan, 'Legislative Supremacy and Rule of Law', p.129.
- ⁸⁵ Hutchinson & Monahan, 'Democracy & The Rule of Law', p.100.
- ⁸⁶ Allan, 'Legislative Supremacy and Rule of Law', p.139.
- ⁸⁷ *Ibid*, p.130.
- ⁸⁸ *Ibid*, p.133.
- ⁸⁹ Katerine Fierlbeck, *Globalizing Democracy. Power, Legitimacy and the Interpretation of Democratic Ideas*, Manchester and New York: Manchester University Press, 1998, p.31.
- ⁹⁰ Allan, 'Legislative Supremacy and Rule of Law', p.134.
- ⁹¹ Timothy Kenyon, *Democratisation & the Rule of Law*, MANCEPT Paper No. 7/97, University of Manchester: MANCEPT Working Paper Series, 1997, p.23.
- ⁹² According to Sajó, Britain lacked democracy as contemporarily understood (i.e. representative democracy), to pair with the idea of the rule of law, as recently as 1947. It also illustrated a deficiency of the rule of law in that it lacked 'legal redress for damage caused by the state administration', Sajó, *Limiting Government*, p.212; footnote 13 on p.212.
- ⁹³ Sajó, *Limiting Government*, p.206.
- ⁹⁴ Quote in Hutchinson work was taken from the work of E. Chemerinsky, *Interpreting the Constitution*, New York: Basic Books, 1988.
- ⁹⁵ Allan C. Hutchinson, 'The Rule of Law Revisited: Democracy and Courts', in Allan C. Hutchinson and Patrick Monahan (Eds.), *The Rule of Law: Ideal or Ideology*, Toronto: Carswell, 1987, p.207.
- ⁹⁶ Jurgen Habermas, 'On the Internal Relation Between the Rule of Law and Democracy', *European Journal of Philosophy* 3 (1995):12-20, p.17.
- ⁹⁷ Hutchinson and Monahan, 'Democracy and Rule of Law', pp.98-99.

⁹⁸ EU documentation conflates both the terms- 'rule of law' and 'democracy'. Comments from interviews conducted in Brussels provide evidence to substantiate the notion that the two terms have been used interchangeably by the EU, thereby emphasising and illustrating the contested nature of the rule of law. This will be further investigated in Chapter Two of this thesis.

⁹⁹ Hutchinson and Monahan, 'Democracy and Rule of Law', p.100.

¹⁰⁰ Bob Fine, *Democracy and the Rule of Law. Liberal Ideals & Marxist Critiques*, London: Pluto Press, 1984, p.147.

¹⁰¹ Hutchinson and Monahan, 'Democracy and Rule of Law', pp.99-100.

¹⁰² *Ibid*, p.100.

¹⁰³ *Ibid*, p.99.

¹⁰⁴ *Ibid*, p.100.

¹⁰⁵ Allan, 'Legislative Supremacy and Rule of Law', p.134.

¹⁰⁶ Hutchinson and Monahan, 'Democracy and Rule of Law', p.100.

¹⁰⁷ *Ibid*, p.100.

¹⁰⁸ Sájó, *Limiting Government*, p.207.

¹⁰⁹ *Ibid*, pp.207-208.

¹¹⁰ Habermas, 'On the Internal Relation Between the Rule of Law and Democracy', p.12.

¹¹¹ *Ibid*, p.17.

¹¹² *Ibid*, p.20.

¹¹³ Dworkin, *A Matter of Principle*, pp.11-12.

¹¹⁴ *Ibid*, pp.11-12.

¹¹⁵ *Ibid*, p.13.

¹¹⁶ Lech Morawski, 'Positivist or Non-Positivist Rule of Law? Polish Experience of a General Dilemma', in Martin Krygier and Adam Czarnota (Eds.), *The Rule of Law After Communism*, Aldershot, UK: Ashgate Publishing Company, 1999, p.41.

¹¹⁷ Frederick Schauer, 'Positivism, as Pariah' in Robert P. George, *The Autonomy of Law. Essays on Legal Positivism*, Oxford: Clarendon Press, 1996, p.36.

¹¹⁸ Ward, *An Introduction to Critical Legal Theory*, p.22.

¹¹⁹ Morawski, 'Positivist or Non-Positivist Rule of Law? ', p.42.

¹²⁰ *Ibid*, pp.41-42.

¹²¹ *Ibid*, p.42.

¹²² Positivism in Germany during the 1950s however, attempted to go beyond previous understandings in its commitment to 'reestablishment of the *Rechtsstaat*, which was a contrast to the feigned rule of law during the Nazi régime.'; Frieder Günther, '*Staatrechtslehre*' Between Tradition and Change West-German University Teachers of Public Law in the Process of Westernization, 1949 - 70, Conference at the German Historical Institute, Washington, D.C., March 25-27, 1999, www.ghi-dc.org/conpotweb/westernpapers/guenther.pdf, pp.5-6.

¹²³ Kent Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism', in Robert P. George, *The Autonomy of Law. Essays on Legal Positivism*, Oxford: Clarendon Press, 1996, p.13.

¹²⁴ Morawski, 'Positivist or Non-Positivist Rule of Law? ', p.42.

¹²⁵ *Ibid*, p.42.

¹²⁶ *Ibid*, p.42.

¹²⁷ However, this basic assumption made of positivism is not actually mentioned by positivists themselves. The basic legal positivist position 'contains no answer to how much is resolved in advance by legal materials and how much is left to judicial determination in particular cases.' Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism', p.15.

¹²⁸ Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism', p.2.

¹²⁹ Philip Selznick, 'Legal Cultures and the Rule of Law' in Martin Krygier and Adam Czarnola, *The Rule of Law After Communism*, Adershot, UK: Ashgate Publishing Company, 1999, p.24.

¹³⁰ Selznick, 'Legal Cultures and the Rule of Law', p.24.

¹³¹ Joseph Raz, *The Authority of Law*, Oxford: Clarendon Press, 1979, p.228; Selznick, 'Legal Cultures and the Rule of Law', p.24.

¹³² Selznick, 'Legal Cultures and the Rule of Law', p.24.

¹³³ 'Autonomous Law demands separation of law and politics' - which has been associated with a conception of the rule of law identified as 'western legal tradition/legal culture' often associated with the institutions of autonomous law.' Selznick, 'Legal Cultures and the Rule of Law', p.25.

¹³⁴ Dworkin, *A Matter of Principle*, p.14.

¹³⁵ Selznick, 'Legal Cultures and the Rule of Law', p.25.

¹³⁶ Dworkin, *A Matter of Principle*, p.15.

¹³⁷ For purposes of this thesis, legal positivists and proponents of the rule-book conception of the rule of law are considered synonymous. However, while legal positivists share much in common with those who believe in a rule-book conception of the rule of law, especially support for the conception of law as autonomous from the political, some positivists have also conceded to some degree on certain positions which have differentiated them from non-positivists. See Ward, *An Introduction to Critical Legal Theory* and Greenawalt, 'Too Thin and Too Rich: Distinguishing Features of Legal Positivism' for further details of slight differences between legal positivists and proponents of the rule-book conception of the rule of law.

¹³⁸ Ward, *An Introduction to Critical Legal Theory*, p.22.

¹³⁹ Greenawalt, 'Legal Cultures and the Rule of Law', pp.3-4.

¹⁴⁰ *Ibid*, p.4.

¹⁴¹ *Ibid*, p.10, Greenawalt considers himself a legal positivist.

¹⁴² *Ibid*, p.10.

¹⁴³ *Ibid*, p.10.

¹⁴⁴ *Ibid*, pp.11-12.

¹⁴⁵ *Ibid*, p.10.

¹⁴⁶ *Ibid*, p.13.

¹⁴⁷ Ward, *An Introduction to Critical Legal Theory*, p.156.

¹⁴⁸ Greenawalt, 'Legal Cultures and the Rule of Law', p.13.

¹⁴⁹ *Ibid*, p.7.

¹⁵⁰ *Ibid*, p.7.

¹⁵¹ Schauer, 'Positivism, as Pariah', p.35.

¹⁵² Morawski, 'Positivist or Non-Positivist Rule of Law?', p.43.

¹⁵³ Habermas, *Between Facts and Norm*, p.258.

¹⁵⁴ David A. O. Edward, 'The Role of Law in the Rule of Law' in the David Hume Institute Papers on Public Policy, *In Search of New Constitutions*, vol.2, no.1, Spring 1994, p.7.

¹⁵⁵ Dworkin, *A Matter of Principle*, pp.11-12.

¹⁵⁶ *Ibid*, pp.11-12.

¹⁵⁷ *Ibid*, p.17.

¹⁵⁸ Ward, *An Introduction to Critical Legal Theory*, pp.56, 60.

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- ¹⁵⁹ *Ibid*, p.59.
- ¹⁶⁰ *Ibid*, p.70.
- ¹⁶¹ *Ibid*, pp.56, 60-61.
- ¹⁶² *Ibid*, p.70; Jurgen Habermas, *Between Facts and Norms. Contribution to a Discourse Theory of Law and Democracy*, Cambridge, Massachusetts: The MIT Press, 1996, pp.191, 430-52.
- ¹⁶³ Ward, *An Introduction to Critical Legal Theory*, p.70.
- ¹⁶⁴ *Ibid*, p.70.
- ¹⁶⁵ Habermas, *Between Facts and Norms*, p.236.
- ¹⁶⁶ Jeffery Jowell and Dawn Oliver (Eds.) *The Changing Constitution*, 3rd Edition, Oxford: Clarendon Press, 1994, p.73.
- ¹⁶⁷ Sájó, *Limiting Government*, p.215.
- ¹⁶⁸ Dworkin, *A Matter of Principle*, p.11.
- ¹⁶⁹ Andrew Le Sueur, 'The Judicial Review Debate: From Partnership to Friction', *Government & Opposition*, v.31, n.1, Winter 1996, p.16.
- ¹⁷⁰ Dworkin, *A Matter of Principle*, p.11.
- ¹⁷¹ CLS share moral relativism of positivists but draw different conclusions from them.
- ¹⁷² It should be noted that here, both the CLS movement and the 'originally Free Law movement in Germany' reflect a progressive bent.
- ¹⁷³ Hayek, *The Constitution of Liberty*, p.220.
- ¹⁷⁴ Friedrich A. Hayek, *The Road to Serfdom*, London: Routledge, 1993, p.54.
- ¹⁷⁵ Hayek, *The Road to Serfdom*, p.54.
- ¹⁷⁶ Hayek, *The Constitution of Liberty*, p.220; Andrew Heywood, *Political Theory. An Introduction*, Second Edition, Basingstoke and London: Macmillan Press Ltd., 1999, pp.153-154.
- ¹⁷⁷ Hayek, *The Constitution of Liberty*, p.220.
- ¹⁷⁸ Ward, *An Introduction to Critical Legal Theory*, p.124.
- ¹⁷⁹ *Ibid*, pp.124-125.
- ¹⁸⁰ According to Ward, Robert Nozick shares Hayek's perspective of government intervention in the economic sphere. 'For Nozick, the idea of a free market translates into

the most minimal role for government in the ordinary economic and social activities of the individual citizen.', Ward, *An Introduction to Critical Legal Theory*, p.126.

¹⁸¹ Hayek, *The Constitution of Liberty*, pp.140-141.

¹⁸² *Ibid*, p.220.

¹⁸³ *Ibid*, p.222.

¹⁸⁴ 'It is the market, not the political institutions *per se*, which matter, and accordingly, the role of a legal system is to 'preserve competition and to make it operate as beneficially as possible'. The key characteristic of the liberal State is the rule of law. It may be that the rule of law 'produces economic inequality', but such 'inequality is not designed to affect particular people in a particular way.'; Ward, *An Introduction to Critical Legal Theory*, p.125, and Hayek, *The Road to Serfdom*, 1962 ed., pp.28, 59.

¹⁸⁵ Heywood, *Political Theory*, pp.85-86.

¹⁸⁶ *Ibid*, p.84.

¹⁸⁷ Hayek, *The Constitution of Liberty*, pp.207-208.

¹⁸⁸ Jim Tomlinson, *Hayek and the Market*, London: Pluto Perspectives, 1990, pp.113-114; 'When Hayek famously wrote in *The Road to Serfdom* that "stripped of all technicalities this [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", it was primarily this protective function of the rule of law that he probably had in mind.', William E. Scheuermann, 'Globalization and the Fate of Law', in David Dyzenhaus (Ed.) *Recrafting the Rule of Law: The Limits of Legal Order*, Oxford and Portland, Oregon: Hart Publishing, 1999, p.250.

¹⁸⁹ Scheuermann, 'Globalization and the Fate of Law', p.245.

¹⁹⁰ Tomlinson, *Hayek and the Market*, p.22.

¹⁹¹ Hayek, *The Constitution of Liberty*, p.228.

¹⁹² Scheuermann, 'Globalization and the Fate of Law', p.248; 'From the perspective of our early capitalist merchant, one way to reduce economic uncertainty would be to make sure that laws impacting on his business remained unaltered by the time he completed his trek and returned to his home port from the rural hinterlands. ... In short, familiar features of the rule of law would serve as a powerful tool for counteracting uncertainties generated by the distance and duration of economic exchange. A liberal system would not only facilitate capitalist exchange by securing private property and a system of free contracts, but also by dramatically reducing insecurities deriving from the time and space horizons of the merchant's economic environment.' Scherermann, 'Globalization and the Fate of Law', p.251.

¹⁹³ Hayek, *The Constitution of Liberty*, p.222.

¹⁹⁴ *Ibid*, p.222.

¹⁹⁵ Friedrich A. Hayek, *Economic Freedom*, Oxford: Basil Blackwell Ltd., 1991, p.385.

¹⁹⁶ Unidem Seminar, Sofia, 14-16 October 1993, European Commission for Democracy through Law, *Rule of Law and Transition to a Market Economy*, Germany: Council of Europe, 1994, p.14.

¹⁹⁷ *Ibid*, p.14.

¹⁹⁸ Paul G. Mahoney, 'The Common Law and Economic Growth: Hayek Might be Right' in *Transition. The newsletter about reforming economies*, vol.10, n.6, Dec.1999, p.28.

¹⁹⁹ Barbara Goodwin, *Using Political Ideas*, Third Edition, Chichester: John Wiley and Sons Ltd., 1992, p.36.

²⁰⁰ Heywood, *Political Theory*, p.156.

²⁰¹ Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, Cambridge, Massachusetts and London: Harvard University Press, 1983, p.6.

²⁰² *Ibid*, p.5.

²⁰³ Walker presents other similar examples, for instance, 'the worshipping of the rule of law prevents disposed groups in our society from questioning the capitalist system.' He also stated that 'the hostile attitude of CLS and the clerisy to the rule of law and to the institutions such as the bench and the bar that help to sustain it appears in the following passage from a CLS-influenced work: "When lawyers, including judges, speak of the "rule of law", therefore, they are usually speaking about the existing system of regulation that has grown up as part of the current allocation of political power and economic resources in the community. As members of the community who are satisfied with that current allocation they are arguing for stability and order and against change and experimentation." Ergo, if we desire change, experimentation and a better allocation of political power and economic resources, the first thing we must do is abolish the rule of law.', Walker, *The Rule of Law*, p.265.

²⁰⁴ Unger, *The Critical Legal Studies Movement*, p.6.

²⁰⁵ *Ibid*, p.7.

²⁰⁶ *Ibid*, p.8.

²⁰⁷ Hayek and those who accept this principle, differ widely about the extent of state intervention that is connected with or required by this principle.

Chapter Two: Understanding and Application of the Rule of Law within the EU

This chapter will review the variation in understanding of the rule of law concept amongst European Union member states. Specifically, it has been claimed by writers such as Kenneth Dyson, that there is a Continental - Anglo-Saxon dichotomy in the conceptualisation of the rule of law. It is the historical and cultural experiences, taking into account differentiation in attitudes and understanding of terms such as laws, government, individual liberty, and the role each plays in the governing of a state, which serves as the basis for variations in the interpretation of the rule of law. These differences, and the differences in the implementation of the rule of law, substantiate claims that there is a lack of uniformity in the conception of the rule of law across the European Union. An awareness of these differences and the reasons for them, further illustrates the contested nature of the concept itself, and is essential to understanding the implications this lack of uniformity has on the further expansion of the EU eastwards.

Section One - Contested Concept: Variation in Understandings and Influences

Across the member states of the European Union, there are a variety of understandings of the rule of law concept. The concept is contested because variations in its conceptualisation exist across EU member states.²⁰⁸ It has been suggested that the differences in attitudes and traditions between member states, of ideas such as the role and function of the state, the legal system, and of law, has had a direct effect on how the rule of law has been conceived of in member states across the European Union. These differences suggest that despite the fact that some states may share common experiences, such as democracy, and share some common governmental institutions, there are 'profound differences of social, cultural and political idiom', which preclude the development of any uniform legal system or legal culture across the European Union.²⁰⁹

The distinction between Anglo and Continental traditions will become evident. This distinction, based upon a dichotomy outlined by Dyson, is useful, in that it illustrates some of the main differences between understandings of the rule of law held by Britain, in comparison to countries on the Continent (like France and Germany). A closer look at the Continental countries show that despite Dyson's distinction, there are also differences in understandings between many of these countries, based upon their cultures and traditions. This chapter will focus particularly on England, France and Germany. The reason for focusing upon these three countries in particular, is that they illustrate the differences in traditions and form a natural point of reference for smaller countries, (especially those Central and East European countries seeking EU membership), as will be discussed in the next chapter.

One example of the influences of different traditions and attitudes, is the contrast between Continental European and Anglo-Saxon views²¹⁰, is that the Continental European conception of the state refers to it as 'a living entity' and as 'a structure of authority and a mechanical organisation of constraint'.²¹¹ From this conception of the state, the idea of 'legal control over the administration' through 'emphasis on the importance of exercising public power in accordance with definite principles', was developed. Continental Europe, according to Dyson, had a better understanding of the relationship between the role of law and of the state, which was structured to provide information on values and how individuals were to conduct themselves in their relations with one another and with the state.²¹²

By contrast, Dyson considered the Anglo-Saxon concept of the state to be underdeveloped. This difference can be attributed to the Anglo-Saxon departure from continental European ideas of the state, in its development from the seventeenth century onwards.²¹³ This difference in development led to the idea of law as disassociated from

the ideas of politics and administration, and 'reflected a medieval notion of the Rule of Law that viewed the law and the ruler, though connected, as two different things.'²¹⁴ Although law depended on the ruler for its existence, its existence was not owed 'to a creative act of will but was regarded as one aspect of the collective life, a set of habits, customs and practices that constrained the exercise of power.'²¹⁵ This was because,

There was not a conception of the state to which principles and rules could be attributed, only a proliferating, incoherent maze of statute law complemented by a judge-made patchwork, empirical development of common law from accumulated precedents and 'individualistic' premises.²¹⁶

The conception of law and state are rooted here, in the development of a legal culture. The legal culture defines the boundaries of what law and state mean within a country. It also defines the role of judges and the role of the government in relation to the state and how laws are created and passed. Anglo-Saxon and Continental legal traditions developed different ideas of the rule of law which reflected the differences in ideas of state, law, the role of judges and the role of government.

The 'rule of law' is the term developed and utilised by the English. Its closest equivalent on the continent is the German *Rechtsstaat* and the French *Etat de droit* or *Régne de la Loi*. These terms illustrate not only the contrasts between countries' understandings, but also where there are some similarities or shared ideas. Following an overview of the variations, a summary contrasting the three understandings will be presented.

The Rule of Law (British-English Version)

In Britain, specifically England, the conception of the rule of law reflects the historical development of the country's ideas about the source and legitimacy of law, and of the relationship between the government and individuals. The difference between the

Continental perspective and the one developed in England by A. V. Dicey, illustrates England's (Britain's) solution to the dilemmas and conflicts presented earlier.

With regard to Britain's ideas about the source of law, Dicey's approach to the rule of law identifies Parliament-made law representing the norms and values of society, as the source of law. This was expressed by Dicey in his description of the relationship between law and the constitution,

That with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.²¹⁷

In addition to this, other writers such as Esteban identify the source of law as 'conceived of as a body of inherited values, mainly distilled from the experience of the common law over the centuries (the common law acquired the connotation of unwritten law of customary origin by contrast to the written law of statutes)'.²¹⁸ After the revolt against monarchical rule, the source of codified law was identified as the Parliament. It was believed that the Parliament, being of the people, would better serve as a source of law that would be representative of the ideas and values of the country. In contrast to what was happening in Britain at this time, countries on the Continent had turned to enshrining codified law in a written constitution. This differentiation of approaches has been attributed to the split during the Eighteenth century, between British and the Continental legal traditions. During this period in Europe, although 'many of the Continental governments were far from oppressive', there were few countries 'where men were secure from arbitrary power'²¹⁹ as was considered the case in Britain by Dicey. This is because unlike many of its Continental contemporaries, Britain utilised what is considered a more non-positivist approach to the rule of law.²²⁰

According to Dicey's conceptualisation, the rule of law determined not only the source of law itself, but also determined the legitimacy of laws created in Britain. This was developed based upon historical experiences unique to Britain from the Eighteenth century onwards. It served as a method of guaranteeing rights under common law, and acted as 'a counter-balance to the absolute sovereignty of parliament.'²²¹ This is made clear in Dicey's definition of the rule of law as meaning the 'absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excluded the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.'²²²

Similarly, Wade shares this perspective of the British approach, characterising the rule of law by four main principles, one of which is that 'government should be conducted within a framework of recognised rules and principles which restrict discretionary powers'.²²³ However, despite similarities between Britain and Continental countries on this issue and the idea that 'the law should be even-handed between government and citizens' as the rule of law 'ensures that government should not enjoy unnecessary privileged or exceptions from the ordinary law'²²⁴, there are other fundamental differences in the approaches countries have undertaken. For instance, Wade and Esteban both reiterate that the British rule of law understands that 'disputes on the legality of acts of government are to be decided by judges who are wholly independent of the executive.'²²⁵ This notion lends credence to reasons behind the development of judicial discretion and powers, and the utilisation of judicial review procedures that separate Britain from countries on the Continent.

The rule of law has provided a means of coming to terms with the problems described previously in chapter one. Dilemmas such as legitimacy of law, questions of judicial power and protection of rights from arbitrary or coercive use of powers, are

addressed within Dicey's historical conceptualisation of the rule of law, and this has been reiterated in the more recent work of Bradley and Ewing. Bradley and Ewing reiterate this, stating that they believe Dicey was contrasting the 'rule of law [in Britain] with systems of government based on the exercise by those in authority of wide or arbitrary powers of constraint, such as a power of detention without trial.'²²⁶ This is because the system governed by the rule of law in Britain, constrained the powers of the executive and legislative branches, whilst providing the judiciary with more independence and discretion to protect individual rights under the law. For instance, the rule of law as conceived here, meant '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 law.'²²⁷ This has been considered a 'peculiarity of English institutions' and of English legal traditions.²²⁸

More importantly, Dicey's understanding of the rule of law illustrates Britain's non-positivist leanings in its approach to democracy. The balance between judicial and parliamentary powers and the role of the courts, as defined by Dicey's rule of law conception, provides an example of this. Britain's non-positivist rule of law approach believed in 'equality before the law, or equal subjection of all classes to the ordinary law of the land administered by the ordinary courts.'²²⁹ Esteban characterises the British approach to democracy as 'government under law', which she understands as 'the organs of government must themselves operate not only through the law, but also under the law, in the sense that the legality of their actions may be tested by independent courts of law, and that law operates as a limitation or constraint upon the actions of government.'²³⁰ As Dicey phrased it, 'no man is above the law' and everyone is or should be 'under duty to obey the laws.'²³¹ More specifically, it illustrates British attitudes towards democratic ideals, in that 'all citizens (including officials) were subject to the jurisdiction of the

ordinary courts should they transgress the law which applied to them, and that there should be no separate administrative courts as in France, to hear complaints of unlawful conduct by officials.²³²

What this understanding of the rule of law illustrates, is a 'perception of fluidity between state and society' that leads at times to conflicting or less than clear distinctions between the role of each. Nonetheless, this 'perception of fluidity between state and society' ... 'can be related to no small extent to the historical conditions of the emergence of the British State.'²³³ According to Laborde, the English use of the term 'state' is 'more polysemous than the French, as [in Britain] it may be more readily used to refer both to organised political authority and the wider community.'²³⁴ She also believes that both the term 'state' and 'society' have often been used interchangeably, which 'suggests the persistence of a number of assumptions about state and society in Britain.'²³⁵ This seems to exemplify the potential ambiguities that can exist within a state, as well as between states, with regard to the understanding and approaches taken to the rule of law, when it [rule of law] is conceptually interconnected with the notion of how the 'source of law', 'state' and 'society' are defined.

Continental Rule of Law

As mentioned earlier in this section, Dyson made a distinction between English and Continental ideas of what the rule of law meant. He presented this distinction because he believed that continental Europe shared a number of main ideas based on their focus on the state. These core ideas were: 'common with the nature of public authority, a rationalistic spirit of enquiry, and a holistic preoccupation with theoretical linkages between social forms and political authority.'²³⁶ The two main continental ideas which are considered analogous to the English 'rule of law', are the French *Régne de la Loi* and

the German *Rechtsstaat*. Although they are considered analogous, their meanings differ. The differences between these two main continental understandings of the rule of law will be further investigated, illustrating that the distinction drawn earlier by Dyson is much more complex, as there are differences even between continental countries, like France and Germany. The following sub-sections will also consider the previous section on the English understanding of the rule of law, how the understandings and approaches taken by different countries illustrate the solutions these countries have taken to the dilemmas outlined in chapter one.

Régne de la Loi OR Etat de droit (French Version)

France, like other members of the European Union, has adopted an eclectic but skewed solution to the dilemmas outlined in chapter one. In terms of the legitimacy of law, France turned to an essentially positivistic approach, with the sovereign will of the nation, as represented by the Assembly, as the source of codified law. There are evident historic reasons for this. According to Dicey the French turned to the rule of law (*Régne de la Loi OR Etat de droit*) 'not because the French King ruled more despotically than other crowned heads, but because the French people appeared from the eminence of the nation to have a special claim to freedom, and because the ancient kingdom of France was the typical representative of despotism.'²³⁷ The violent break with monarchism ushered in a new principle of legitimacy in which the people, or rather the nation, became the source of law.

It is important to note, however, that the eminence of the rule of law was not only the product of a revolt against monarchy. Ironically, it was also a revolt against the previous judicial system. The courts, that is the *Parlements*, had acted as a restraint upon royal power, invoking, in a thoroughly non-positivistic manner, the 'fundamental

laws of the realm'.²³⁸ Yet they had also used their authority to block reform and to secure their own privileges. It is here, in response to the corrupt and arbitrary practices of the *Parlements* that one finds the source of Montesquieu's famous declaration that 'judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating its force or rigor.'²³⁹ The revolutionaries' antipathy to the *parlementaires* was subsequently made manifest through the guillotine, leading to the death of as many as 50% of the *parlementaires* in Toulouse. Of more lasting significance than this was the law of August 1790 which explicitly prohibited judicial review of legislation. The penal code of the following year went even further, making judicial review effectively a punishable offence.²⁴⁰ Further confirmation of the triumph of positivism was evident in the stipulation that in cases of doubt judges had to turn to the legislature to find out what had been its true intent.

Not only was the legislature freed from judicial control but so too was the administration. Title II, article 13 of the law of August 13th, specified that 'Under penalty of forfeiture of their offices, the judges shall not interfere in any way whatsoever with the operation of the public administration...'²⁴¹ That did not mean that the administration was intended to be arbitrary. To the contrary, as Esteban has argued, the rule of law was supposed to entail the 'subordination of the entire state apparatus to predetermined abstract legal norms enacted by an Assembly which represents the will of the people.'²⁴² Once again administrators too were supposed to be mouthpieces of the law.

A positivist conception can also be discerned in the approach to democracy. France has arguably had a largely subterranean tradition of participatory democracy, philosophically rooted in Rousseau's contempt for representative democracy, which has periodically exploded into the daylight in such events as the Paris Commune and the 'events' of 1968. Yet there is, of course, another side to Rousseau. His very hostility to

the divergence of interests, which threatened a consensual way of life, led to the emphasis upon the general will and to the obligation to obey that will. The latter has indeed been argued to be the most extreme form which a positivist approach to the law can take. According to Norbert Bobbio turning positivism into a theory of obligation constitutes 'ideological' positivism.²⁴³

In the light of the dilemmas identified in chapter 1, it is not surprising that the French State had difficulty in adhering to such an extreme set of solutions. One of the most prominent casualties of the revolutionary model was the prohibition on judicial control of the administration. Indeed, so thoroughly had the French developed administrative law that the Englishman Dicey found this to be one of the most striking differences between the rule of law in English and French law. He even denied that there was any term in the language that conjured up the full significance of *droit administratif*.²⁴⁴ This restoration of judicial authority had its limits. Firstly, the *droit administratif* was administered by a separate corps of judges. Secondly, as Dicey famously complained, French administrative law privileged the state:

the government, and every servant of the government possesses as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens, and that the extent of these rights, privileges, or prerogatives is to be determined on principles different from the consideration which fix the legal rights and duties of one citizen towards another.²⁴⁵

While Dicey was not the most sympathetic of commentators he did pick up significant characteristics of the French view of the state which have a bearing not only upon the approach to administrative law, but also to the French response to the relation between the rule of law and the idea of a free market economy. These characteristics have been summarised more recently by Cécile Laborde. According to her, the French *sens de l'État* 'refers to the conviction that state institutions pursue aims that are both distinct, inherently fragile and corruptible.'²⁴⁶ This has not meant that France has always

been hostile to a laissez-faire approach to the economy, despite the Colbertiste tradition. As Jack Hayward put it the problem has been rather that 'Most of those who are essential to liberal, social and economic democracy are excluded from the economic policy community, whereas most of those included-notably the elite economic bureaucrats and the select business leaders - have no democratic legitimacy.'²⁴⁷ The relation between the French State and the market has of course been affected by the process of European integration and wider processes of globalisation. It has also been affected by the rise of the Constitutional Council. This body became involved in the dispute over the French government's nationalisation programme in 1982. The government relied largely on article 34 of the 1946 constitution behind which stood 'appeals to majority rule and parliamentary sovereignty, that is ... Rousseauian orthodoxy.'²⁴⁸ The Council only blocked the government temporarily but it was the form and logic of its judgement that was significant. According to Stone, the Council 'imposed an interpretation of the preamble that was wholly antithetical to the founder's intent in 1946.'²⁴⁹ Albeit in the unusual form of the Constitutional Council French judges had clearly moved a long way from the supposed subservience of 1790.

It was unlikely that what, in retrospect, looks like an extreme positivist solution to the dilemmas outlined in chapter one, would prove tenable. Indeed, in some respects an eclectic revision had begun even before the clamour of the revolutionaries had faded. For it was Napoleon Bonaparte who began the consolidation of French administrative law that Dicey found so distinctive. One can also note the presence of participatory elements in the political conception of citizenship predominant in France that have found a skewed, but sometimes eclectic and ambiguous answer to the problems posed by the rule of law. Moreover, despite the changes, especially in recent years, it is an answer that is deeply rooted in French history and culture.

Rechtsstaat (German Version)

Another understanding of the rule of law generally referred to on the Continent, is the German idea of the *Rechtsstaat*. Like Britain and France, Germany developed an understanding of the rule of law that reflects its solutions to the dilemmas outlined previously. For historical reasons, understanding of the term *Rechtsstaat*, developed and changed over time, providing variations within German history. For example, according to Esteban, Germany turned to a positivistic approach that 'originated as the result of a parallel evolution (to the one in France) which consisted in the progressive limitation of the initially unlimited powers of the German monarchies.'²⁵⁰ However, this understanding changed over time and another form of this concept 'arose out of a tendency that first appeared during the final years of the Weimar Republic, namely, the abandonment of juridical positivism.'²⁵¹ It developed as the 'direct result of the old ideal of the Rule of Law, where an elaborate administrative apparatus rather than a monarch or a legislature was the agency to be restrained.'²⁵² During this period, there was a change from a 'formal' to a 'material' conception of the *Rechtsstaat*.²⁵³

The German approach to dilemmas regarding the source and legitimacy of law, judicial review and market economy, can be attributed to its understanding of the state. The basis for its approach, known in German as *Rechtsstaat*, developed through the identification and articulation of what is understood as the 'state' throughout German history, and how conceptions of this relate to other aspects covered in chapter one.

The term *Rechtsstaat* is 'peculiar to the German-speaking world' and has 'no equivalent in any other language.'²⁵⁴ In fact, the English translation of this term is literally, 'constitutional state' or 'law state'. According to Robert von Mohl, Carl T Welcker, and J. C. Freiherr von Aretin, the term *Rechtsstaat* was 'not a particular form of state - in the sense, for example, of the *status mixtus* - or as a form of government but as

a specific *type* of state' ... 'the state of reason', 'the rational state', or 'government in accordance with the reasonable collective will and only what is generally best is pursued.'²⁵⁵ Böckenforde summed up the understanding of these three writers, explaining the term as 'the state governed by the law of reason, the state that realises, in and for human coexistence, the principles of reason embodied in the theoretical tradition of the law of reason.'²⁵⁶

The focus upon the 'state' is an important aspect to the idea of and basis for the historical development of the *Rechtsstaat*. This is reflected in the various conceptions of the state incorporated into the German understanding of the term. For instance, Nevil Johnson differentiates between 'state' in the 'broad' and 'narrow' sense. 'State' in the broad sense is used to 'denote the political community ... a quantity which is itself ambiguous for it may indicate those who are engaged in political activities, all who have political rights in the community, or the conditions of political activity in that community.'²⁵⁷ Whereas, in the narrow sense, the 'state' refers to 'some or all of the institutions of government (and it is not easy matter to draw boundaries here), whilst in the narrowest sense to the executive powers alone.'²⁵⁸ Thus the state becomes 'a shorthand expression for a statement of the rules or norms by which the community is given political unity and coherence.'²⁵⁹

In modern German usage, the term 'state' generally means 'as providing the articulation in practice of the state.' From this, the 'state' is a 'legal construct, but in the German context that means that it is equally a political phenomenon, a summation of the manner in which political authority in the society is established and justified.'²⁶⁰ The understanding of this German term which has been described as something similar to the English rule of law and the French *etat de droit*, illustrates how its understanding is inter-

linked with ideas of the state. It provides an overall understanding of how in Germany, dilemmas identified in the previous chapter were handled.

For example, one such 'solution' to the dilemma of judicial power and review in Germany, was the development of a formal concept of the *Rechtsstaat*, as 'developed by the German late constitutionalist school during the last decades of the nineteenth century.'²⁶¹ This conceptualisation is based upon the idea that 'we subject ourselves to the authority-or rule-of a text.'²⁶² What can be discerned from this is an underlying positivist conception of the role of administrative law and the prohibition of judicial discretion. It identifies codified law as raised above everything and everyone else. This understanding makes certain demands on the state. One such demand is that the 'state should be allowed to carry out its claims only within and by means of law: the law was raised above the state'.²⁶³ Esteban makes another case for the role of the *Rechtsstaat*. She describes it as laying within the 'formal, procedural sphere and related principally to the administration.'²⁶⁴ Accordingly, this 'resulted in the absolute priority of law for the administration too, the provision of effective judicial legal protection against the administration and the progressive legislative shaping of administrative law.'²⁶⁵

The claims made by Esteban can be viewed as conflicting. On the one hand there is a provision for recourse to the judiciary against legislative actions. Whilst at the same time, there is discussion of 'progressive legislative shaping of administrative law' as described earlier by Esteban. These conflicting perspectives can be made simultaneously, however this overlooks the potential conflicts inherent to such claims based upon the notion of superiority of codified law, like for example, the *Rechtsstaat* is understood to demand. Despite such claims, it also makes a naive supposition that the judge or constitutional lawyer is merely the mouthpiece of the law, leaving little room for

discretion by the judiciary in cases where administrative laws that were not necessarily in-line with the ideas and values of the society.

Currently, the concepts of 'rule of law' and *Rechtsstaat* 'both refer to a set of conditions underpinning democracy, including separation of powers, principles of legality and adjudication, formal equality, and constitutional rights.¹²⁶⁶ Despite this similarity and shared ideas, 'due to their different historical backgrounds, the meaning of 'rule of law' and *Rechtsstaat* are not identical.¹²⁶⁷ This difference is based on the fact that 'originally, the rule of law signified the victory of English people over the absolutist monarchy and then a strong Parliament, whereas the *Rechtsstaat* proclaimed the sovereignty of the law and the state without the backing of a sovereign parliament.'¹²⁶⁸

In Germany, there has been a strong tendency towards a more strict conception of the rule of law than has been the case in France. This approach underlies the solutions it has devised for dealing with the problems and conflicts posed in chapter one. Its strict following has been questioned at various points throughout the country's history. For example, the Weimar period is especially illuminating for it exposed some of the vices and disturbing sides of positivism. More specifically, during this period in German history, legal positivism was said to have proven itself impotent in the face of authoritarian critics of democracy such as the Nazi party, which held the reins of power.²⁶⁹ The strict positivism provided little protection against the cruel and unjust administrative laws created within the bounds of the legal and governing systems.

Summary

Esteban re-states Neumann's argument that the 'crucial difference between Continental and English legal theory lies in the fact that English legal theory denies the law to be a closed system which expresses a consistent and logical body of rules, whereas this idea

lies at the heart of the continental conception.²⁷⁰ This difference in attitude and tradition has a profound affect on the way in which individual member states interpret the rule of law. This was illustrated earlier with the overview of historical traditions and developments, of the rule of law, in Britain, France and Germany. For instance, historically, the British legal system has been acceptable and has indeed supported the notion of judicial discretion and of judicial influence in policy-making. In France and Germany, the role accorded judges is one that is much more limited in concept (than their British counterparts). Although in practice, the German Constitutional Court has been known to 'influence policy-making by concrete judicial review' and through use of 'constitutional complaint'.²⁷¹

The interpretation of the rule of law by individual member states, while affected by historical traditions, has also been affected by popular conceptions of the concept beyond merely the elite's understanding of it. Popular conceptions of the rule of law are significant as encompassed in these conceptions, are particular attitudes and understandings of the role of law and of government.

According to Linz and Stepan, the formation of 'a legal culture with strong roots in civil society, respected by political society and the state apparatus', is necessary for the development of the rule of law in a state.²⁷² It is because of the importance of the formation of a legal culture for the development and support of the rule of law, that it is necessary to also focus on member states' legal cultures. In focusing upon the legal cultures of states, it is people's attitudes and understanding of the role of laws and of the role of the government, which greatly influences the perceptions and interpretations of the rule of law. This is because the 'extent to which citizens believe that they ought to adhere rigidly to law is one aspect of legal values, and it is quite likely that nations differ significantly on this dimension'.²⁷³ Much is dependent on whether laws are perceived as

protecting the interests of those in the society or whether the law is perceived as a repressive force that is used for coercive or arbitrary reasons of the government. At the very core of most legal systems is the struggle or problem between government interference and of individual freedom.

The statements above illustrate the influence conceptions and perceptions of law, state, and the restraint of or interference of government authority, have had an effect on the attitudes of individuals in member states, of the rule of law, which also has the circular effect of influencing their compliance with laws. An example of the affect conceptual differences have had, is illustrated in a survey completed on support for the rule of law, individuals were asked to rate their level of support for each of the three statements noted in the endnote.²⁷⁴ The results from Gibson and Calderia's surveys of these statements, show that member states could be clustered into three different groups. In the first group made up of Greece, Belgium, Luxembourg, Portugal, and East Germany, there was not strong support and regard for the rule of law. At the opposite end of the spectrum, showing strong support for the rule of law and other connected values of law and individual liberty, are the countries of Denmark, The Netherlands, West Germany, and Great Britain. The last group of member states have shown mixed views on the various statements overall, with neither a strong or weak regard for the rule of law. This group consisted of Spain, Italy, France, and Ireland.²⁷⁵ These results support the assessment that the lack of uniformity in ideas about law, have directly influenced the existence of variations in the conception of the rule of law, providing further evidence of the lack of uniformity of this principle across EU member states.

All of the differing ideas have assisted in understanding of the development of various conceptions of the rule of law. This in turn has assisted in defining the institutions and structures of government, and the roles in which different institutions

play in the implementation and operation of the rule of law. The manner which individual governments view ideas of individual freedom and government restraint has had an effect not only on how they have chosen to interpret the rule of law. This has also affected how they have chosen to implement measures to ensure the proper operation of the rule of law by government institutions and structures. For example, these ideas (of restraining government actions and promotion of individual freedom) are evident in both the English and German ideas of the rule of law. The German idea of this principle can be separated into two, the *Rechtssicherheit* (legal certainty or security), and *Rechtsstaat* (legally regulated state); while the English conception of the rule of law, in turn, combines both of these German elements.²⁷⁶

The French and British understandings can also be contrasted. As Laborde states,

in contrast to the French, British state institutions were not a product of institutionalisation and differentiation from civil society. The state developed along pluralistic lines, favouring the representation of local and functional authorities in parliament, allowing the control of government by social elites, and thus precluding the autonomization of the state.²⁷⁷

In comparing the Continental and English conceptions, it has been stated that 'in strong contrast to France and Germany, the dual nature of law (parliament - and judge-made) in Britain has meant that law was not the dominant idiom in which theories of the state were couched.'²⁷⁸ Another comparison, according to both Dyson and Laborde, is that Britain did not share this focus on the concept of the state that was prevalent on the Continent. With reference to Britain, Laborde comments (based on Dyson's thesis) that, 'while the concept of the state was commonly used to refer to an independent political unit acting in the field of international relations, it never figured as a central organising concept in national discourse about political authority.'²⁷⁹

The evolution of the three main understandings of the rule of law as discussed previously in this chapter, 'reflects a different conception of the legal system' in each of these countries.²⁸⁰ It does not merely indicate a difference in legal techniques, but instead represents or illustrates that a difference in legal approaches has been developed from the differences in culture.²⁸¹ For example, Gibson and Caldeira point to the example of common law versus civil law practices. They believe that it is 'quite likely that the cultural values underpinning these systems [common law in Britain and Ireland; civil law systems in France and most of the Continent] differ as well.'²⁸²

Despite these differences between English and Continental understandings described earlier by Dyson, there is some common ground between the three main understandings in Europe. The terms used refer to 'partly similar assumptions and legal prescriptions found in various traditions referring to the state's structure, organisation, and operations.'²⁸³ Sájó also considers the main idea the various conceptions share to be that the 'state's bodies act according to the prescriptions of law, and law is structured according to principles restricting arbitrariness.'²⁸⁴ He believes that in all models or understandings, the rule of law 'makes sense of legislative activity' and that it provides for legal redress when the state's activities violate the law.²⁸⁵

A recent challenge to Dyson's thesis has been formulated by Meadowcroft. Laborde refers to Meadowcroft, and suggests that with such a 'variety of indigenous understandings of it [the state] that it has become difficult to endorse Dyson's suggestion that the state concept was a mere continental import to Britain.'²⁸⁶ She (Laborde) elaborates on this, stating that 'one major fallacy of Dyson's reasoning is that it conflates the *institutions* of the state and the *idea* of the state into a single idea.'²⁸⁷ Although Laborde is not proposing that there is necessarily commonality between continental and

English understandings of the state, she believes that there may be some overlap between 'indigenous understandings' that have not been considered by Dyson's arguments.

There seems to be some general similarities in understandings, but the differences between these three main understandings and conceptions of the 'rule of law', provide some possibility for future discrepancies. This is to be examined in the last two sections of this chapter, with regard to potential discrepancies at the Community level, especially with the future enlargement of the EU to include countries from Central and Eastern Europe who lack strong and imbedded democratic values and principles.

Discussion in the next section will focus on the impact of different legal cultures. This will be illustrated and reflected in approaches to key issues: a) potential challenges to the Community legal order; b) different attitudes to judicial discretion; and c) citizenship, taken at the three different levels of decision-making. The significance of this next section is that it will illustrate how differentiation in understandings of the rule of law (as presented in this section), can affect the various levels within the governing system. This is especially useful, as it will provide a basis for examining the development and understanding of the rule of law in Central and Eastern European countries in negotiation with the EU for future membership.

Section Two - Impact of Different Legal Cultures

The impact of different legal cultures on the implementation and application of the rule of law can be better illustrated by examining specific issues. These three issues were chosen, as they will illustrate the impact different conceptions of the rule of law have had in the Community to date.

While the first section of this chapter was comprised of different understandings of the rule of law, in particular, the conceptions of Britain, France, and Germany.²⁸⁸ This

section provides the foundations for further investigation into the potential challenges to the legal order of the Community from internal (through its institutions) and external (from individual member states) sources.

Lastly, the issue of citizenship will be surveyed to further illustrate the impact of different legal cultures. It will also illustrate how divergence in the interpretation of the rule of law, has created variation in the structure of legal orders, which in turn have created differences in the handling of the same issue across member states. Citizenship is an interesting topic because aside from differences between countries within the Community (EU), there are also differences between *levels* of the Community order. These points will be covered in more detail in this sub-section.

A Community Understanding of the Rule of Law?

The European Union as a whole,²⁸⁹ has repeatedly stated its belief in the importance of the principle of the rule of law. Although numerous documents clearly include the term 'rule of law' suggesting a distinct emphasis by the EU, none of these documents have put forward a clear definition of the term.²⁹⁰ Despite such emphasis, the Commission and the Parliament have both avoided committing themselves to a formal definition of the rule of law, focusing their conceptions of the rule of law, in more general terms, whereas the Court of Justice has proposed and shaped a 'Community rule-of-law principle' through its judgements.

Across the EU institutions, one of the first instances in which the term 'rule of law' was mentioned in documentation from any of the European Union institutions²⁹¹, was in the European Parliament's *Proceedings of the Round Table on 'Special rights and a charter of the rights of the citizens of the European Community' and related documents*, in Florence, October 1978. It is in one of the related documents from the

Parliament's proceedings, entitled *Declaration on Democracy* (Copenhagen, 8 April 1978), which refers to the rule of law. It states:

The Heads of Government confirm their will, as expressed in the Copenhagen Declaration on the European identity, to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of *the rule of law*, of social justice and of respect for human rights.²⁹²

This reference to the rule of law emphasises its use as a principle, which should be observed in the same manner as the principle of representative democracy. It does not explicitly define or attempt to define the rule of law or how it is to be used, the *Declaration on Democracy* merely stresses that the rule of law principle is important and should be protected.

Another document referring to the rule of law, goes further to describe it as one of the 'fundamental principles' that are necessary and is a prerequisite 'for any sustainable, socially fair and environmentally sound economic development.'²⁹³ This provides some evidence that the rule of law concept has become increasingly more important to the European Union as a whole and that it deems it to be important for economic and political/democratic development. Other documents provide further evidence of the how EU institutions are using the rule of law. In the official journal of the European Communities, the European Parliament:

Stresses that, while it is true that the Community is a *community based on the rule of law*, with a full set of means of appeal and procedures, in which the Court of Justice exercises supervisory powers in respect of the compliance of the acts of the Member States and the institutions with the 'Constitutional Charter', i.e. the Treaty, there will be gaps in the system for protecting fundamental rights until such time as the Community is subject to the monitoring procedures provided for under the ECHR (European Convention on Human Rights) in the same way as its Member States.²⁹⁴

The quote above is illustrative of the Parliament's use of the term in its documentation. From this passage, the Parliament is showing an eclectic understanding of the term - mixing both positivist and non-positivist notions of the rule of law.

There are other documents presented by the Commission and Council of Ministers that state their purpose as being an initiative 'to achieve the Treaty objectives of developing and consolidating democracy, the rule of law and respect for human rights and fundamental freedoms.'²⁹⁵ This statement once again emphasises the rule of law as a principle to be protected and further developed. It does make reference to the 'support for the democratic transition process that is a new theme within the general framework of co-operation action to strengthen the rule of law and democratic freedoms.'²⁹⁶ And in section 1.2 Promoting and Strengthening the rule of law of this document by the Commission, it describes ways of establishing and consolidating the rule of law for the successful transition to a democratic governing system. The Commission has stated that the establishment of the rule of law is a process that requires major legislative and political reforms in order to guarantee respect for individual rights by governments, to ensure judicial independence and that it is operational, and guarantee that there is transparency of the decision-making processes.²⁹⁷

In June of 1997, there was a conference held jointly by the Dutch Presidency, the European Commission and the Council of Europe, on the rule of law. In the opening speech of the conference, the Minister of Justice for The Netherlands - Mrs. Winnie Sorgdrager, stated that 'prior to 1992, the term "the Rule of Law" hardly appears in European Community documents or declarations. It was not referred to explicitly until the conclusions adopted by the European Council in Copenhagen in June 1993.'²⁹⁸ Esteban similarly mentions that 'the principle of the rule of law in official documents and legislation is practically non-existent' with regard to the 'relevant case law of the Court of

Justice.²⁹⁹ The reason for the conference had been to assist in establishing the rule of law as a basic principle and to ensure that proper attention is given to this principle with regard to further enlargement of the EU. Because there are many aspects encompassed by the term ‘rule of law’, it was decided by the organisers of the conference³⁰⁰, that it would focus specifically on the rule of law as it relates to the administration of justice. The main conclusion that The Netherlands Minister of Justice had hoped would be reached by the end of the conference, was the identification of ‘technical obstacles and shortcomings that impede a state in its application of the Rule of Law’³⁰¹. This action, as well as a commitment to continuing discussions focusing on different aspects of the rule of law and how to make it a permanent part of the European Union’s activities, had been the desired outcomes of the conference.

Throughout the Conference on the Rule of Law, delegates, including European Commissioner Hans van den Broek gave various speeches. The conference was organised with the primary intention of securing ‘permanent attention for the fundamental principles of the constitutional state in the Member States of the European Union and the ten applicant countries from Central and Eastern Europe.’³⁰² The key issues which were discussed and examined during the conference in relation to the rule of law, included independence of the judiciary, the implementation of court decisions, the role and position of public prosecution departments, and the ability to lodge appeals against the government and access to the courts by individuals.

Speeches and press releases from the Conference on the Rule of Law suggest that the European Union as a whole is in the process of identifying key issues and conditions that it feels is necessary for the establishment and consolidation of the rule of law by current member states, as well as associated countries. In his speech to the conference, the then European Commissioner Hans van den Broek stated that ‘it is only natural that

the European Union should make the rule of law and democracy a central part of its enlargement strategy. It cannot and will not accept as a member, any country which is not fully committed to these principles.³⁰³ He also concludes that 'the rule of law is the foundation of civil and democratic society. There can be no democracy and no human and minority rights without it.' 'The rule of law is also the foundation of economic development.'³⁰⁴

This conclusion made by Commissioner Van den Broek is a significant one. It provides some evidence that the European Union has begun to make moves towards outlining some form of definition and conception of what the rule of law means to it and how it proposes to use the rule of law concept within the Union and by both member states and prospective members. Despite these efforts on the part of the European Union, a clear definition of the rule of law was not agreed upon. Without some clearly formed conception or definition of the rule of law, the European Union will potentially have difficulties in ensuring that the conclusions and opinions on the development of prospective member states, are balanced, fair, and uniform.

In more recent documentation from the Community, the Commission submitted its proposal for a Council regulation on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms. The Council of the European Union, in this document, made references to the rule of law stated in Article 130u (2) of the EC Treaty, as well as having stated that 'Community action on human rights, democracy and the rule of law requires a stronger identity.'³⁰⁵ The Commission adopted the regulation, and in chapter 1, article 2c on the 'Objectives and general principles of action to promote human rights and democratic principles', stated that the Community shall in particular support operations aimed at:

promoting or strengthening the rule of law, notably through measures to uphold the independence of the judiciary and strengthen it (the administration of justice, treatment of offenders, crime prevention)

and for the activities of parliaments and other democratically elected institutions; supporting institutional and legislative reform,³⁰⁶

This particular passage of the Council regulation adopted by the Commission, provides further evidence that the Commission, if not the other institutions of the European Union, are progressing towards identifying particular conditions and institutions related to the establishment, development, and consolidation of the rule of law principle. The identification of particular necessary conditions and institutions is significant in regard to the enlargement of the European Union to include countries from central and eastern Europe who are in the process of transition from Communism to a democratic form of government and governing system. Such identification is significant and useful for applicant countries in transition, as it is on these and other conditions identified by the European Union (as necessary for the development and promotion of a democratic system), that applicant countries are to be judged and the EU to make its judgements, as outlined in such lengthy documents as its Agenda 2000 Opinions and the Accession Partnership Agreements.

There is a clear discrepancy between the Commission, Parliament, and Council of Ministers' intentions to avoid defining the rule of law and the Court of Justice- in its pursuit of setting a framework for defining its use and references made to the principle. While within the majority of the EU institutions there is a lack of desire but growing acknowledgement that the rule of law needs to be defined, only the Court of Justice has made efforts to define the concept. 'The Court of Justice has shaped a Community rule-of-law principle that, whilst drawing on Member States' traditions, also differs from them', in the way that it does not allow for 'the same deference to national executives and legislatures as traditionally accorded by the national orders.'³⁰⁷ This seems to support the notion that within the European Union there is a working definition of the

term 'rule of law', despite claims to the contrary. However, the Court's efforts do not detail exactly how it has defined the rule of law. Nor is it clear as to whether other EU institutions are referring to the Court's definition in their use of the term.

Where the Court of Justice has proposed a 'Community rule-of-law principle', the Commission and Parliament have focused their conceptions of the rule of law, in more general terms, using the term to make references to both the economic and political spheres.³⁰⁸ Such a definition of the rule of law places the principle in areas that many writers and theorists believe to be too expansive, and is seen to have weakened what is meant by use of the term. This broad definition goes beyond the EU's interpretation and use of the rule of law. Much of the EU documentation that have included the term, have usually linked it with other well-used, broad terms held to be fundamental to the European Union, such as democracy and human rights.

There is a second problem concerning the EU's approach to the rule of law. There is a clear discrepancy between the EU's intention to avoid defining the rule of law, and its action, in regard to this principle. For example, in the Treaty of Amsterdam, Article F, paragraph 1, it states, '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.' Article F, paragraph 1 of the Treaty on European Union, also reaffirms that, 'the Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.'³⁰⁹

In this treaty article, the EU has shown that it holds the rule of law to be one of the fundamental principles upon which the Community is based. However, at the same time, it illustrates the EU's desire to shy away from defining exactly what it means by its use of this term on which it is founded. EU Commissioner Van den Broek has gone as

far as to state clearly during a conference on the rule of law,³¹⁰ that ‘the rule of law is a vast concept which defied precise definitions and delimitation.’³¹¹ This statement communicates the general perspective of the EU institutions, regarding the rule of law. It emphasised the way in which the EU as a whole, regards defining the term ‘rule of law’ as of secondary importance when compared to the actual implementation and application of the concept.³¹² There seems to be an assumed knowledge or understanding of what is meant by the use of the term, in its documentation; this assumed understanding could be what the Court of Justice was trying to give substance to in its attempt to define the term.

Other comments that were made during the Rule of Law conference in Noordwijk, have explained not only the EU's desire to not define this concept, but also some thoughts on its application, by conference participants. This in turn has an impact on the way in which applicant countries are interpreting, developing, implementing, and choosing to ensure the proper operation of the rule of law principle internally, despite the lack of any formal definition provided from the EU.

The various member states within the Community, with differences in legal cultures, have a direct impact on the manner in which EU institutions conceive of the rule of law. This has been illustrated by the varying ideas of the rule of law that helped shape the conclusions and concerns brought out at the conference in Noordwijk. The conference illustrated not only the differences in conceptions of the rule of law upon which countries then develop their strategies for improving particular governmental institutions. It also illustrated the differences between understanding and usage of the rule of law by the EU institutions, which reflects variation in member states’ conceptions. This will be further examined in the next sub-section, focused on potential challenges to the Community legal order.

Potential Conflicts Between Community and National Legal Orders

As was stated earlier in this chapter, despite differences between countries and regions, between cultures, traditions and histories, it has been emphasised that the rule of law is of great importance and value, and that its position as ‘a basis for the development of the individual and of society, is universal.’³¹³ Although this has been emphasised by some individuals within the European Union, others working within the Commission and the Parliament, have stated that although the ‘idea’ of the rule of law principle is universal, its interpretation and development will differ across applicant countries as it does across member states. The development of different conceptions of the rule of law has been due to the differences in their cultures, traditions, histories and experiences. For example, there are differences in the interpretation and development of the rule of law principle between member states such as Germany and the United Kingdom, because each represents different legal approaches based on different experiences and conceptions of what role the individual, the state, and laws have within their country.³¹⁴

For many EU member states, the impact of their conception of the rule of law on the development of their legal cultures, can be best illustrated by examining the constitutions. Many member states have chosen either to include articles which specifically refer to the rule of law, or have instead, included articles about the structure of and procedures for various government bodies, such as the judiciary, which make references to the rule of law principle, within their individual constitutions. These references provide examples of how member states’ implementation of specific government institutions and procedures, emphasise and illustrate their individual interpretations of the term ‘rule of law’. However, examination of member states’ constitutions also provides examples of an area where potential challenges to the

Community legal order, can occur. The main area of contention and potential challenge to the Community legal order, is the primacy of Community law over national law.

The issue of primacy continues to be problematic for both the Community as a whole, and for individual member states. It centres on the conflict between the need to have community law interpreted and applied in a uniform manner across all member states of the EU, and the sovereignty of national constitutions on matters they consider to be of 'national interest', and outside the scope of the Community. This problem can be illustrated with examples from Britain, France and Germany. For these countries, submission of its sovereign powers to the European Union, is influenced by definitions of their national powers and structures according to their individual legal cultures. This has been and remains to be, one of the main sources of the conflicts between community and national law. This is a problem because 'respect for principles such as human rights, the rule of law and democracy is mandated and controlled at the national level, sometimes by constitutional courts', and has the potential of producing divergence in the interpretation of these principles across the EU.³¹⁵ Inter-linked with this problem of supremacy of Community law, is the issue of judicial discretion, (which will be discussed further on in this sub-section).

The German Constitutional Court and its 'Maastricht judgement' provide examples of the problems involved with the issue of supremacy of Community law. In its decision in this judgement, the German Constitutional Court held that 'transfers of sovereign powers by Germany to the European Union' were 'compatible with the German Constitution only to the extent that democracy is not impaired as a consequence thereof.'³¹⁶ This example of the German Constitutional Court illustrates the concerns raised, regarding the basis for the EU's 'constitution-making powers'. Many German authors do not consider the European Union treaties to be a constitution 'because the

power of the Community was not derived from the people, but mediated by states, and therefore was not the expression of a society's self-determination'. Additionally, they do not consider the treaties to be a constitution as they consider the EU to be 'an international organisation and not a state', thereby it is incapable of having a constitution.³¹⁷ The conclusions drawn here go beyond the issue of primacy of Community law, and actually questions the legitimacy of the Community to interfere with legislation passed by national governments, in order to ensure that there is uniformity in the interpretation and especially the application of Community law across all member states.

The British government also finds the issue of primacy of Community law to be problematic, as in the case of the German Constitutional Court, but for slightly different reasons. Whereas the German Court was arguing that power and sovereignty emanates from the people and that Community law lacks participation of the German people, the British government argues that sovereignty emanates from Parliament. For the British government, the idea of supremacy of Community law is in direct opposition to its 'doctrine of the sovereignty of the Westminster Parliament'.³¹⁸ This doctrine invests in the Parliament, 'unlimited authority, recognised by the courts, to make any law or amend any law already made.'³¹⁹ Therefore, the idea of British sovereignty and its sovereign powers, contradicts the idea of implementation of national laws in accordance to Community law, when there is a conflict between the two. Conflicts and differences in the interpretation of where sovereignty and sovereign powers ultimately lay, makes it difficult to ensure that all Community laws are interpreted and applied in a uniform manner across the European Union.

The conflict between national and Community law has also been an issue in France. This was illustrated by the Conseil d'Etat, in the case of *Syndicat General Des*

Farbricants De Semoules De France (CE 1 March 1968). As described by Brown and Bell, this case demonstrated a 'clear conflict between a French statute and a Community regulation.'³²⁰ However, rather than rule on this case itself, the Conseil d'Etat referred the matter to the Constitutional Council, as it 'declared itself unable to ignore the statute: if the text was unconstitutional by reason of its conflict with Community law', therefore it 'was a matter for the Constitutional Council, not the Conseil d'Etat.'³²¹ This case illustrates the attitude of the Conseil d'Etat towards primacy of Community law over national law. It believed (in 1968) that it 'could not challenge the legality of a statute, as being in conflict with a prior treaty obligation.'³²² This view changed in 1989 with the *Compagnie Alitalia* case and the *Nicolo* case.³²³

With the *Nicolo* case³²⁴, the Conseil d'Etat departed from its usual attitude towards dealing with conflicts between national and Community law. According to Brown and Bell, the interesting part of this case is not the decision itself, but the conclusions drawn by the Commissaire du Gouvernement, M. Frydman. He concluded 'that the times of the absolute supremacy of a statute were past and that Article 55 of the Constitution authorised the courts to review conformity of a statute with a treaty.'³²⁵ What this example illustrates, is the ongoing problem with primacy of Community law over national law, in France. And that despite instances by the Conseil d'Etat to 'come to terms with the supremacy of Community law', it is still a potential or on-going problem for France and other member states within the Community.³²⁶

This conflict between Community primacy and national sovereignty causes further problems as it results in national courts, not always applying or implementing Community law when it conflicts with national laws. It means that countries like Germany, Britain and France could be interpreting and applying laws and principles in a manner that may be consistent with their own national constitutions and legislation, but

applying these in a manner that is inconsistent with the rest of the Community. This will be further discussed now, with examination of the issue of judicial discretion.

Judicial Discretion

Judicial discretion is another potential problem area for the Community's legal order. Within the EU, this problem is illustrated by the conflict between the so-called 'pick-and-choose' technique through the third pillar of the Community, and Article 177 of the Treaty on European Union. The third pillar of the Community extends the competence of the Court of Justice and has been widely seen as 'an enhancement of the Rule of Law in the European Union'.³²⁷ However, the 'pick-and-choose' technique, which allows Member states to decide from one of four possibilities³²⁸ with regard to referring cases to the Court of Justice from national courts, 'contradicts the very essence of preliminary rulings as defined by the Court of Justice, namely its role in avoiding divergence in the interpretation of Community law'.³²⁹ Thereby rendering Article 177, to fall short of its role as 'essential [component] for the preservation of the Community character of the law established by the Treaty and has the object of ensuring that in all circumstances this law is the same in all states of the Community'.³³⁰ This raises the potential of producing variations in the implementation and application of Community law across the EU. It is these issues of sovereignty and power, which produce conflicts between national and Community primacy.

For individual perspectives of the issue of judicial discretion, the focus here shifts to examining the attitudes of three EU member states (Germany, France and Britain). Examination will compare the views towards judicial discretion of these three particular countries, as it will be consistent with the previous comparisons drawn. These countries highlight the differences both between Anglo-Saxon and Continental perspectives and



legal cultures (as defined earlier with reference to Dyson), but also illustrates the differences between Continental countries which are often times overlooked.

The difference between British and Continental views on the issue of judicial discretion, is the scope of judicial discretion which can be utilised by judges within a country's legal culture and structure. For instance, in Britain, judges seem to have a wider scope for use of judicial discretion than on the Continent. This seems to be the result of their different approaches to the law (common law versus civil law). Britain, a common law country, is based on the development of case law and the use of precedents, in the decision-making process of the judiciary. The development of case law in the courts through the decisions of judges, is commonly known as judges 'making law'. This type of legal approach is closely linked to a perspective of the rule of law as a 'way of life'. It has been stated, that this approach to law allows for the possible utilisation of discretion more often, as laws would change with developments in society, as the rule of law is based on the idea that laws and morals of the society are inter-linked. In such a situation, reliant on interpretation in line with the morals and understandings held by the society, the 'process of interpretation necessarily involves an element of choice between alternative meanings, and choice gives scope for judicial creativity.'³³¹

This is different from the Continental approach to law (known as civil law) which entails decisions to be made based on the word of the law without much scope for judges to 'make law' as in the British system through passing of judgements on cases. In such a system, the rule of law is more commonly understood as a limitation on government agents and institutions. With the limitation on government agents and institutions, there is less scope (in theory, as compared to practice) for judges to 'make

law'. For example, this is illustrated in the differing perceptions of the kind of system Britain has, in comparison to Germany and France. Brown and Bell state that

The Germans would say that in the United Kingdom, we have a *Justizstaat* [justice state], where conflicts between public authorities and the ordinary citizen are determined by the 'ordinary' courts; France, on the other hand, is a *Rechtsstaat* [law state], where a series of specially constituted administrative courts exercise control over the state.³³²

Within this perspective, there is an emphasis on the part of Continental countries, in this case France, on the courts exerting control over the state. The difference in understandings regarding judicial discretion, that divides Britain from Continental countries, seems to be based on ideas of what the prerogative of the courts are and what role they were established for.

Despite the different perspectives of judicial discretion, these differences seem to become marginalised in the actual practice of judicial discretion in various countries. One area where judicial discretion seems to be growing which challenges the theory and ideas long-held about judicial discretion both in Britain and the Continent, is the area of judicial review.

Judicial review in Britain is considered to be 'an instrument of administrative law, encompassing a cluster of remedies available in the courts for challenging the legality or fairness of acts or omissions by public authorities.'³³³ In Britain, there has been much 'written about the ebb and flow over the years, of 'judicial activism in the exercise of judicial review.'³³⁴ However, Drewry states that 'by its very nature, judicial review is concerned with the *processes* of the decision-making, rather than with the *substance* of policy.'³³⁵ In comparison, Germany like France, has seen a rise in the use of judicial review for the purposes of interpreting conformity with their constitutions. Christine Landfried describes this practice as 'policy-making'. She states that in Germany, the Constitutional Court can be seen to be participating more in the policy-making process

by its ability to invalidate laws. In addition to this ability, Landfried states that the Court has also 'developed some alternative sanctions to escape the simple choice between declaring a law constitutional or unconstitutional.'³³⁶ According to her, 'this is a declaration that one particular interpretation of law is the only constitutionally permissible one and often entails precise prescriptions for the implementation of a law.'³³⁷ Landfried considers this to be a clear indication that in Germany, as well as in France, there are interpretations being made with reference to conformity with the constitutions, which are policy-making in nature.

Both in Britain and on the Continent, there have been signs that judicial discretion is growing, as judicial review is further utilised. This does not mean that there has been a conscious change in attitudes or perspectives of the idea of judicial discretion. However, what it does seem to signify, is a discrepancy between theory (ideas held) and practice, in some member states across the European Union. There may be several reasons why perspectives on judicial discretion have not changed. One reason may be that they are a convenient method for limiting or clamping down on the over-use of judicial powers and gives governments a method of holding judges to a more narrow scope in passing judgements, if it is deemed necessary and in the government's interests to do so.

This issue of judicial discretion was also recognised as another important area, and was hence covered at the Rule of Law conference held in Noordwijk. This theme referred to the topic of interference with judicial decisions. Particular emphasis was placed on the execution of judicial decisions without interference. It was stated in the conference conclusions, that procedures regarding exceptions to rules on interference should be kept to a minimum and laid down by law.³³⁸ So it seems that even on a larger scale within the European Union, despite moves towards further independence of the

judiciary, especially through judicial discretionary powers, there is a feeling that there should be some limitation. This perspective seems to be more in line with Continental perspectives than with British/Anglo-Saxon ones. What these similarities and differences do demonstrate, is that the Community legal order, because it has been created by a number of countries who share some similar perspectives, but also some very diverse ones, could face potential challenges. The diverse interpretations could potentially have a serious effect on the process of European integration, through a lack of uniformity in the interpretation and application of such fundamental principles.

Issues of Citizenship and Migration

The issue of citizenship is a good example of how differences in the interpretation of foundation principles such as the rule of law, can produce national rules, regulations, and laws that may be based upon the right ideas, but in practice, run counter to Community law. Across the European Union, there are different applications of citizenship laws. For example, France maintains that ‘all children born in France are entitled to citizenship regardless of the ancestry of their parents, with the sole caveat that children of foreign parents must live in the country for five years between the ages of 11 and 18’, after which time they may apply for citizenship and are normally granted it if they are found to have a clean police record.³³⁹ At the opposite extreme from France’s seemingly liberal citizenship regulations, is the Austrian citizenship law. Austrian citizenship is ‘not automatically granted to resident aliens for a full 30 years after entry’, although ‘application may be made after 10 years of residency and upon certification of a good knowledge of the German language.’³⁴⁰

Despite similarities in some requirements, such as a minimum residency requirement of 5 years and a minimum age of 18 years, to make an application for

citizenship in most member states, the extreme differences between countries such as France and Austria, illustrate a lack of uniformity in citizenship laws across the European Union. In fact, some member states like Britain, which leaves decisions made on granting citizenship, to the *discretion* of the Home Secretary or some other authorised government official. This individual or government body is allowed to decide whether an applicant has met the minimum requirements such as minimum residency and age, as well as other more subjective requirements such as whether the applicant is ‘of sound mind, good character’, and whether the applicant has ‘a knowledge of English, Welsh or Scottish Gaelic.’³⁴¹ Such discretionary powers which leaves the decision of whether or not to grant particular individuals citizenship, has the potential of being arbitrary and subjective, as well as open to abuse, corruption, and various interpretations on meeting such requirements about character and knowledge of language. This illustrates the lack of uniformity in citizenship regulations and laws, based on differences in the interpretation of what rights and benefits are associated with citizenship in a particular country. What is perceived to be associated with citizenship and what should be inherent as a part of citizenship, is a motivating factor for the differences evident in citizenship laws in place across the EU. These assumptions and ideas are based on countries’ individual histories and legal cultures, their perceptions of national identity, their experiences with huge influxes of migrants and asylum seekers, and the perception of potential problems to arise from supporting and implementing more liberal citizenship laws.

Closely connected to one another and to the issue of citizenship, are issues of migrants and the protection of minorities. According to the European Union treaties and Community law, citizens of any EU member state have the right to live and work in another EU member state if they so chose. However, in some member states, national

laws have been considered to be contrary to Community laws on the free movement. An example of this has been the establishment of national laws in some member states, such as laws on languages - 'aiming at protecting the plurality of languages within a multi-lingual state', can be considered to be contrary to EU principles and laws on free movement of persons and goods (laws which support migrants).³⁴²

This produces a complicated situation that again brings the issue of primacy to the centre. Should states which have established laws to protect its minorities, be held liable for breach of EU principles and laws established with other objectives in mind? The fact is that the Treaty of Amsterdam may illustrate the EU's steps towards recognising minority issues (as a way of sorting this complication), but it does not recognise language as a minority issue that needs protection by law. In such a case, the primacy of Community law would lend support to the rights of migrants instead of protection of minorities, especially as the Community does not recognise language as a minority issue; but does an individual country have the right to protect its minorities through support of language which is deeply rooted in the cultures of groups of people, regardless of Community laws on the rights of migrants? It is a controversial issue, but it does illustrate that there is a lack of uniformity and consensus on minority issues. This example of conflicts between minority rights and migrant rights, also illustrates the problems of enforcing Community law and policies in this area, thereby bequeathing to member states, the duty and responsibility to make decisions and laws for the protection of both migrants and minorities. By bequeathing responsibility to member states, the Community has allowed for the possibility that it will generate variances in the implementation and application of Community laws, but also the implementation of national laws on issues dealing with minorities and migrants, in accordance with Community regulations.

Another example of discrepancies over the application of Community law, is the case of *Scholz v Opera Universitaria di Cagliari*.³⁴³ In this case, a public authority in Italy 'refused to take into account periods of service in the public service in another member states when determining whether the candidates for a post had the requisite experience.'³⁴⁴ This caused indirect discrimination against migrants seeking public service posts in Italy. This case illustrates how some member states may be interpreting Community regulations and laws in a way that affects its implementation and application. The Italian public authority was applying the Community's regulations regarding migrant workers, but it was also creating regulations not covered by the Community's, in its implementation and practice of these Community regulations.

It is the national applications of Community laws and principles that illustrate the potential challenges that differences in legal cultures and a lack of uniformity in conception of the rule of law, can have within the Community. The differing perspectives and interpretations applications of such issues as citizenship or judicial discretion, or the issue of primacy of Community law further illustrates the potential and existent problems and difficulties, a lack of uniformity can produce.

Section Three - A Lack of Uniformity and Its Implications

This last section of chapter two examines the lack uniformity and the implications of such a situation, within the European Union. In addition, this section will identify the effects this situation potentially has on further enlargement of the European Union to encompass associated countries from Central and Eastern Europe.³⁴⁵

The fundamental problem is made clear by Amaryllis Verhoeven, who states that,

Divergent national interpretations of such values as democracy, human rights and the rule of law- and especially national courts' "activism" in applying these notions to matters that affect the Union at large - require the Court of Justice to step into the democracy debate. If the Court does not take a stance on what respect for

democratic principles are required in the Union context, national courts will have final say on the matter, even where the Union and Union citizens are involved. National views and applications of key values for European integration will then prevail, at the expense of a loss of uniformity and, worse, of the very supranational dynamics of the integration project.³⁴⁶

What Verhoeven is stating here, is that the lack of a uniform definition across member states on a principle like the rule of law, which has been identified as a fundamental basis for the creation of the European Union, by the European Union, has serious implications for its existence. Such a lack of uniformity leaves interpretation of the rule of law to member states, thereby affecting the application of this principle through particular areas and overall, directly affecting the idea of primacy of Community law and the foundations on which the European Union stands. It affects primacy of Community law by allowing for differentiation in interpretations across the EU, giving member states the possibility of finding ways of moulding interpretations to suit their needs or allowing member states to put-off implementation within the national framework, until forced to do so by threat of penalty, (which has been previously utilised by several member states for different reasons).

The significance of this, is that there is the possibility that a lack of a uniform conception of the rule of law will affect how and the way in which applicant countries reform their governmental structures according to their interpretation of the concept. This has the potential of influencing and disrupting the further expansion of the EU to include countries from Central and Eastern Europe.³⁴⁷

Another significant issue that needs to be pointed out is that there is the possibility that the non-existence or lack of a formalised uniform conception of the rule of law means that assessment of an applicant country's transformation may be biased. There are questions about how uniform and fair assessment can be made of countries

that have different ideas and histories that affect their interpretation of the rule of law concept, if there are no formal 'rules', for the lack of a better word, in which to base assessment on. It seems that if the rule of law is as important as has been reiterated time and again by the European Union, then steps should be made towards providing some 'type' of uniform conception that would be adaptable to the differences in culture, history and legal order of the various member states and associated countries from Central and Eastern Europe.

In assessing the potential reasons for this current situation in the Community, it seems that at some point (in the Community), when it was decided that the rule of law was an important principle with regard to the development of democracy, bureaucrats and officials across the Union felt some pressure or need to set-up some criterion for measuring the rule of law. In the process of doing so, they came to realise that the criterion which they would set, would need to be vague and encompassing, to ensure that current member states in the Community would meet its own requirements. This has proved to be too problematic a commitment, so the Community as a whole, has instead turned to use of the term (rule of law) without a Community-wide definition for it. This has then allowed for variations - large or small, to be acceptable throughout the EU. However, this has also left judgement of whether the rule of law exists and functions properly in member states and prospective member states, open to subjective decisions, as it is open to variation in interpretations based on any number of valid and biased reasons. In many ways, it seems on reflection that the Community may have put the 'apple cart before the horse', which has left it in the difficult position of reiterating the values and necessity of the principle of the rule of law, without confining itself to defining this revered principle, so as to minimise the potential problems and disagreements that would crop up otherwise.

Conclusion

The influence of differences in views on ideas such as the role of the state and of laws, have had an impact on the interpretations and understanding of the term- rule of law. A divergence of conceptions has in turn, caused problems in the uniform application of this principle through laws and policies, across the European Union member states. Another important implication of a lack of uniformity in the conception of the rule of law across member states and EU institutions, is the potential that this problem will cause more of a strain on the entire integration process, as the EU enlarges to include Central and Eastern European countries who lack a history, the development and practice of democratic values and institutions, that current member states are purported to have and share in common. These applicants for EU membership, from Central and Eastern Europe, will be looking to current member states as examples and for guidance, in interpreting, applying, and ensuring the proper operation of the rule of law, in order to meet requirements for membership.

The problem of the lack of uniformity presents for potential EU member states, will be discussed in further detail, in the next chapter. This chapter which will focus specifically on applicant countries from Central and Eastern Europe, reviewing the interpretations made by these associated countries, of the rule of law. Aside from covering this important principle for EU membership, the chapter will also examine how they are applying this principle through specific issues, like those issues covered in this chapter with reference to member states.

²⁰⁸ See W. B. Gallie's five characteristics for determining 'contested concepts' in Maria Luisa Fernandez Esteban, *The Rule of Law in the European Constitution*, The Hague, London and Boston: Kluwer Law International, 1999, p.67. The original as cited by Esteban, 'W. B. Gallie, 'Essentially Contested Concepts' in (1955-56) 56 Proceedings of

the Aristotelian Society 169, cited by N. MacCormick, 'Der Rechtsstaat und die Rule of Law', *Juristenzeitung*, v.39, 1984, p.66.

²⁰⁹ Kenneth H. F. Dyson, *The State Tradition in Western Europe: a study of an idea and institution*, Oxford: Martin Robertson, 1980, pp.116-117.

²¹⁰ Interview A conducted in Brussels on Tuesday, 5 May 1998.

'Yes there is consensus about a common experience of democracy and government within and across the European Union member states. And no, there is not a uniform conception [of the rule of law] because of different nuances; as well as the fact that there seems to exist, North/South or Anglo-Saxon/Continental differences - different Attitudes and traditions.'

²¹¹ Dyson, *The State Tradition in Western Europe*, pp.116-117.

²¹² *Ibid*, pp.116-117.

²¹³ *Ibid*, pp.37-38; Cecile Laborde, 'The Concept of the State in British and French Political Thought', *Political Studies*, v.48, n.3, June 2000, p.542.

²¹⁴ Dyson, *The State Tradition in Western Europe*, p.117.

²¹⁵ *Ibid*, p.117.

²¹⁶ *Ibid*, p.117.

²¹⁷ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, Indianapolis, Indiana, USA: Liberty Fund, Inc., 1982 (reprint of the original, 8th Edition, London: Macmillan, 1915) p.121; A.W. Bradley and K.D. Ewing (Eds.), *Constitutional Administrative Law*, 11th Edition, London and New York: Longman Group Limited, 1993, pp.100-101.

²¹⁸ Esteban, *The Rule of Law in the European Constitution*, pp.68-69.

²¹⁹ Dicey, *Introduction to the Study of the Law of the Constitution*, p.111.

²²⁰ This was described in the previous chapter, as providing protection for individuals from the arbitrary powers of government.

²²¹ Esteban, *The Rule of Law in the European Constitution*, p.72.

²²² Dicey, *Introduction to the Study of the Law of the Constitution*, p.110; Esteban, *The Rule of Law in the European Constitution*, p.73; Bradley and Ewing, *Constitutional Administrative Law*, pp.100-101.

²²³ Esteban, *The Rule of Law in the European Constitution*, p.74. Esteban quotes Wade here and lists H.W.R. Wade's four principles characterising the rule of law, the original is found in H.W.R. Wade, *Administrative Law*, Oxford: Clarendon Press, 1988, p.23.

²²⁴ *Ibid*, p.23.

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- ²²⁵ *Ibid*, p.23.
- ²²⁶ Bradley and Ewing, *Constitutional Administrative Law*, pp.100-101.
- ²²⁷ Dicey, *Introduction to the Study of the Law of the Constitution*, p.110.
- ²²⁸ *Ibid*, p.110.
- ²²⁹ *Ibid*, pp.114-115, 120; Bradley and Ewing, *Constitutional Administrative Law*, pp.100-101; Esteban, *The Rule of Law in the European Constitution*, p.73.
- ²³⁰ Esteban, *The Rule of Law in the European Constitution*, p.68.
- ²³¹ Dicey, *Introduction to the Study of the Law of the Constitution*, p.114.
- ²³² Bradley and Ewing, *Constitutional Administrative Law*, p.102. Bradley and Ewing mentioned this differentiation by Dicey here, as they believed that to Dicey, the '*droit administratif*' in France favoured the officials and that English law through decisions such as *Entick v Carrington*, gave better protection to the citizens.'
- ²³³ Laborde, 'The Concept of the State in British and French Political Thought', p.552.
- ²³⁴ *Ibid*, p.551.
- ²³⁵ *Ibid*, p.551.
- ²³⁶ *Ibid*, p.541.
- ²³⁷ Dicey, *Introduction to the Study of the Law of the Constitution*, p.113.
- ²³⁸ Mauro Cappelletti, *The Judicial Process in Comparative Perspectives*, Oxford: Clarendon Press, 1989, p.191.
- ²³⁹ Baron de Montesquieu, *The Spirit of the Laws*, London: Collier Macmillan, 1949, p.159. Montesquieu was himself a *parlementaire*.
- ²⁴⁰ Alec Stone, 'Where Judicial Politics are Legislative Politics: The French Constitutional Court', in Mary L. Volcansek, *Judicial Politics and Policy-Making in Western Europe*, London and Portland, Oregon: Frank Cass & Co. Ltd., 1992, p.29. According to Stone, 'no judge since has ever struck down or refused to apply a statute for being unconstitutional.'
- ²⁴¹ Quoted in Cappelletti, *The Judicial Process in Comparative Perspective*, p.195.
- ²⁴² Esteban, *The Rule of Law in the European Constitution*, p.75.
- ²⁴³ Giorgio Pino, 'The Place of Legal Positivism in Contemporary Constitutional States', *Law and Philosophy*, v.18, 1999, pp.518, 521.
- ²⁴⁴ Dicey, *Introduction to the Study of the Law of the Constitution*, p.215.
- ²⁴⁵ *Ibid*, p.219.

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- ²⁴⁶ Laborde, 'The Concept of the State in British and French Political Thought', p.546.
- ²⁴⁷ Jack Hayward, *The State and the Market Economy. Industrial Patriotism and Economic Intervention in France*, Brighton: Wheatsheaf, 1986, p.18.
- ²⁴⁸ Stone, 'Where Judicial Politics are Legislative Politics', p.37.
- ²⁴⁹ *Ibid*, p.38.
- ²⁵⁰ Esteban, *The Rule of Law in the European Constitution*, p.75.
- ²⁵¹ Ernst-Wolfgang Böckenforde, *State, Society and Liberty, Studies in Political Theory and Constitutional Law*, New York and Oxford: Berg Publishers Ltd., 1991, p.66.
- ²⁵² Esteban, *The Rule of Law in the European Constitution*, p.79.
- ²⁵³ See Esteban, *The Rule of Law in the European Constitution*, sub-section on the *Rechtsstaat*, for understandings and definitions of what she means by 'formal' and 'material' conceptions of the rule of law.
- ²⁵⁴ Böckenforde, *State, Society and Liberty*, p.48. 'The 'rule of law' in Anglo-Saxon law is not in substance a parallel concept, and French legal terminology has no comparable words or concepts whatever.'
- ²⁵⁵ *Ibid*, p.49.
- ²⁵⁶ *Ibid*, p.49.
- ²⁵⁷ Nevil Johnson, 'Law as the Articulation of the State in Western Germany: A German Tradition Seen From a British Perspective', *West European Politics*, v.1, n.2, May 1978, p.179.
- ²⁵⁸ *Ibid*, p.179.
- ²⁵⁹ *Ibid*, p.181.
- ²⁶⁰ *Ibid*, p.179.
- ²⁶¹ Esteban, *The Rule of Law in the European Constitution*, p.82.
- ²⁶² Csaba Varga, 'Varieties of Law and Rule of Law', *Archiv für Rechts-und Sozialphilosophie*, v.82, 1.Quartal. Heft 1, 1996, p.63.
- ²⁶³ Esteban, *The Rule of Law in the European Constitution*, p.83.
- ²⁶⁴ *Ibid*, p.84.
- ²⁶⁵ *Ibid*, p.84.

²⁶⁶ Willem de Haan, Jos Silvis and Philip A. Thomas, 'Democracy, Rule of Law and Critical Legal Thought in Germany', *Journal of Law and Society*, v.18, n.3, Autumn 1991, p.350.

²⁶⁷ Haan, Silvis, and Thomas, 'Democracy, Rule of Law and Critical Legal Thought in Germany', p.350.

²⁶⁸ *Ibid*, p.351.

²⁶⁹ Hans-Dieter Roth, *Positivismus und Demokratie*, Berlin: Duncker and Humblot, 1981, p.146.

²⁷⁰ Esteban, *The Rule of Law in the European Constitution*, p.90.

²⁷¹ Christine Landfried, 'Judicial Policy-Making in Germany: the Federal Constitutional Court' in Mary L. Volcansek (Ed.), *Judicial Politics and Policy-Making in Western Europe*, London and Portland, Oregon: Frank Cass & Co. Ltd., 1992, p.51.

²⁷² Juan J. Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation*, Baltimore: The John Hopkins University Press, 1996, p.14.

²⁷³ James L. Gibson and Gregory A. Caldeira. 'The Legal Cultures of Europe', *Law & Society Review*, v.30, n.1, 1996, p. 60.

²⁷⁴ Gibson and Caldeira. 'The Legal Cultures of Europe', p.67 - the following were the listed statements shown to interviewees: 1) It is not necessary to obey a law you consider unjust; 2) Sometimes it might be better to ignore the law and solve problems immediately rather than wait for a legal solution; and 3) If you don't particularly agree with law, it is all right to break it if you are careful not to get caught.

²⁷⁵ *Ibid*, pp.69-70.

²⁷⁶ Roger Cotterrell. 'The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality', *Social & Legal Studies*, v.5, n.4, 1996, p.452.

²⁷⁷ Laborde, 'The Concept of the State in British and French Political Thought', p.552.

²⁷⁸ *Ibid*, p.552.

²⁷⁹ *Ibid*, p.542.

²⁸⁰ Esteban, *The Rule of Law in the European Constitution*, p.89.

²⁸¹ Varga, 'Varieties of Law and Rule of Law', p.61.

²⁸² Gibson and Caldeira, 'The Legal Cultures of Europe', p.57. Also see Esteban, *The Rule of Law in the European Constitution*, p.90 for her assessment. Her understanding it that while the *Rechtsstaat* is based on the concept of the state, the English notion of the rule of law 'does not refer to any legal concept of the state.'

²⁸³ Sájó, *Limiting Government*, p.205.

²⁸⁴ *Ibid*, p.205.

²⁸⁵ *Ibid*, pp.13, 205.

²⁸⁶ Laborde, 'The Concept of the State in British and French Political Thought', p.542.

²⁸⁷ *Ibid*, p.542.

²⁸⁸ These countries were selected for the reasons outlined and explained earlier in this chapter.

²⁸⁹ By whole, this is referring to its institutions.

²⁹⁰ Esteban, in *The Rule of Law in the European Constitution*, footnotes that 'Mention of the principle of the Rule of Law in official documentation and legislation is practically non-existent', with regard to 'provisions of the Treaties and the relevant case law of the Court of Justice', p.65.

²⁹¹ *Ibid*, p.65. In her footnote on this page, Esteban mentions that 'the principle of the Rule of Law in official documents and legislation is practically non-existent', with regard to 'relevant case law of the Court of Justice'. The Court of Justice's perspective will be discussed in further detail later in this section and chapter.

²⁹² European Parliament, *Declaration on Democracy*, Copenhagen, 8 April 1978.

²⁹³ *Resolution 1036 (1994)1 on the progress of economic reform in central and eastern Europe: lessons and prospects*, <http://stars.coe.fr/ta/ta94/ERES1036.HTM>, p.2.

²⁹⁴ *Official Journal of the European Communities*, No. C 44/32, 'Part II: 1. Community Accession to European Convention on Human Rights, A3-0421/93', Tuesday, 18 January 1994, p.32.

²⁹⁵ Commission of the European Communities, *Report From the Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995)*, Brussels, 17.01.1997, COM(96)672 final, p.4.

²⁹⁶ *Ibid*, p.6.

²⁹⁷ *Ibid*, p.8.

²⁹⁸ *Speech of the Minister of Justice for The Netherlands, Mrs. Winnie Sorgdrager, at the opening of the Rule of Law Conference, Noordwijk, 23 June 1997*, http://www.minjust.nl:8080/c_actual/speeches/sp021.htm, p.1.

²⁹⁹ Esteban, *The Rule of Law in the European Constitution*, p.65. This quote was also previously mentioned in this thesis in footnotes 83 and 84 in this chapter.

³⁰⁰ The narrowed focus of the conference was decided upon by the hosts - the Dutch Presidency of the EU, the European Commission, and the Council of Europe, collectively.

³⁰¹ *Speech of the Minister of Justice for The Netherlands, Mrs. Winnie Sorgdrager, at the opening of the Rule of Law Conference, Noordwijk, 23 June 1997*, p.2.

³⁰² *EU Conference on Rule of Law, Noordwijk, 23 and 24 June 1997*, [http://minjust.nl - \(http://minjust.nl:8080/c_actual/persber/pb116.htm\)](http://minjust.nl-(http://minjust.nl:8080/c_actual/persber/pb116.htm)), Press Release, 25.06.97, p.1. This was one of the main aims or reasons for the organisation of the conference and the choice of topic and specific focus.

³⁰³ Hans van den Broek, Member of the European Commission - *The Rule of Law in the context of enlargement, Conference on the Rule of Law, Noordwijk, 23 June 1997*, <http://europa.eu.int/>, Speech/97/144, 23.06.97, p.1.

³⁰⁴ *Ibid*, p.5.

³⁰⁵ *Official Journal of the European Communities*, No. C 282, Volume 40, 18 September 1997, 'Proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms' - Submitted by the Commission on 24 July 1997, p.15 (C282/15).

³⁰⁶ Proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms', p.15.

³⁰⁷ Amaryllis Verhoeven, 'How Democratic Need European Union Members Be? Some Thoughts After Amsterdam', *European Law Review*, v.23, June 1998, p.231.

³⁰⁸ This reference to economic and political spheres in conceptions of the rule of law, is similar to the type put forth by the International Commission of Jurists in their *Declaration of Delhi* document, which characterised the rule of law as: 'The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of men.'

³⁰⁹ Nigel Foster (Ed.), *Blackstone's EC Legislation 1995-6, 6th Edition*, London: Blackstone Press Ltd., 1995, p.138 (Article F (1) - Treaty on European Union).

³¹⁰ Conference held jointly by the Dutch Presidency of the EU, the Commission, and the Council of Europe, on the Rule of Law, in Noordwijk, The Netherlands, 23 - 24 July 1997.

³¹¹ Van den Broek, Member of the EU Commission, *Speech given at 'The Rule of Law in the Context of Enlargement: Conference on the Rule of Law'*, Noordwijk, The Netherlands, 23 June 1997, p.3. The Rule of Law conference in Noordwijk, focused in particular, on 'the independent status of the judiciary and judicial decision-making; access to courts, including legal aid and advice; the status and role of the public prosecutor; and matters of interference with judicial decision, in particular the execution of these decisions.'

³¹² This was illustrated by the conference's emphasis on the independence of the judiciary and judicial decision-making, specifically through the independence of judges. The conference conclusions outlined participants' views on the role of judges to make decisions independent of 'external non-judicial influences'. They also stated the need for the selection, term of office, and disciplinary procedures related to judges, to be 'guaranteed by law and in practice.'

In the second of the four points identified at the rule of law conference, access to the courts, legal aid, and legal advice, were focused upon. Participants outlined the principle that access to the courts and information on legal rights and use of the court, should be guaranteed and made a high priority throughout the European Union. Aside from outlining methods and points for consideration, the final conclusions also identified particular obstacles to individuals' access to the courts and the judicial system. The participants at the conference, identified and recognised: court fees, legal aid, and the geographical availability of courts, to be areas where there was need for further study and evaluation of conditions and the current situation. *Final Conclusions – Conference on the 'Rule of Law'*, p.1.

³¹³ Hans Van Den Broek, Member of the EU Commission, *Speech given at 'The Rule of Law in the context of Enlargement: Conference on the Rule of Law'*, Noordwijk, The Netherlands, 23 June 1997, p.2.

³¹⁴ Varga, 'Varieties of Law and Rule of Law', *Archiv fur Rechts- und Sozialphilosophie*, v.82, 1 Quartal. Heft 1, 1996, p.61.

³¹⁵ Verhoeven. 'How Democratic Need European Union Members Be? Some Thoughts After Amsterdam', p.227.

³¹⁶ *Ibid*, p.227.

³¹⁷ Manfred Zuleeg, 'The European Constitution Under Constitutional Constraints: The German Scenario', *European Law Review*, v.22, February 1997, p.20.

³¹⁸ John Pinder, 'The European Community, the Rule of Law and Representative Government: The Significance of the Intergovernmental Conferences', *Government and Opposition*, v.26, n.2, Spring 1991, p.207.

³¹⁹ *Ibid*, p.207.

³²⁰ L. Neville Brown and John S. Bell, *French Administrative Law – 4th Edition*, Oxford: Clarendon Press, 1993, p.268.

³²¹ *Ibid*, p.268.

³²² *Ibid*, p.268.

³²³ These cases were believed to be the turning point for the Conseil d'Etat, in its view in dealing with cases of conflict between national and Community law. The case of *Compagnie Alitalia (CE 3 Feb 1989)*, will not be covered in this thesis. Although the case of *Nicolo (CE 20 Oct 1989)* will be referred to in the text of this section. See Brown and Bell, *French Administrative Law – 4th Edition*, pp.268-9 for further details.

³²⁴ See Brown and Bell, *French Administrative Law – 4th Edition*, pp.268-9. Here, Brown and Bell give an overview of *Nicolo (CE 20 Oct 1989)*. The case concerned a French statute from 1977 on direct elections to the European Parliament. It was believed that the French statute ‘violated Article 227 of the EEC Treaty, and that consequently, the 1989 elections should be declared void.’

³²⁵ The conclusions quoted here are Brown and Bell’s interpretation of the comments and conclusions made by M. Frydman, the Commissaire du Gouvernement. See Brown and Bell, *French Administrative Law – 4th Edition*, pp.268-9.

³²⁶ Brown and Bell state, that like the French, the British via the House of Lords, has also had to come to terms with the issue of supremacy of Community law. Here they cite the well-known *Factortame* case [cases C-213/89 and C-221/89]. In this British case, it was ruled that ‘the British Merchant Shipping Act 1988 could not be applied by the House of Lords as conflicting with Community law.’ Brown and Bell, *French Administrative Law – 4th Edition*, p.270; also see p.263 footnote 22.

³²⁷ Esteban, *The Rule of Law in European Constitution*, p.20.

³²⁸ Esteban, *The Rule of Law in European Constitution*, p.19. Here she lists the four possibilities which Member states may choose from, with regard to making references to the Court of Justice. Those four possibilities are: ‘1) no declaration in the sense of Article K.7 TEU so national courts will not be allowed to refer to the Court of Justice; 2) declaration in the sense of Article 35 III a. TEU so only last instance courts may refer to the Court; 3) declaration in the sense of Article 35 III b. TEU so every national court can refer to the Court; and 4) declaration in the sense of the Declaration Relating to Article K.7, so that national courts against whose decision there is no judicial remedy under national law, will be required to refer the matter to the Court of Justice.’

³²⁹ *Ibid.*

³³⁰ Esteban, *The Rule of Law in European Constitution*, pp.19-20.

³³¹ Gavin Drewry, ‘Judicial Politics in Britain: Patrolling the Boundaries’ in Mary L. Volcansek (Ed.), *Judicial Politics and Policy-Making in Western Europe*, London and Portland, Oregon: Frank Cass and Co Ltd., 1992, p.13. Drewry noted here, that Lord Denning’s (of Britain) efforts have been noted by other writers and some of his judicial colleagues, to be at times, leaning towards extreme judicial creativity.

³³² Brown and Bell, *French Administrative Law – 4th Edition*, p.7.

³³³ Drewry, ‘Judicial Politics in Britain: Patrolling the Boundaries’, p.19.

³³⁴ *Ibid*, p.19.

³³⁵ *Ibid*, p.25.

³³⁶ Christine Landfried, ‘Judicial Policy-Making in Germany: The Federal Constitutional Court’ in Mary L. Volcansek (Ed.), *Judicial Politics and Policy-Making in Western Europe*, London: Frank Cass and Co. Ltd., 1992, p.51.

³³⁷ Landfried, 'Judicial Policy-Making in Germany: The Federal Constitutional Court', pp.51-52.

³³⁸ *Final Conclusions- Conference on the 'Rule of Law'*, p.4.

³³⁹ Desmond Butler, 'What It Takes to Make a Citizen', *Time*, January 25, 1999, p.27.

³⁴⁰ Butler, 'What It Takes to Make a Citizen', p.27.

³⁴¹ *Ibid*, p.27.

³⁴² Verhoeven, 'How Democratic Need European Union Members Be? Some Thoughts After Amsterdam', p.233.

³⁴³ Case C-419/92 [1994] ECR I-507.

³⁴⁴ Jo Shaw, 'Legal Developments', *Journal of Common Market Studies*, v.33, Annual Review, August 1995, p.94.

³⁴⁵ Further detailed discussion on eastern enlargement will be covered in chapter four.

³⁴⁶ Verhoeven, 'How Democratic Need European Union Members Be? Some Thoughts After Amsterdam', p.228.

³⁴⁷ This will be covered in more detail later in chapter four, specifically focused on EU enlargement eastwards.

Chapter Three - Interpretation and Application of the Rule of Law Within

Prospective Member Countries

At the start, it should also be noted that this chapter will cover only a few associated countries and will not include discussion of all of those Central and Eastern European countries in negotiations, regarding European Union membership, individually.³⁴⁸ This is because the purpose of this chapter is to provide an illustration of how prospective member states from Central and Eastern Europe are interpreting the rule of law. It will examine their definitions of the term 'rule of law', as well as identifying influences and motives behind their particular conceptions, including past abuses and the resulting suspicion of the rule of law and the prevailing weakness of indigenous rule of law traditions in these countries. Identification of these influences provides a framework for understanding difficulties the regimes in these countries have in dealing with the problems that have been identified in chapter one. Some examples to illustrate this are how positivist conceptions of the rule of law clash with considerations of justice (i.e. dealing with past 'injustices'), and of how judicial review clashes with notion of the sovereignty of the people. These conflicts often appear highly acute because of problems of countries in transition face. They may also be attributed to the fact that these countries in Central and Eastern Europe have not had the experience and time to work out the compromises, or perhaps one should say evasions, which have characterised the rule of law in more stable western states.

To illustrate the conflicts prospective member states are facing in respect to the rule of law, the following will be considered: the rule of law and economic development; judges and judicial discretion; and the rule of law and democratic institutions. This is of interest because as will be covered in chapter four on EU Enlargement, the European Union seems to be imposing a particular understanding of the rule of law on prospective

member states. The European Union has done this through its emphasis in associated countries, on the reform and creation of particular institutions, processes, and procedures, despite current differentiation amongst its own member states.

The significance of the chapter's focus on developing an understanding and insight into how the rule of law is conceived and utilised, is that it will clearly illustrate some of the discrepancies and problems that become prevalent when differences in understandings of the rule of law exists. It also provides a framework for further examination of how, within the context of enlargement of the European Union, a lack of uniformity in conceptualisation of the term 'rule of law', can be detrimental to the EU as a whole, but has also been beneficial for EU member states individually. This matter was briefly covered in chapter two and will be further examined in chapter four.

Section One - Understanding of the Term 'Rule of Law'

A General Understanding of the Rule of Law in the CEECs?

As discussed in chapter one of this thesis, the rule of law has been defined generally as 'law that protects the citizens rather than controls them, that regulates their relations with each other and with the authorities they elect.'³⁴⁹ This type of general conception of the rule of law is utilised and readily accepted by many CEE countries, as it has popular appeal because it provides protection for citizens which did not exist or was unavailable to them under their previous regimes, or governing systems. Although many of these countries have acknowledged and stated their desire to have a state based on the rule of law, what exactly do they mean by 'founding a state based on the rule of law'?³⁵⁰

In Central and Eastern European countries, there seems to be a general understanding of the rule of law conceived narrowly, as restricting arbitrariness in the exercise of governmental power and authority, thereby providing 'safeguards against the

abuse of power.³⁵¹ Writers such as Krygier and Czarnota believe that 'there is a tendency among devotees of the rule of law, particularly and understandably in countries where it has so long been ignored and abused, to favour the negative conception [of the rule of law] and be suspicious of any larger ambitions for law.'³⁵²

Selznick also discusses the rule of law in negative terms. He states that the negative conception of the rule of law is based on 'autonomous law'. This, he believes, 'demands the separation of law and politics; insists on a corollary distinction between lawmaking and adjudication; and accepts the principle that the rule of law is a "law of rules" - rules that sharply limit [things such as] judicial discretion.'³⁵³ Selznick considers this to be 'closely connected to the "model of rules" of legal positivism, where law *stricto sensu* is conceived of as limited to authoritatively posited rules of a legally autonomous system of rules.'³⁵⁴ Both he and Lech Morawski consider this 'positivistically conceived rule of law inadequate to the tasks they consider important, and both argue that law can properly incorporate considerations of value.'³⁵⁵ However, the feeling of these writers are, that because of past experience under the Soviet regime, many people in Central and Eastern Europe are weary of anything looking vaguely to be above the law or which allows for arbitrariness. Therefore they would prefer a negative conception of the rule of law to limit such possibilities from occurring once again.

This view of pervasive weariness in Central and Eastern Europe, is shared by other writers such as Elster, Offe, and Ulrich, who have attributed conceptions of the rule of law to similar reasons. They go a bit further than Selznick and Morawski's summary above. Elster, Offe, and Ulrich state that 'due to their experiences under communist rule, citizens [in Central and Eastern Europe] do not believe in the rule of law, tend to distrust political elites, and they are rather sceptical that political and economic reforms will bring about the desired outcomes.'³⁵⁶ They also believe that many

of these citizens developed their beliefs and desires, values and frames, roles and routines in past periods of life'. Because of the manner in which their beliefs and values have developed, changing this and the ways of thinking, especially with regard to the rule of law, will not be easy or quick to accomplish.³⁵⁷ Sájó and Losonci made a similar assessment of the rule of law, to the one presented earlier by Elster, Offe, and Presse, stating that the legal system was abused and distorted within the Communist system, and that 'law was understood as instrumental to social and economic planning.'³⁵⁸ Distortion of legal systems across the Central and East European region under the Communist regime are illustrated by the roles assigned to judges, the courts, and to lawyers. It is also through the legal education and training systems which are 'subject to party control', that abuses of the legal systems are most evident. Sájó and Losonci also reveal that examination of the 'contents of laws and regulations' under the Communist regime illustrate how the law was 'understood and used to control and supervise people who would have been otherwise unmotivated to comply.'³⁵⁹ These factors have left a distorted and narrowed perspective of what the rule of law stands for, and in many cases, this is the reason for a lack of belief in it by citizens.

Despite the perspective of the rule of law in Central and Eastern European countries as presented above, the precise meaning of this principle remains open to interpretation and 'no single model' exists.³⁶⁰ Another reason Selznick gives for the diversity in Central and East European countries, is the fact that he believes 'the rule of law is often identified with that [western] legal culture, and especially with the institutions of autonomous law. Yet that is by no means a unanimous view.'³⁶¹ He believes that the principle of the rule of law is based within a western legal culture framework that differs from the legal cultures of non-western countries. Selznick does state that although it is useful to understand how the rule of law is understood in western

countries, the way in which it is understood in non-western countries will differ because of differences in legal cultures.

This is where conceptions developed and held by western countries come into consideration. Because in the development of their individual understandings of the rule of law, most Central and East European countries are looking to their histories and cultures, but also towards countries in the west with whom they have historical and cultural ties with. One conception in particular that these countries are examining is the conception held by Germany.

They look towards the understanding of the rule of law held by Germany based on historical connections. For example, it has been stated by some writers like Sájó and Lasonci, that the 'German *Rechtsstaat* tradition played a considerable role in the pre-Communist legal and political culture of the [East Central European] region.³⁶² (This will be further elaborated on later in this section.)

However, it is useful to note here, that different versions of the rule of law have developed based on the 'conceptual culture' of a country, which in turn rests upon 'certain historical presuppositions'. These conceptualisations are based on ideas of how law and the legal system developed.³⁶³ Each version of the rule of law is the product of different sets of experiences, goals, conceptions of how the legal system, is conceived.³⁶⁴ The next sub-section will examine these claims of historical and goal-oriented reasons, and illustrate how individual countries conceptualise the rule of law.

Individual Perspectives of the Rule of Law

In evaluating these countries, it has been generally concluded that many of them acknowledge the rule of law, but do not actually possess a clear understanding of the principle or of its complexity. It is also evident that some countries in the CEE region

will conflate the rule of law and ideas of democracy. This point is important as it provides a basis for understanding the reasons why some regimes have difficulty in dealing with some of the problems that were identified earlier in chapter one.

Bulgaria

In Bulgaria, there has been acknowledgement by those in government positions, of the importance of the rule of law. In fact, like many other countries in the region, Bulgaria has shown great interest in reviving historical ideas and ideals. This is because in Bulgaria, the 'German judicial system, with its concept of a constitutional state (*Rechtsstaat*), served as a model' for the development of 'Western-style legal institutions that were created in the late nineteenth and early twentieth centuries'.³⁶⁵ During this period, under the legal system that developed, 'impartiality and equal treatment before the law were fundamental ideas'.³⁶⁶ These ideas and traditions however, were nearly erased by the forty-five to fifty years of Communism that came to replace it.

Because of abuses of the legal system and the judiciary during the Communist reign, inevitably there has been 'a serious loss of confidence in both legal institutions and the legal system as a whole' in Bulgaria.³⁶⁷ This is clearly illustrated by the lack of understanding of the rule of law and the new changes in the legal system, by the average Bulgarian citizen. For the average person on the street in Bulgaria, the rule of law is not something that is really understood, much less something that is felt.³⁶⁸ One of the reasons given for this lack of understanding or belief in the rule of law, is the lack of trust and faith in the government. A commonly held assumption is that the government and its ministries are serving their own interests or the interests of the government, above those of the citizens, as it had under the Communist regime. This is founded on the view that 'those in government were trained by the old system - where the law served their own

interests or those of the government.³⁶⁹ What this has resulted in, is a lack of respect for rules in the country, and this is an important area which needs to be developed if Bulgaria is to truly become a country based on the rule of law.³⁷⁰

Other factors which may have considerable influence on the development of a better understanding of the rule of law in Bulgaria, is its contacts with and observations of other countries. 'Bulgaria is [currently] adopting different aspects from various countries, in its development of its legal system.'³⁷¹ It has been commented that 'Bulgarians do not understand the complexity of the rule of law', nor would they separate the idea of the rule of law from the idea of democracy.³⁷² It has been noted also, that Bulgaria 'does not understand the complexity of the whole issue [of the rule of law and democracy] ... so sometimes this understanding of the rule of law is narrowed down to very simplistic actions.'³⁷³ The two ideas (democracy and the rule of law) seem to be understood as one and the same in Bulgaria by those in government. The eclectic approach the government has undertaken to reform itself, can be attributed to its confused understanding of the rule of law, and these reforms will likely also have an impact on the development of its further understanding of this important principle.

Latvia

Like Bulgaria, the Latvians do not seem to differentiate between the rule of law and democracy. 'This may be due to historical or cultural reasons.' It has also been attributed to 'the fact that Soviet rule was strong, making the rule of law idea difficult especially for Baltic countries, but also has had an influence on the other countries in the region.'³⁷⁴ There seems to be, as in Bulgaria, an underdeveloped conception of what this principle means and entails, illustrating only a superficial understanding of the rule of law to be utilised in reforming institutions and the legal culture in Latvia. Some of this may

be attributed to the fact that 'they [Latvians] do not seem to attach great attention to the rule of law as they should.'³⁷⁵ They also lack experience with the institutions and practices associated with the rule of law, so that attempts to transition to the rule of law are impeded by weaknesses in transposing conceptions of the rule of law that may not be suited to Latvian culture and the country's current development.

Estonia

In contrast to the previous two countries discussed, Estonia seems to exhibit some understanding of the differentiation between the rule of law and democracy, in its conception of the rule of law principle. This is reflected by the fact that in theory, people in Estonia seem 'aware of the rule of law and that it implies democracy - democracy implies free elections, which in turn implies freedom of speech and other rights and freedoms.'³⁷⁶ The country has also been developing its legal system using Germany as a model and participating in a number of bilateral projects with Germany, in the reform and transformation of its governing and legal institutions and practices. Whether these connections will prove to be very influential in further developing the Estonian understanding of the rule of law, remains to be seen.

Despite general claims that there exists an understanding the rule of law in Estonia, there seems to be a lack of connection between the big ideas (linked with the Estonian conception of this principle) and the role the rule of law has in the reform and development of the country. One of the reasons given for this, has been that 'the average citizens' awareness of issues and problems with the rule of law, law and government, are low. This is due to their preoccupation with everyday things such as money, jobs, and problems with crime (organised crime is high).'³⁷⁷ As will be seen later in the case of

Hungary, people seem to recognise the rule of law as important and have an idea of what it means and entails, but there is a lack of connection of this principle to their daily lives.

The Former Czechoslovakia - Present Czech and Slovak Republics

In the former Czechoslovakia, 'there has been a large degree of consensus among the country's politicians, lawmakers, and legal theoreticians as to what constitutes the rule of law and what steps should be taken to establish it.'³⁷⁸ According to Pehe, 'the most important achievement of the efforts to build a state based on the rule of law', have been the conception of a 'clear definition of the proper relationship between the individual and the state'.³⁷⁹ It defines the relationship between the government and individuals, whereby the state is no longer superior to the individual, as it once was during the communist regime, but stands for equality under the law, generally understood as 'no one should be above the law (everyone is subject to it)'.³⁸⁰ The relationship between the state and individuals should also be understood as one that assures individuals of protection and respect for their rights, and that they shall also be treated fairly in accordance to the law. This is illustrated by Czechoslovakia's [prior to its separation] emphasis that a state based on the rule of law 'must respect the political will of the majority; but it must also ensure that the rights of its minorities are respected.'³⁸¹

Czechoslovakian legal theoreticians have stated that beyond this understanding of state and individual relations, the 'basic pillars of the state based on the rule of law include not merely laws but also an independent judiciary or a system of checks and balances between the legislature, the executive, and the judiciary.'³⁸² Despite such statements, and reform efforts to build the country into a state based on the rule of law, the concept of the rule of law is still quite fragile. This can be illustrated with examples of the reform of the legal system. For instance, Pehe has commented that in the process

of "decommunizing" the country's political and economic institutions', 'many leading politicians appear willing to sacrifice some basic principles of the rule of law to politically motivated retribution.'³⁸³ This bending and sacrificing of basic principles has been characterised as illustrating Czechoslovakia's 'slightly schizophrenic attitude towards the rule of law.'³⁸⁴

An example of this 'schizophrenic attitude towards the rule of law is reflected in the controversy surrounding the screening laws [lustration laws] in Czechoslovakia. The screening laws provide for the 'systematic screening of officials in certain government agencies and offices and for the subsequent dismissal of those found to have worked for the communist secret police or to have been high-ranking communist officials.'³⁸⁵ Pehe states that the 'controversy surrounding the screening law shows that in post-communist Czechoslovakia, the concepts of justice and the rule of law are still rather fragile.'³⁸⁶ This serves to both illustrate and emphasise some of the difficulties Central and Eastern European countries are facing, in reconciling attempts to become based on the rule of law, with efforts to come to term with their pasts.

As Vaclav Klaus (then Minister of Finance of the Czech and Slovak Federal Republic) explains, it is much easier to 'dismantle explicit socialism' than it is to dismantle the 'implicit socialism'.³⁸⁷ This is because the changing and reforming of institutions and the governing system is much easier and a quicker than changing the patterns of thinking of those who were a part of the society under communist rule.³⁸⁸ The habits, traditions, values, and beliefs are very different in a communist society as compared to a democratic one. It takes time and much support to transform a way of life and thinking, that has been ingrained over decades and it will not be an easy or quick transformation. This has also been acknowledged by many legal theorists in

Czechoslovakia, who state 'that the political system and the political culture of the country play crucial roles in introducing and maintaining the rule of law.'³⁸⁹

Another point emphasised by Minister Klaus was that for [the then] Czechoslovakia, 'one of the main obstacles to our development now is ideological infiltration from the West.'³⁹⁰ By this comment, Klaus meant that what his country needed was not a blueprint from the West with which to replicate, but that it [Czechoslovakia] should develop into a democratic state founded on ideas such as the rule of law. He emphasised that the country needed to develop and integrate such ideas in a manner that is unique, and reflects the unique situation internal to both the Czech Republic and the Slovak Federal Republic.

Reconciling the internal differences between the two Republics proved to be a source of constant conflict until the separation of the country into two separate countries. With the separation, differences in perceptions held by each republic have become more evident. For instance, in the Czech Republic, there is the 'feeling that [the] Czechs are more German than Slav, with its view of laws similar to the Germans.'³⁹¹ It has been acknowledged that it is 'difficult to quantify something like perceptions of the rule of law and democracy [in the Czech Republic] because it has to do with changing attitudes and culture of the people.' In spite of comments like these, the 'cultural and historical links' between the Czech Republic and Germany have probably had some impact on how the Czech Republic is conceptualising the rule of law. There has also been evidence of the Czech Republic using Germany as one of its models in the reform and development of its legal system through EU twinning programmes developed between the two countries. However, the Czech Republic has also participated in twinning projects with Britain and France, illustrating that it has an interest in some of the institutions and procedures used in countries other than Germany.³⁹² Although this

does not conclusively illustrate how the Czech Republic is conceptualising of the rule of law, it does illustrate that with the reform of its legal system and institutions, it has not settled on a single model. In fact, it seems to be taking parts from various systems that are compatible to its own values, legal culture and historical development.

Slovakia is said to lack an understanding of the differences between the ideas of the rule of law and democracy. Its understanding of the rule of law includes 'thinking about the judiciary and its proper functioning, as well as respect for the law itself.' While it understands democracy in terms of 'basis rights and freedom' a democratic system' institutional set-up; and checks and balances.³⁹³ One of the reasons behind Slovakia's lack of differentiation between the rule of law and democracy has been attributed to its experiences of the Communist understanding of the 'rule of law'. Under the former regime, the rule of law was manipulated and used to serve the interests of the state and governing party. Because of this, as is the case in many other Central and East European countries, understanding of the rule of law is vague and confused. There are many worries and a lack of understanding of what the concept itself means, by the general public.³⁹⁴

Hungary

Hungary, like Czechoslovakia, has made great efforts toward establishing itself as a state based on the rule of law. Whereas [the former] Czechoslovakia considered defining the relationship between individuals and the state, as well as the role each has, to be important for the rule of law, the Hungarians have taken this a step further. The Hungarian government has emphasised the relationship between state and individual by stating the importance of civic initiatives and participation in the political process, as well as identifying the protection of the individual from the arbitrariness of the state, as a

necessity. Discussions of the rule of law have focused on 'protecting the individual against the arbitrariness of the state' and statements that "there is a continuing need for self-defence against the excessive power of the state."³⁹⁵ Often mentioned in these discussions, are references to "continental law". With these references, Hungarians have referred to Germany as an 'example of a state that successfully rebuilt its legal and economic system by observing the rules of parliamentary democracy.'³⁹⁶

The Hungarian conception of the rule of law has its foundations in the German concept of the *Rechtsstaat*.³⁹⁷ Hungary has taken 'basically a positivist view' of the rule of law in that 'the validity of a law is determined by its pedigree.'³⁹⁸ What this view implies, is that the validity of a law is not determined by whether it is good or bad, or whether it discriminates or not, its validity is based on how it has been enacted. Therefore, it does not matter what the laws under the former regime were like, as this conception of the rule of law has led the Constitutional Court to argue that 'there was no basis for treating the laws of the prior regime any differently than laws of the present one.'³⁹⁹ It ruled on this matter in the manner it had, because it believed that 'the certainty of the law based on formal and objective principles is more important than necessarily partial or subjective justice.' It further stated that 'a state under the rule of law cannot be created by undermining the rule of law.'⁴⁰⁰ The Court made it clear in these statements that it felt laws passed were still laws no matter what their effect, and to take the road towards disregarding laws that were deemed 'bad', was not only subjective in nature, but would undermine the very notion of the rule of law. Halmai and Scheppele reiterate this when they quote a source from the Hungarian Constitutional Court. The source states that,

[I]n a constitutional state, the violation of rights can only be remedied by upholding the rule of law. The legal system of a *Rechtsstaat* cannot deprive anyone of legal guarantees. These guarantees are basic rights appertaining to all. Wherever the value of the rule of law is entrenched, not even a just demand can justify the disregard of the

Rechtsstaat's legal guarantees. Justice and moral argument may, of course, motive penal sanction, but its legal foundation must be constitutional.⁴⁰¹

Similar remarks have been made by such writers as Franz Neumann, who described the rule of law as "...law that is not only reliably enforced but also general in application, applied uniformly to all cases within its terms. It is, therefore, predictable and calculable in its consequences, permitting a sphere of freedom to the citizen. The Rule of Law is thus the enemy of particularistic regulation and administrative discretion."⁴⁰² This is reflected by statements made by sources from Hungarian Ministries about the Hungarian conception of the rule of law, where the 'law is not judge-made like it is in Britain' where law is based on precedent, because the role of judges are to 'apply the law only'.⁴⁰³

The understanding of the rule of law by the government and the courts are very different from the understanding of the rule of law held by the ordinary citizen. There are conflicting reports about what ordinary Hungarian citizens understand of the rule of law. For instance, one comment made during an interview with sources from the Ministries of Justice and Interior, was that to ordinary citizens, the rule of law meant that 'their rights are protected by the authorities (administrative authorities, judicial authorities, and law enforcement officers).'⁴⁰⁴ This however, was contradicted by a source from the Hungarian National Secretariat, who felt that there was a 'lack of understanding of the rule of law [amongst the citizenry], reflected in the general public's perception of laws and in its use of the judicial system.'⁴⁰⁵ This perception of laws by citizens was reflected in a survey conducted in 1992. In a survey conducted in 1992, Hungarian citizens were asked whether they agreed or disagreed with the following statement: 'It is not necessary to obey a law that is unjust.' The results of the survey showed that in response to this question, 38% of those surveyed stated complete or

somewhat agreement with what the statement said, while 62% surveyed stated some or strong disagreement with the statement.⁴⁰⁶ As another source in Hungary states, 'there is not a culture of following legal rules here [in Hungary]' because 'law has not always represented the true reality under the old regime.'⁴⁰⁷ It can be stated that the legal culture in Hungary needs further development if it the rule of law is to take a deep hold within the country.

Poland

In Poland, the understanding of the rule of law is complex. Its conception of this complex principle reflects a 'mix of legal systems of various other countries', foremost, but not exclusively, the German and French systems. The Poles in general, have been characterised as 'legalistic...that they like their laws.'⁴⁰⁸ This is illustrated by the country's transformation of its legal system and institutions.

The transformation and reform of its government institutions and legal procedures are representative of some of its positivist inclinations. Some legal positivists in Poland believe that 'law cannot be applied retroactively and that the right of derogation belongs exclusively to the law-making body and cannot be appropriated either by the executive or by the judiciary.'⁴⁰⁹ It was further illustrated in the decision taken by Taseusz Mazowiecki (the first Prime Minister), when Solidarity took control of the governing of Poland in September 1989. 'Mazowiecki's government rejected a revolutionary approach to systemic change by setting the precedent that the existing body of laws, however unjust or imperfect, should be binding in its entirety, pending relevant amendments or new legislation.'⁴¹⁰ These examples illustrate Poland's positivist tendencies with respect to its understanding of the rule of law.

This tendency is further exhibited in comments about Poland's legal system. It has been commented, that Poland subscribes to a 'Continental - European [legal] tradition', with respect to issues such as judicial discretion, and that the Polish [legal] tradition is not like the American or English traditions, where a 'judge may create law' and where judges have more scope for discretion.⁴¹¹

Despite these efforts to understand what the rule of law entails and to transform Poland into a state based on the rule of law, one of the main problems with defining and understanding this principle here, has been the communist regime's manipulation of the concept. The manipulation of the rule of law by the communist regime, in its attempts to legitimise itself and appear democratic in the early 1980s, has left a lasting influence on perceptions of the rule of law. Its influence was still evident in a survey conducted in 1992, where individuals in Poland were asked whether they agreed or disagreed with the following statement: 'It is not necessary to obey a law that is unjust.' The responses to this question seem to suggest that at the time of the survey, Polish citizens were still responding to perceptions of the law, influenced by their understanding of it under the Communist regime. Of the respondents, only 57% stated some or strong disagreement with the statement, while 43% stated some or complete agreement with the statement made.⁴¹² Many citizens remember what the rule of law meant under the communist regime, and have a very 'anti-government attitude'.⁴¹³

Section Two - The Establishment and Practice of the Rule of Law

This section aims to connect the conceptualisations (or weak conceptualisations) discussed in the previous section, with the practice and realities of individual countries, further illustrating the differences associated with the variation of rule of law conceptions

across associated countries from the CEE region. It will survey the situation in a few of the Central and European countries, in detail in this section.

As was mentioned in the previous section, there is no single model of the rule of law. This outcome is not surprising, when one considers that among western states based upon the rule of law, there are not only differences but also 'much debate as to whether specific practices, rules, and institutions further the ideals, or undermine it.'⁴¹⁴ Despite these debates, it is believed that there exist particular 'baselines ... such as an independent judiciary and respect for precedent'.⁴¹⁵ However, debates also exist over whether these particular practices and institutions are necessary for the rule of law and whether they would be the best method for ensuring the rule of law. This seems to illustrate that there is tension and scope for misunderstanding, especially with regard to so-called 'baselines'.

One of the reasons given for these tensions is that 'it is not easy to say which practices and institutions are *best*, from the standpoint of the rule of law.'⁴¹⁶ The discrepancies identified, over the necessity of particular institutions or practices, and whether they assist or undermine the rule of law, have also led to variations in understanding what these institutions and practices entail, thereby also causing variation in the implementation of such practices, rules, and institutions.⁴¹⁷ It is believed that 'these differences in judgement as to what the rule of law requires', 'stem from distinctive histories.'⁴¹⁸ These discrepancies, to be illustrated here, reflect the lack of awareness or understanding of the complex nature of the rule of law.

Hungary

For example, in Hungary, many legal commentators and experts agree that there exist, 'the basic conditions necessary for building a state based on the rule of law.'⁴¹⁹ One such

condition was the separation of powers. The separation of the executive, the legislative, and the judicial branches are laid down as a part of the constitutional framework of the country and protected by law. Hungary has also emphasised and observes the ideas of parliamentary democracy and popular sovereignty, which places emphasis on power of the people through elected representatives to limit government power from arbitrary and improper use.⁴²⁰ Another element of the rule of law it considers to be of importance, is "the absolute supremacy or predominance of regular law", and that law be "predictable and calculable in its general consequences".⁴²¹

Some writers such as Pogany have stated that some of the elements of a state based on the rule of law existed in Hungary prior to its Communist legal order. Elements such as the separation of powers, "predominance of regular law", and the predictability of law, were said to have existed in Hungary 'in the final decades of the nineteenth century and throughout much of the first half of this century' [the twentieth century].⁴²²

However, despite the existence of some of these important elements, the Democratic Charter (a civic movement in support of the rule of law in Hungary) expressed concern that 'democratic transformation is stagnating in Hungary.'⁴²³ The remedy, they stated 'was to satisfy several major requirements for establishing the rule of law.'⁴²⁴ One major requirement identified by the Democratic Charter was that 'the citizen must not fear the authorities in power.'⁴²⁵ Another element important for the establishment of the rule of law was to ensure that the independence of the judiciary was protected and that the government and political groups should refrain from trying to influence it. Other examples of the requirements put forth by the Democratic Charter included the rejection of arbitrary laws, and refraining from taking political revenge.

These requirements were partially covered by the Hungarian government's establishment of a Constitutional Court vested with the powers to resolve difficulties and

adjudicate over the constitutionality of laws passed by the legislative branch. The Hungarian government sees the creation of the Constitutional Court and the powers vested in it, evidence of its commitment towards 'contributing to the creation of a state build on the rule of law'.⁴²⁶ The Hungarian Constitutional Court in turn, has been key to the development of building Hungary into a state based on the rule of law.⁴²⁷ The Constitutional Court declared that the state 'does not and cannot have an unrestricted right of punishment' in a state based on the rule of law. To do so, would be to go against the fundamental ideas of the rule of law, which is to ensure a proper and democratic relationship is upheld, between the state and individuals, thereby protecting individuals from any coercive and arbitrary actions by the state.⁴²⁸ This comment was made in connection with the need to balance the necessity for a functioning parliamentary democracy in Hungary, and the need to come to terms with the injustices of its past. In this matter, the Constitutional Court believes that the 'principles of a state founded on the rule of law' should take precedence over feelings and demands for 'political justice' to right the injustices and wrongs that occurred under the Communist regime.⁴²⁹

An example illustrating the Constitutional Court's contribution to defining and reinforcing the rule of law and a functioning parliamentary democracy in Hungary, was its ruling on the Zetenyi-Takacs law.⁴³⁰ In the preamble of its decision, the Court 'defined the principles of a law-based state more thoroughly than ever before, making a significant contribution to Hungarian legal thought.'⁴³¹ The Constitutional Court decided that the law 'had violated the principle of legal security, one of the basic tenets of a state built on the rule of law.' It decided against the Zetenyi-Takacs law because it believed, 'that every citizen was entitled to legal protection and that the rule of law could not be sacrificed in the interest of political justice.' Because to do so, by 'extending the statute

of limitations retroactively', would 'violate the principle of predictability of the state's actions.'⁴³²

In its ruling, the court reasoned that a state based on the rule of law could be realised only if legislation and the functioning of state institutions were in harmony with the constitution and if the culture and value system embodied in the constitution permeated the entire society. It said that the 'basic guarantees of a state based on the rule of law cannot be put aside on the grounds that a [special] historical situation exists.'⁴³³

Another example, illustrating the complexity and conflicts between the conceptualisation and practice of the rule of law, is in the context of the Hungarian Constitution. The Hungarian Constitution itself, in Article 2(1), 'refers to the Hungarian Republic as a constitutional Rule-of-Law State'.⁴³⁴ It has also been stated by writers such as Halmai and Scheppele, 'that Hungary is a *Rechtsstaat* in both statement of fact and a statement of policy.' What this meant was that,

Rechtsstaat becomes a reality when the constitution is truly and unconditionally given effect. For the legal system, the "change of system" [*rendszer váltás*] means ... that the constitution of the *Rechtsstaat* must be brought into harmony ... with the whole system of laws. Not only must the regulations and the operation of the state institutions comport strictly with the constitution, but also the constitution's values and its "conceptual culture" must imbue the whole of society. This is the rule of law and this is how the constitution becomes a reality ... For the organs of the State, participation in this process is a constitutional duty.'⁴³⁵

Therefore, legislation formed that contradicts any part of the constitution is problematic because it undermines the rule of law in Hungary. When this occurs, it is left to the Constitutional Court to ensure that a decision is made that does not undermine the country's constitution or its basis on the rule of law.

For instance, when the Parliament attempted to enact legislation supporting retroactive justice, the Hungarian Constitutional Court, in an unanimous decision struck it down because 'section one of the law violated the principles of a constitutional rule-of-

law state [*jogállam*]', namely Article 2(1).⁴³⁶ The law regarding retroactive justice in Hungary also contradicted Article 57(4) of the constitution, which states: 'No one shall be declared guilty and sentenced for an act which was not a criminal offence under Hungarian law at the time when it was committed.'⁴³⁷ This action was in-line with ideas and concerns about ensuring the rule of law. The Court decided that it was the correct decision to take on the matter, as its job is to ensure laws enacted do not contradict the constitution. Because 'from the point of view of a rule of law system ... utilising the constitution to rewrite political agreements is counterproductive to the goal of creating respect and belief in constitutionalism' and it undermines the rule of law.⁴³⁸ These conflicts within Hungary seem to demonstrate that it is developing and reforming based upon an understanding of the rule of law that is unique to it, reflecting its past as well as its future goals.

Poland

After the collapse of communism in Poland, the country's new leaders accepted the principle that the Polish State and all its institutions should be based on the rule of law. They enshrined the rule of law principle within Article 1 of the amended Polish Constitution of December 1989. In this article it states, 'The Republic of Poland is a democratic state based on the rule of law and implementing the principles of social justice.'⁴³⁹

Despite this, there exists in Poland contradictions between the ideas behind making Poland into a state based on the rule of law, and the shape that reforms and laws are taking and being used in the name of 'justice'. The discussion of 'lustration laws' or accounting for past violations and wrongs, is one of the areas where these contradictions are most evident. Poland, like other transition countries, have faced the difficulty in

reconciling its understanding and efforts to instil the rule of law principle in the country, with its attempts to come to terms with the violations of law and individuals under the previous regime.

On this matter, Poland has 'proceeded in an evolutionary fashion, on the basis of the existing legal system, to bring to account only those members of the communist party and the former establishment who had violated the laws of the day.'⁴⁴⁰ This approach was undertaken as a way to 'smooth the passage to democratic government.'⁴⁴¹ Unfortunately, this has not been the only method under consideration, as the government has also considered 'the possibility of extending the statute of limitations on Stalinist crimes, which have already expired.'⁴⁴² Other ways of coming to terms with the past considered in Poland, include the idea of purging governmental institutions and other important posts, of Communists or those whom were suspected of having strong links with the previous regime. There is the feeling amongst some writers that the government's desire to hold former leaders of the communist regime responsible for crimes committed under the previous regime, is contradictory to the basic idea of the rule of law. They consider these types of retaliation to be 'only the violence of the victorious against the defeated' and a recycle of the type of methods that were utilised under the previous governing system. It goes against the fundamental idea of the rule of law concept, as it exhibits once again, the tendency of government to consider itself to be above 'valid positive law'. Actions such as these have led to the continued underlying feeling that those in power feel that they are exempt from the law and its provisions.⁴⁴³ However, what these types of ideas for redress have shown is a lack of understanding, but more worrying, it illustrates a lack of respect for the law within the country.

One of the explanations given for these contradictions between conceptions of the rule of law and the actions by the Polish government is the one offered by Winicjusz

Narojek. Narojek, who writes on the transition of Poland into a democracy, believes that the rule of law is important, but that 'the relationship between law and democracy extends beyond the concept of the rule of law to legal culture.'⁴⁴⁴ He believes that without a legal culture based and developed from the rule of law, democracy is difficult to achieve. There is a lack of understanding of the laws and regulations that are being passed in Poland and of the effects these laws have on the living conditions and changes occurring in society. Thus illustrating Narojek's point about the need for the development of a legal culture in Poland, in order for the rule of law to become ingrained and for democracy to flourish.

Another area that has been seen as an impediment to the establishment and grounding of the rule of law in Poland has been in the reform of the legal structure itself. It has been alleged that 'the legal infrastructure is not always equal to the demands of democratic practice' and that the 'chaotic domestic politics impede legal and institutional reform.'⁴⁴⁵ For example, 'the state's restricted financial, personnel, and administrative potential makes it harder still for the rule of law to take permanent root in Polish daily life.'⁴⁴⁶ This is partly due to the fact that several institutions for the controlling the state administration and for protecting the rule of law were created under communist rule in the 1980's to give the government the appearance of having in place democratic safeguards. Such problems illustrate and raise questions regarding the concept of the rule of law and how this concept is being used in the restructuring of former communist-run countries. Although having particular structures associated with the former communist government does present problems for the newly established government and for the rule of law concept taking permanent root in Poland, more problematic has been the change of laws created under the communists. The problems here have the potential for undermining 'perceptions of justice and the rule of law' in Poland.⁴⁴⁷

However, the government has taken steps to further become a state based on the rule of law, through the creation of a special commission within the Legislative Council. The special commission has identified three criteria for the evaluation of legislation, so to ensure that it supports a state based on the rule of law. The three criteria are: 'a) provisions that served to strengthen the foundations of the democratic state based on the rule of law; b) provisions essential to the functioning of a free market economy; and c) provisions that brought Poland's legislation in line with European standards and conventions and treaties already ratified by Poland.'⁴⁴⁸

Other groups internal to the country have also made moves to assist Poland in realising its goal of becoming a state based on the rule of law. One such group is the press in Poland. Poland's uncensored press have contributed to public awareness of the rule of law concept through discussions and articles describing both what the rule of law entails and how the previous communist government had violated both Polish and international laws related to the concept of the rule of law.

Despite these efforts and the reforms taking place to establish Poland as a state based on the rule of law, there are still many criticisms of Poland's ability to establish a democratic system that is based on the rule of law. Many of these criticisms have been based on the fact that there are differences in the ways and means of implementing the rule of law concept on a day-to-day basis that seem to defy what the principle stands for. For Poland, this illustrates the inconsistencies in its understanding of the rule of law (which is by Western standards, underdeveloped). These inconsistencies also remain one of its main challenges in developing into a state based on the rule of law.

The Slovak Republic

The transformations taking place in Slovakia, 'has been characterised by many signs of open and conspicuous irregularities'. This is because the 'distinction of political struggles under constitutional rules and disputes about such rules - is not safely guaranteed where, as has been claimed with respect to Slovakia, "the evaluation of almost any political proposal for 'constitutionality' or 'unconstitutionality' has become part and parcel of everyday public discourse".⁴⁴⁹ An example illustrating this in Slovakia, has been described by some writers such Miroslav Kusý, as the main struggle in the country. This struggle is 'between supporters of an authoritarian and a democratic regime', represented by the government coalition's 'repression and abandonment of democratic principles, and the opposition, who are struggling for the 'maintenance and development' of democratic principles in Slovakia.⁴⁵⁰

The struggle between the two opposing groups was evident in many of the actions taken to resolve disputes. Kusý describes the coalition as using 'all means at its disposal to achieve its interests', using and abusing 'institutional means at its disposal and gradually transformed [this] political battle onto the level of an institutional crisis.'⁴⁵¹ This institutional crisis in Slovakia has triggered worries within and outside of the country, about whether the rule of law existed in the country. There are examples that Slovakia is suffering from institutional difficulties, but these examples also illustrate the lack of respect for the rule of law by the government coalition. An example of lack of respect for the rule of law is illustrated by 'the Government's refusal to make nominations for the appointment of certain judges, in spite the fact that it is its constitutional duty'.⁴⁵² This illustrated the government's lack of respect for the country's constitution and constitutional provisions, causing difficulties within the judicial system, but more generally, showing that respect for and upholding the rule of law was not a priority.

It was further exemplified by an action taken by the Slovakian Ministry of Education, with regard to the Hungarian minority within the country. The Ministry of Education decided to reverse a practice in place since 1921, which provided bilingual school records in Slovakia, for Hungarian pupils, ordering all school records in Slovak only.⁴⁵³ This decision shows a disregard for the minority population of the country, along with providing an example of arbitrary changes to legislation and practices in Slovakia. It showed not only that the government's action went against the will of the people (illustrated in the number of petitions and protests that occurred), but also how it has gone against the rule of law. The government's actions in these two examples demonstrated its disregard for the rule of law and the 'erosion of constitutionalism' and 'the disregard of public interest in favour of political and personal interests'.⁴⁵⁴

Another example that further depicted its lack of regard and support for developing the country to be based on the rule of law, was the dispute about the referendum in May 1997. This referendum contained questions concerning integration of the country into NATO and about 'the possibility of the deployment of nuclear weapons and military bases on Slovak territory', and the 'direct popular election of the president'.⁴⁵⁵ What occurred during the referendum has been referred to by journalists inside and outside the country as the end of democracy for Slovakia; 'Slovakia crossed the border dividing democratic and undemocratic countries'. These remarks were made in response to the fact that the 'government intervened unconstitutionally in to the organisation of the referendum and ordered the Minister of Interior ... to withdraw the fourth questions from the ballot'.⁴⁵⁶ Amidst the confusion and accusations about unconstitutional intervention into the process by the government, only ten percent of eligible voters participated in the referendum, which the Supreme Referendum Commission then declared void.⁴⁵⁷ The entire referendum was viewed by many both

inside Slovakia and in the international community, as a shamble and concern was expressed about the events that had taken place. The European Union expressed its concern about the incident and 'asked the Slovak government to respect the rule of law and principles fundamental for the stability of democratic society.'⁴⁵⁸

These events and incidents that occurred in Slovakia since 1997 have sparked worries about whether the rule of law exists in Slovakia. However, what must also be contemplated, is not only the functioning and support for the rule of law within the country, but also whether Slovakia's current practices perhaps reflects its understanding or incomplete understanding of what the rule of law means and entails. The events may be a flaunting of the practices associated and necessary for the establishment of this important principle. At the same time, the Slovakian government's actions seem to also reflect its confused understanding of what is important regarding the rule of law and illustrates that "the rule of law and democracy do not seem to be deeply rooted enough in Slovakia."⁴⁵⁹

This has also been illustrated in the conflict between the courts and the government's idea of democracy. The courts and especially Constitutional Courts in the region are seen as the protectors of individual rights, and as establishers of the rule of law. In Slovakia, the courts, especially the Constitutional Court, have been making efforts to develop the process of judicial review to ensure that legislation created is in accordance with the country's constitution, and that the various branches of government do not overstep their jurisdictions and powers. However, judicial review is something not previously a part of the governing systems in the region, and there is wide criticism of and scepticism about the process. Judicial review is considered by many to be undemocratic along classical understandings, where democracy is understood as representation through parliaments of the 'popular interests' of the people. So many

politicians in the region, including Slovakia, have made 'frequent attempts to attack uncooperative judges and to limit the courts' authority'.⁴⁶⁰ This is relevant, as it was one of the unresolved issues that was identified in Chapter One's discussion of judicial independence and authority⁴⁶¹. One example of this power struggle has been the conflict between then Prime Minister Vladimir Meciar and the Slovakian Constitutional Court. The Constitutional Court 'frequently stymied Prime Minister Vladimir Meciar's efforts to run roughshod over the country's constitution in his campaign to enhance his control over the government'.⁴⁶² In retaliation, Meciar attempted to frequently discredit the Constitutional Court by calling it the 'ailing element' of the country's political system. Meciar went as far as proposing a change in the procedures for the Court to be able to void an act of Parliament. This was not passed, but had it been, it would have greatly reduced and limited the powers of the Court to 'curtail parliamentary infringement of the Constitution'.⁴⁶³

What the examples above have illustrated clearly, is that the establishment and nurturing of the rule of law in Slovakia needs much work. The difficulties identified above reflect the problems regimes face in their transition to the rule of law. Problems have been attributed to the country's lack of direction and are impeded by the weakness or lack of a rule of law tradition. This need for more development of a rule of law tradition is one identified by the European Union. In a statement made by the then European Union commissioner for external relations, Hans van den Broek, stated that 'The Union expects: "... clear signals from the Slovak Government about its intentions to support the rule of law and democratic process in this country, after which necessary practical steps will follow..."'⁴⁶⁴

In more recent reviews, Slovakia has made changes and democracy is considered to have been consolidated within the country, according to the European Union

Commission. However, it was also commented that the country has been 'slow on reform of [the] judiciary'.⁴⁶⁵ This gradual reform of the judiciary hinders the further establishment of the rule of law in Slovakia, as the judiciary has been identified by many writers and commentators on the region, as one of the most important institutions for establishing a state based on the rule of law in action.

All of the conflicts cited above have demonstrated that Slovakia seems to have an underdeveloped understanding of the rule of law and what is important for ensuring that the country is based upon it. It looks to be attempting to develop a conceptualisation of the rule of law that reflects its national differences and its past. However, this looks to be in conflict with other ideas infiltrating the country, of what is necessary for the rule of law to become developed and established in Slovakia.

Bulgaria

It has been stated the previously that Bulgaria seems to understand that the rule of law is an important part of a democratic state, although it does not necessarily understand what the rule of law or democracy really are. This has therefore led to a tendency in Bulgaria, to conflate the two concepts into one idea. This has been especially prevalent amongst the citizenry of the country, who have had 'no experience that another system may work' and much of their worries are focused not on whether Bulgaria is based on the rule of law, but on their survival and support for their families.⁴⁶⁶ However, this tendency to conflate the two ideas is not limited only to the citizenry, as government officials and those within the judicial system have also exhibited this tendency.

Much of the Bulgarian strategy for reforming institutions, especially within its legal system, as previously discussed, has consisted of transposing certain institutions and procedures from various countries. At the beginning, the Bulgarians were more

concerned with the adoption of democratic institutions and practices without deep understanding of how to use them or its compatibility with Bulgarian ideas. This has begun to change, with Bulgaria now comparing the 'actual advantages of various systems', so as to determine which institutions and practices from different countries would be best suited to its own development. This may have the affect of producing a complex and confused understanding of what the rule of law means, as different countries have developed particular institutions based upon their own conceptualisations of different values and ideals, such as the rule of law.

For instance, in its legal reform efforts, Bulgaria has copied ideas about the 'organisation of the police from Germany', its penal code has taken particular ideas from the French system, and this has been mixed with ideas on constitutional courts and procedures taken from Britain. Bulgaria has also borrowed ideas about its judicial system from the French and Belgians, 'models to human rights and social minority questions' from Northern Europe/Scandinavia, it has looked to Portugal, based on the 'size of the country' in relation to itself.⁴⁶⁷

However, the practice of transposing institutions and structures from other countries, has also caused it some difficulties, especially in the judicial system. It has some of the institutions and procedures of a proper judicial system based upon the rule of law in place, but it does not have the legal culture or the values important for instilling and establishing the principle into the country's culture. There have been a number of reports about the Bulgarian judicial system and how it is weak and emphasis on the fact that it needs strengthening.⁴⁶⁸ It has also been commented that in Bulgaria, 'continued attention also needs to be paid to respect for the rule of law at all levels of the administration and by the law enforcement bodies.'⁴⁶⁹

These practices and comments illustrate that for Bulgaria, the rule of law has been associated with particular institutions, structures and practices. Whilst it has also reflected Bulgaria's desire to develop in a manner that is consistent with and takes into account its culture, history and goals.

Conclusion

This chapter has illustrated both the variation in understandings held, and variation in the application of these understandings of the rule of law in practice, by Central and East European countries applying for European Union membership. Many of the countries in the region have in general, taken on a German *Rechtsstaat* understanding of the rule of law, but one that is open to variation and slight discrepancies as there is a lack of understanding of the complex nature of the rule of law.

There is the speculation that in the rush to become based on the rule of law, many Central and Eastern European countries have taken actions that undermine and impede, rather than establish and ensure the rule of law is instilled. This seems to reflect the challenges and difficulties these countries are facing as they come to term with this complex principle. Their understanding of the rule of law diverge from western conceptualisations based on individual circumstances and attempts to balance the clash of interests it brings to surface.⁴⁷⁰ Many writers and policy-makers believe the transitions are happening too quickly and that the 'historically best, yet no longer available, path to democracy has been both gradual and linked to the emergence of fitting socio-economic and cultural conditions.'⁴⁷¹ They believe that the rates of the transformations are potentially harmful for the development and establishment important principles like the rule of law in these countries. It has also been stated that it is 'difficult for an outsider to understand the history, culture, system which these people in Central and Eastern

European countries, lived in [under authoritarian rule].⁴⁷² However, these are important areas to understand, as they affect the conceptualisation and establishment of the rule of law in these countries.

The development of CEE conceptualisations of the rule of law can be attributed to several things. Firstly, it has been ascribed to the mixture of a desire to return to the 'Golden Age' before Communism in some of these countries, and the influence of its historical connections to particular EU member states. Another reason given by writers such as Alexander Smolar, has been the problem of balancing the need for a strong leader to push the transition process along and ideas of a limited role for government under the rule of law. He states that there are 'contradictions between the limited role that states will have and should have in the future and the kinds of tasks and obligations states are forced to take on now.'⁴⁷³ This is especially emphasised within countries in transition. Because transition and reforms means that new governments are placed in the position where there are wielding enormous powers in order to make substantial changes in a shortened time period, this is not the role that is envisioned for them in the future. The expectation is that in a country based on the rule of law, the state will have a much more limited role than the one it currently has, in order to develop and support an active civil society.

Another factor to be considered, is how different countries are dealing with their pasts, especially with the recent past under Communism. One of the major problems cited in the CEE countries has been the contradiction between the countries' desire to become based on the rule of law, and its handling of those who were apart of the former regime. The passing of lustration laws in the region has been seen as a 'major blow to the *Rechtsstaat* [rule of law] principle'.⁴⁷⁴ This factor combined with the 'lack of [a] constitutional legal culture', and the influences of having lived under Communist rule for

so many years, have made understanding, much less establishing the rule of law a difficulty for the majority of the countries.⁴⁷⁵

What this chapter has identified is the existence of different conceptualisations of the rule of law, which have led to differentiation in establishing what is important or necessary for the rule of law. This variation is something that the European Union has expressed its encouragement for in Central and Eastern Europe, for several reasons, as discussed previously in chapter two. Most prominently, this perspective serves its [the EU's] own purpose of maintaining the status quo in the Community, as there are variations in conceptualisations of the rule of law, as well as differentiation in the establishment of this principle in practice. It has done so despite evidence that such variations have already caused some difficulties and problems within the Community of fifteen states, regarding integration and development of the Community. This lack of uniformity will have an impact on the effectiveness of the European Union in the future, and will dramatically effect its progress towards further integration of the Community.

As will be further examined in the next chapter (chapter four), the rule of law is stated to be an important principle in the future enlargements of the European Union, as stated in the Copenhagen criteria. However, the lack of a uniform conception or definition of the rule of law by the Community, whilst preserving the status quo and necessitating little change by current member states, is problematic for future enlargements and further integration of the Community. There is the potential for further problems with regard to the legal and judicial spheres of both the Community and individual member states, as the boundaries between national and supranational competencies become more regularly in conflict.

³⁴⁸ Examination of the understanding of the rule of law by several associated Central and Eastern European countries have been conducted recently in books published by Jiri Priban and James Young (Eds.), *The Rule of Law in Central Europe. The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*, Aldershot, UK: Ashgate Publishing Ltd., 1998; and Martin Krygier and Adam Czarnota (Eds.), *The Rule of Law after Communism. Problems and Prospects in East-Central Europe*, Aldershot, UK: Ashgate Publishers Ltd., 1998. What this thesis sets out to do, is to examine both the EUs and CEECs understandings of the rule of law, and examine these within the context of EU enlargement - how understandings differ and how these differences, although seen by some as beneficial, also have serious consequences for an enlarged Community of up to 25 member states, and a Community more deeply connected and integrated.

³⁴⁹ J. F. Brown - 'Introduction', *RFE/RL Research Report - Toward the Rule of Law*, v.1, n.27, 3 July 1992, p.1

³⁵⁰ In relation to conceptualisation, the extent to which newly formed governments and governmental systems are based on particular understandings of the rule of law principle will be examined in section two of this chapter. This section (section one) will be specifically focused on reviewing understandings and conceptions of the rule of law.

³⁵¹ Martin Krygier and Adam Czarnota, 'The Rule of Law After Communism: an Introduction' in Martin Krygier and Adam Czarnota (Eds.), *The Rule of Law After Communism. Problems and Prospects in East-Central Europe*, Aldershot, UK: Ashgate Publishing Ltd., 1998, p.24.

³⁵² Krygier and Czarnota, 'The Rule of Law After Communism: An Introduction', p.5.

³⁵³ Selznick, 'Legal Cultures and the Rule of Law', in Martin Krygier and Adam Czarnota (Eds.), *The Rule of Law After Communism. Problems and Prospects in East-Central Europe*, Aldershot, UK: Ashgate Publishers Ltd., 1998, pp.25-26. Here Selznick explains what he conceives of as a 'negative conception of the rule of law'. He associates it with what Dworkin called the "model of rules" - whereby discretion of officials 'is limited by norms of clear content and definite scope rather than by more general, more indeterminate standards or principles.' (p.26).

³⁵⁴ Krygier and Czarnota, 'The Rule of Law After Communism: An Introduction', p.6. This is also discussed in detail in chapter one of this thesis, with other historical and contemporary definitions of the rule of law, illustrating the complexity of this principle. Selznick reiterates this in his article 'Legal Cultures and the Rule of Law'. Here he states that a 'conventional understanding of the rule of law' is of it as 'a government of laws and not men.' (Selznick, 'Legal Cultures and the Rule of Law', p.21.) By this he is referring to the rule of law as assisting in the governing of a country by setting standards and ideals. Selznick relates this to two norms previously discussed in Chapter One, as stated by A. V. Dicey. These two norms were, 1) that no one is above the law and 2) that 'no one should be punished, "except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of law."' (Selznick, 'Legal Cultures and the Rule of Law', p.22; original as noted in footnote on page 22, A. V. Dicey, *Introduction to the Study of the Law of Constitution*, London: Macmillan, 1956, p.188; or in a later edition of Dicey's work, it states that no one, no matter their position is above the law and that 'a

man may with us be punished for a breach of law, but he can be punished for nothing else.', A. V. Dicey, *Introduction to the Study of the Law of Constitution*, Indianapolis, USA: Liberty Fund, Inc., 1982, p.120.)

³⁵⁵ Krygier and Czarnota, 'The Rule of Law After Communism: An Introduction', p.6. Krygier and Czarnota discuss here, the works of Selznick and Morawski, later presented in their book. However, their arguments on positivistic/legal positivistic understanding of the rule of law and its limits, were discussed earlier in chapter one of this thesis.

³⁵⁶ Jon Elster, Claus Offe and Ulrich K. Preuss with Frank Boenker, Ulrike Goetting, and Friedbert W. Rueb, *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea*, Cambridge, UK: Cambridge University Press, 1998, p.61.

³⁵⁷ Elster, Offe, and Ulrich, *Institutional Design in Post-Communist Societies*, p.61.

³⁵⁸ András Sájó and Vera Losonci, 'Rule of law in East Central Europe: Is the Emperor's New Suit a Straitjacket?', in Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviers, and Steven C. Wheatley (Eds.), *Constitutionalism and Democracy. Transitions in the Contemporary World*, Oxford: Oxford University Press, 1993, p.321.

³⁵⁹ Sájó and Losonci, 'Rule of law in East Central Europe: Is the Emperor's New Suit a Straitjacket?', pp.324-325.

³⁶⁰ This fact will be illustrated in the next section (section two of this chapter), when individual understandings of the rule of law held by CEECs, are examined.

³⁶¹ Selznick, 'Legal Cultures and the Rule of Law', p.25.

³⁶² Sájó and Losonci, 'Rule of law in East Central Europe: Is the Emperor's New Suit a Straitjacket?', p.321.

³⁶³ Varga, 'Varieties of Law and Rule of Law', p.61.

³⁶⁴ *Ibid*, pp.61-62.

³⁶⁵ Kjell Engelbrekt, 'Bulgaria', RFE/RL Research Report, *Toward the Rule of Law*, v.1, n.27, 3 July 1992, p.4.

³⁶⁶ *Ibid*, p.4.

³⁶⁷ *Ibid*, p.4.

³⁶⁸ Interview F conducted in Brussels- Tuesday, 4 May 1999.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*.

³⁷¹ *Ibid*.

³⁷² Interview F conducted in Brussels- Tuesday, 4 May 1999; Interview H conducted in Brussels- Tuesday, 4 May 1999.

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- ³⁷³ Interview H conducted in Brussels- Tuesday, 4 May 1999.
- ³⁷⁴ Interview K conducted in Brussels- Thursday, 6 May 1999.
- ³⁷⁵ *Ibid.*
- ³⁷⁶ Interview L conducted in Brussels- Thursday, 6 May 1999.
- ³⁷⁷ *Ibid.*
- ³⁷⁸ Jiri Pehe, 'Czechoslovakia', *RFE/RL Research Report- Toward the Rule of Law*, v.1, n.27, 3 July 1992, p.10.
- ³⁷⁹ *Ibid*, pp.10, 14.
- ³⁸⁰ *Ibid*, p.10.
- ³⁸¹ *Ibid*, p.12
- ³⁸² *Ibid*, p.10.
- ³⁸³ *Ibid*, pp.10, 13.
- ³⁸⁴ *Ibid*, p.10.
- ³⁸⁵ *Ibid*, p.13.
- ³⁸⁶ *Ibid*, p.13.
- ³⁸⁷ Vaclav Klaus, 'Transition - An Insider View', *Problems of Communism*, v.41, n.1-2, Jan.-Apr.1992, p.73.
- ³⁸⁸ What this seems to imply is that in the transformation of the country to become based on the rule of law, a value-based approach (i.e. the rule of law as a way of life) is much more difficult to accomplish. It is difficult as it implies potentially (in many cases likely) a dramatic change in values, ideas and practices at all levels of government and throughout the entire society.
- ³⁸⁹ Pehe, 'Czechoslovakia', pp.10-11.
- ³⁹⁰ Klaus, 'Transition - An Insider View', p.73.
- ³⁹¹ Interview M conducted in Brussels- Thursday, 6 May 1999.
- ³⁹² *Ibid.*
- ³⁹³ *Ibid.*
- ³⁹⁴ *Ibid.*
- ³⁹⁵ Edith Oltay, 'Hungary', *RFE/RL Research Report - Toward the Rule of Law*, v.1, n.27, 3 July 1992, p.16.

³⁹⁶ *Ibid*, p.16.

³⁹⁷ The German conception of the *Rechtsstaat* has been discussed in more detail earlier in this thesis, in chapter two - where particular understandings of the rule of law held by current EU member states were examined and discussed.

³⁹⁸ Gábor Halmai and Kim Lane Scheppele, 'Living Well Is The Best Revenge: The Hungarian Approach to Judging the Past' in A. James McAdams (Ed.), *Transitional Justice and the Rule of Law in New Democracies*, Notre Dame, USA and London, UK: University of Notre Dame Press, 1997, p.162.

³⁹⁹ *Ibid*, p.162. Here, Halmai and Scheppele state that 'the court [Constitutional Court in Hungary] argued that the legal regime of the state-party system and the new democratic Hungary constituted a single continuous legal tradition and that there was no basis for treating the laws of the prior regime any differently than laws of the present one.'

⁴⁰⁰ *Ibid*, p.162.

⁴⁰¹ *Ibid*, p.163. Here the authors quote from a source from the Hungarian Constitutional Court.

⁴⁰² Istvan Pogany, '(Re)Building the Rule of Law in Hungary: Jewish and Gypsy Perspectives' in Jiri Priban and James Young (Eds.), *The Rule of Law in Central Europe. The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*, Aldershot, UK: Ashgate Publishing Ltd., 1998, pp.143-144; the Franz Neumann quote can be found in R. Cotterrell, 'The Rule of Law in Transition: Revisiting Franz Neumann's Sociology of Legality', *5 Social and Legal Studies*, 1996, *supra* n.9, p.452. The use of the word *Rechtsstaat* by the Hungarians was a clear indication of its connection to the German understanding of the rule of law. Neumann, a German jurist, illustrates further with his description of the rule of law, how closely the Hungarian understanding of this principle is, to the German one.

⁴⁰³ Interview Q1 and Q2 conducted in Budapest- Monday, 21 June 1999; Interview O conducted in Budapest- Wednesday 16 June 1999.

⁴⁰⁴ Interview Q1 and Q2 conducted in Budapest- Monday, 21 June 1999.

⁴⁰⁵ Interview P conducted in Budapest- Monday, 21 June 1999. This perception that citizens do not understand the law or the rule of law, was iterated also in Interview O conducted in Budapest- Wednesday, 16 June 1999.

⁴⁰⁶ New Democracies Barometer - *Survey Responses*, 1992.
www.cspp.strath.ac.uk/seec/choose-question.cfm.

⁴⁰⁷ Interview O conducted in Budapest- Wednesday, 16 June 1999.

⁴⁰⁸ Interview I conducted in Brussels- Wednesday, 5 May 1999.

⁴⁰⁹ Anna Sabbat-Swidlicka, 'Poland', *RFE/RL Research Report - Toward the Rule of Law*, v.1, n.27, 3 July 1992, pp.30-31.

⁴¹⁰ *Ibid*, p.25.

⁴¹¹ Interview T conducted in Warsaw- Tuesday, 20 June 2000.

⁴¹² New Democracies Barometer - *Survey Responses*, 1992.
www.cspp.strath.ac.uk/seec/choose-question.cfm.

⁴¹³ Interview R conducted in Warsaw- Thursday, 15 June 2000.

⁴¹⁴ Selznick, 'Legal Cultures and the Rule of Law', p.22.

⁴¹⁵ *Ibid*, p.22.

⁴¹⁶ *Ibid*, p.22.

⁴¹⁷ *Ibid*, p.22.

⁴¹⁸ *Ibid*, p.23.

⁴¹⁹ Oltay, 'Hungary', p.16.

⁴²⁰ *Ibid*, pp.16-17.

⁴²¹ Pogany, '(Re)Building the Rule of Law in Hungary: Jewish and Gypsy Perspectives', pp.143-144, footnotes no.8, 11; (with original quotations located in A. V. Dicey, *The Law of the Constitution*, edited by E.C.S. Wade, London: Macmillan, 10th Ed., 1959, p.202; and *Magyar Törvénytar*, [1836-1868], p.490.)

⁴²² *Ibid*, pp.143-144.

⁴²³ Oltay, 'Hungary', p.23.

⁴²⁴ *Ibid*, p.24.

⁴²⁵ *Ibid*, p.25.

⁴²⁶ *Ibid*, p.20.

⁴²⁷ Interview O conducted in Budapest- Wednesday, 16 June 1999.

⁴²⁸ Oltay, 'Hungary', p.21.

⁴²⁹ *Ibid*, p.21.

⁴³⁰ The *Zetenyi-Takacs* law in Hungary (named after the deputies who formulated it), was created to make up for past injustices under the communist regime. The law 'extended the statute of limitations for certain crimes committed under the communist regime.' The law also 'waived the statute of limitations for acts of treason, premeditated murder, and aggravated assault leading to death that occurred between December 1944 and May 1990, making the prosecution of former communist officials possible.' This law was reviewed by the Hungarian Constitutional Court on the petition of President Goncz who was uncertain of the law's constitutionality. The Constitutional Court held that the

law was unconstitutional because it created 'legal insecurity' and was not consistent with creating a state built upon the rule of law. Oltay, 'Hungary', pp.20-21.

⁴³¹ Oltay, 'Hungary', p.21.

⁴³² *Ibid*, p.21.

⁴³³ *Ibid*, p.21.

⁴³⁴ Halmai and Scheppele, 'Living Well Is The Best Revenge: The Hungarian Approach to Judging the Past', p.160.

⁴³⁵ *Ibid*, p.161.

⁴³⁶ *Ibid*, p.160. *Jogállam* is the Hungarian word translated as "Constitutional rule-of-law state" roughly the equivalent to the German *Rechtsstaat*. This quote comes from the published decision of the Hungarian Constitutional Court, 11/1992 (III.5) Abh., for English translation, see *Journal of Constitutional Law in Eastern and Central Europe*, v.1, 1994, pp.131-132.

⁴³⁷ Halmai and Scheppele, 'Living Well Is The Best Revenge: The Hungarian Approach to Judging the Past', p.160, quote from the English translation of the Hungarian Constitution prepared by the Hungarian Constitutional Court.

⁴³⁸ Sájó and Losonci, 'Rule of law in East Central Europe: Is the Emperor's New Suit a Straitjacket?', p.328.

⁴³⁹ Sabbat-Swidlicka, 'Poland', p.25.

⁴⁴⁰ *Ibid*, p.33. The existing legal system mentioned in this passage, was mentioned earlier in this section...that in Poland, the first Solidarity government chose to keep the laws for better or worse from the previous regime, until they could be properly amended or otherwise phased out, rather than favouring a total systemic transformation of the laws and legal system.

⁴⁴¹ *Ibid*, p.33.

⁴⁴² *Ibid*, p.33.

⁴⁴³ Winicjusz Narojek, 'Engineering the Transition to Democracy' in *The Centennial Review*, vol.XXXVII, n.1, Winter 1993, p.214.

⁴⁴⁴ Narojek, 'Engineering the Transition to Democracy', p.214.

⁴⁴⁵ Sabbat-Swidlicka, 'Poland', p.25.

⁴⁴⁶ *Ibid*, p.25.

⁴⁴⁷ *Ibid*, p.28.

⁴⁴⁸ *Ibid*, p.30.

⁴⁴⁹ Jon Elster, Claus Offe, and Ulrich K. Preuss, with Frank Boenker, Ulrike Goetting, and Friedbert W. Rueb, *Institutional Design in Post-Communist Societies. Rebuilding the Ship at Sea*, Cambridge, UK: Cambridge University Press, 1998, p.287; footnote 20, p.287 citing the original quote found in *East European Constitutional Review*, v.IV, n.1, Winter 1995, p.30.

⁴⁵⁰ Miroslav Kusý, 'Does the Rule of Law (*Rechtsstaat*) Exist in Slovakia?' in Jiri Pribán and James Young (Eds.), *The Rule of Law in Central Europe. The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries*, Aldershot, UK: Ashgate Publishing Ltd., 1998, p.104.

⁴⁵¹ Kusý, 'Does the Rule of Law (*Rechtsstaat*) Exist in Slovakia?', p.105.

⁴⁵² *Ibid*, p.105.

⁴⁵³ *Ibid*, p.105.

⁴⁵⁴ Denis J. Galligan and Daniel M. Smilov, *Administrative Law in Central and Eastern Europe 1996 - 1998*, Budapest, Hungary: Central University Press, 1999, p.339.

⁴⁵⁵ Kusý, 'Does the Rule of Law (*Rechtsstaat*) Exist in Slovakia?', p.105.

⁴⁵⁶ *Ibid*, p.106-7.

⁴⁵⁷ *Ibid*, p.108.

⁴⁵⁸ *Ibid*, p.108.

⁴⁵⁹ *Ibid*, p.109; original quote was cited by the daily news agency of Slovakia (footnote 9), and the quote was from the then EU Commissioner for External Relations, Hans van den Broek.

⁴⁶⁰ Mark F. Brzezinski, 'Where Western Models Diverge: Judicial Politics in Eastern Europe', *Oxford International Review*, v.VIII, n.1, Winter Issue 1996/7, p.38

⁴⁶¹ For further details regarding judicial authority and the limitation of judicial discretion and powers, refer to chapter one's discussions on judicial independence and judicial discretion.

⁴⁶² Brzezinski, 'Where Western Models Diverge: Judicial Politics in Eastern Europe', p.38.

⁴⁶³ *Ibid*, p.38

⁴⁶⁴ Kusý, 'Does the Rule of Law (*Rechtsstaat*) Exist in Slovakia?', p.111.

⁴⁶⁵ *Enlargement Weekly*, and e-zine produced by the Europe Information Service, Newsletter 23 October 2000, http://europa.eu.int/comm/enlargement/docs/weekly_1311.htm

⁴⁶⁶ Interview H conducted in Brussels- Tuesday, 4 May 1999.

⁴⁶⁷ *Ibid.*

⁴⁶⁸ *Enlargement Weekly*, E-zine produced by the European Information Service on Enlargement Issues, Newsletter 14 July 2000, http://europa.eu.int/comm/enlargement/docs/weekly_1407.htm; *Enlargement Weekly*, E-zine produced by the European Information Service on Enlargement Issues, Newsletter 13 November 2000, http://europa.eu.int/comm/enlargement/docs/weekly_1311.htm

⁴⁶⁹ European Commission Directorate-General I.A.- External Relations: Europe and the Newly Independent States, Common Foreign and Security Policy, External Service and Directorate-General II - Economic and Financial Affairs, *Joint G-24/Consultative Group Meeting on Bulgaria, Brussels, 21 April 1999, Background Paper of Relations Between the European Union and the Republic of Bulgaria*, March 1999, p.8.

⁴⁷⁰ For example, positivist conceptions of the rule of law clash with considerations of justice - how countries are dealing with past injustices whilst making their transition to the rule of law.

⁴⁷¹ Guisppe Di Palma, 'Democratic Transitions: Puzzles and Surprises From West to East' in Frederik D. Weil, Jeffrey Huffman, and Mary Gautier (Eds.) *Research on Democracy and Society Democratisation in Eastern and Western Europe*, JAI Press Inc., Greenwich, Connecticut, vol.1, 1993, p.43; also commented on in interview with a contact from the European Parliament, Brussels, Belgium, 6 May 1998 at 10.00.

⁴⁷² Interview B conducted in Brussels- Wednesday, 6 May 1998.

⁴⁷³ Smolar, 'Democratic Institution-Building in Eastern Europe', p.70.

⁴⁷⁴ Sájó and Losonci, 'Rule by Law in East Central Europe: Is the Emperor's New Suit a Straightjacket?', p.331.

⁴⁷⁵ *Ibid*, p.334.

Chapter Four: The Rule of Law and Enlargement of the EU

Chapter Four brings together some of the points developed in the previous two chapters, to focus on the rule of law and identify its role in the enlargement of the European Union eastwards. The first section of this chapter reviews previous enlargements, identifying the legal basis and the role of the rule of law, if any, in these enlargements of the European Union. The second section examines the role of the rule of law within the current enlargement process, as a requirement for accession into the Union. It will identify some of the reasons for the EU's emphasis of this particular principle, as well as how commitment to it is measured and assessed. Lastly, the chapter reviews the importance of the rule of law and some of the problems associated with this principle, with regard to enlarging the EU. It returns to the issue of uniformity (previously discussed in Chapter Two, Section Three). This last section examines how the lack of a uniform conception of the rule of law across the Community and prospective member states, conflicts with the Community's emphasis on the rule of law.

As previously discussed in Chapter Two, there exists across the European Union, a variety of understandings of the rule of law. In Chapter Two, a comparison of the variation of understandings based on historical and cultural differences were made. This chapter also reviewed various documents that were identified as containing the term 'rule of law', proclaiming it to be a principle to be 'safeguarded'⁴⁷⁶, and upon which the Community is based.⁴⁷⁷ The rule of law has been identified by the various EU institutions (The Council of Europe, the European Parliament, and the Commission), as a fundamental principle for 'any sustainable, socially fair and environmentally sound economic development.'⁴⁷⁸

Section One - Rule of Law and Previous Enlargements

The rule of law is a prominent criterion of the current enlargement process, but what role has this principle played in previous enlargements of the European Union? In previous enlargements of the Community (prior to the current enlargement to include Central and Eastern European countries), the 'legal basis for the process of enlargement was originally Article 237 of the Treaty of Rome (1957).'⁴⁷⁹ It stated that,

Any European State may apply to become a member of the Community. It shall address its application to the Council, which shall act unanimously after obtaining the opinion of the Commission.

The conditions of admission and the adjustments to this Treaty necessitated thereby shall be the subject of an agreement between the Member States and the Applicant State. This agreement shall be submitted for ratification by all the Contracting States in accordance with their respective constitutional requirements.⁴⁸⁰

This legal basis provided the Community with a structure for applications for membership, but it provided no definition for the term 'European' upon which a state applying for membership was judged eligible or not.

The original legal basis for enlarging the Community was superseded in 1992 by Article O of the Treaty on European Union⁴⁸¹ and paragraph one of Article 237 of the EEC Treaty⁴⁸² was replaced by Article 8 of the Single European Act (SEA). This replacement stated that:

Any European State 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 as by an absolute majority of its component members.⁴⁸³

Despite the changes in these articles, much of it 'has remained virtually unchanged over the years'⁴⁸⁴, making no mention of the rule of law with regard to enlargement and the accession process.⁴⁸⁵

The documentation on enlargement to include Greece, Portugal and Spain⁴⁸⁶ illustrates the beginnings of discussions on formalising the enlargement process beyond the generalised criteria and steps developed through common practice and various treaties over the past decades. However, there was no mention of the rule of law during these accession negotiations. With the most recent enlargement of the EU, Austria, Sweden and Finland acceded into the Community. Conditions and criteria for membership met by these three countries included Article 237 of the Rome Treaty and Article O of the Maastricht Treaty, which stated that 'any European state may apply to become a member'.⁴⁸⁷ The European Union does not specifically or officially define what it means by the term 'European', but it does combine 'geographical, historical and cultural elements which all contribute to the European identity' in its assessments. It determines eligibility by reviewing applicants on these three areas, taking into account 'shared experience of proximity, ideas, values and historical interaction'.⁴⁸⁸ Because of the difficulty in devising a 'simple formula' based on these criteria, the Commission has stated that 'it is neither possible nor opportune to establish now the frontiers of the European Union, whose contours will be shaped over many years to come'.⁴⁸⁹ Other essential conditions are outlined in Article F of the Maastricht Treaty. Here it states that membership into the Union will be based on exhibiting establishment for 'principles of democracy and respect of fundamental human rights', thereby satisfying the 'three basic conditions of European Identity, democratic status, and respect of human rights'.⁴⁹⁰

Therefore, the Community, whilst working towards a more formalised strategy of enlarging itself, has steered away from further defining parameters of eligibility and listing an detailed set of procedures for meeting cited conditions and criteria for membership. It was not until the 1993 Copenhagen European Council meeting that the Community began to further outline conditions and criteria necessary for accession into

the Union. But with these developments, the Community has still maintained its stance of providing guidance without detailing all procedures for membership. Instead, it provides criteria for which prospective member states are to develop or transform themselves to meet, with prospective member states determining how to implement and meet the set of criteria.

With each enlargement, the evolution of Community ideas about enlargement and membership become more defined, although still vague. For example, the Commission stated in its opinion of the Portuguese application for membership, that the 'Treaties of Rome and Paris signify the clear intention that other European States sharing the democratic ideal of the European Community's member states should be able to accede to the Community.'⁴⁹¹ Within the growing number of documents and treaty articles governing the enlargement of the European Union, there were vague terms used to narrow acceptance or rejection for membership, but the rule of law was not cited as a criteria or required as a part of this process.

Section Two - Current Enlargement Plans and the Rule of Law

Within the current enlargement, the rule of law has become a prominent part of the process. The rule of law was mentioned in earlier EU documentation as a principle to be safeguarded along with principles of representative democracy.⁴⁹² It was then with Article F.2 of the EU Treaty⁴⁹³ (entered into force on 1 November 1993) that respect for human rights, democratic principles and the rule of law were for the very first time, made 'essential elements for EU membership and guiding principles of its activities.'⁴⁹⁴ Subsequently, at the European Council meeting in 1993 at Copenhagen, the Council stipulated that countries seeking membership must meet a range of criteria, including: 'stable institutions guaranteeing democracy, the rule of law, human rights and respect for

and protection of minorities.⁴⁹⁵ It was with this European Council meeting in Copenhagen that the rule of law principle was explicitly cited as a requirement for EU membership.⁴⁹⁶ This was a significant change for the Community, as it is with the Copenhagen criteria that the 'first clear rules for membership of the EU' are cited.⁴⁹⁷ The Copenhagen criteria makes explicit the 'economic and political preconditions for membership, but fall short of setting out a detailed check list or objective yardstick.'⁴⁹⁸ As a criteria for membership, the rule of law has been explicitly quoted in Community documentation, under the political aspects which focused on: 'the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.⁴⁹⁹ It was also included in a more recent document, the Council's resolution on human rights, democracy and development, which 'underlined its [the Community's] attachment' to particular principles, including the rule of law.⁵⁰⁰

One of the main reasons for inclusion of the rule of law as a requirement for membership with the current enlargement plans, is because it is considered important and necessary for the formation and support of an 'autonomous civil and political society' in transition countries, especially those who were formerly governed by an authoritarian government.⁵⁰¹ This is based upon the notion that only when a government and its institutions are effectively held accountable to the rule of law that protects individual freedoms and rights, and the necessary conditions for the development of a free and active civil society exists, that democracy can become a possibility.⁵⁰² The decision to include the rule of law in documentation covering enlargement and respect for democratic principles and human rights was 'aimed at giving the EU a more uniform and coherent approach to human rights and democratic principles.'⁵⁰³ The rule of law was also included because it was expected that 'the foundations for a broader Community' including current member states and prospective member states, would be based upon

this important principle.⁵⁰⁴ The Community and the European Parliament explicitly stated that 'an efficient and trustworthy public administration is a vital element in preparations for EU membership to strengthen the rule of law and economic and social cohesion.'⁵⁰⁵

These above ideas illustrate that the rule of law has been held to be of great importance and has been identified by the various EU institutions as a fundamental principle for 'any sustainable, socially fair and environmentally sound economic development.'⁵⁰⁶ It has been mentioned within EU documents, in the same breath as development of 'a pluralist and democratic civil society', as a principle that 'aids in the set-up of guidelines, procedures, and practical measures aimed at promoting civil and political freedoms alongside economic and social rights, by means of a representative political system based on respect for human rights.'⁵⁰⁷ With this in mind, the establishment of the rule of law in transition countries helps to ensure the establishment of the 'supremacy of the law, judicial independence, the transparency of decision-making processes and the adoption of a legal order offering adequate legal guarantees for the respect of citizens' rights.'⁵⁰⁸ These features are important not only for the development of democracy, but together with a representative democratic government, the 'most secure framework for economic efficiency and political power.'⁵⁰⁹ Because of this perception of the rule of law, it has been identified as a fundamental principle for those countries in transition who are applying for EU membership in the future.

The importance of the rule of law to the EU is evident in various Community documents. The European Union institutions have given their views and opinions on the role the rule of law principle is to play in consideration of new member states, through treaties, regulations, and Community communications and documents relating to the topic of enlargement eastwards. The rule of law has also played a role in the assessment of individual applicants, taking account of their institutional structures and operations.

Evaluation and determination of whether a country supports and is based upon the rule of law is made by the Commission with consultation of the Council and the Parliament, because this principle has been explicitly cited in what has become known as the 'Copenhagen criteria'.⁵¹⁰ The criteria state particular conditions that prospective member state countries need to meet, if they are to be considered for membership to the European Union. These conditions include:

- stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the ability to cope with competitive pressures and market forces within the Union;
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.⁵¹¹

These criteria and conditions developed at the European Council meeting formed part of the European Parliament's resolution on enlargement. During consultation on the enlargement strategy from the Commission, the Parliament identified and stated that it expects that an enlarged Union will be based on the rule of law and democracy, because this principle was important for the protection of individual rights and freedoms. All three institutions have maintained that this has been and should continue to be, the overall goal of the Union and one which needs to be made clear to applicant countries, because the Community would be unwilling to let any country who was not committed to these ideas, to become a member state of the EU. This resolution and other conditions have been detailed in documents such as, a) the European Parliament's Resolutions on Enlargement (9.12.1997), b) in the Accession Partnerships (27.3.1998) as decided by the Commission after consultation with the European Council, c) the Regular Reports From the Commission on Associated Countries' Progress Towards Accession (1998, 1999, 2000), and d) the Agenda 2000 documents (the Commission's opinions of

individual applicants). These documents have identified 'priority areas' and medium and short-range goals for each individual applicant for EU membership.

For example, in the Agenda 2000 documents, the Commission gave its opinions on individual applicant countries from Central and Eastern Europe. Within its opinions, under the section on membership criteria, the Commission analysed the then current situation in each applicant country, reviewing the reform of institutions and the governing system, as a gauge of the country's commitment to ideas of the rule of law and democracy. This reflected the EU's entire enlargement strategy and its belief 'that the length of, and rate of progress in, negotiations could vary from country to country in terms of the ability to adopt the *acquis communautaire*, ... and equip themselves with stable institutions which respect the rule of law'.⁵¹² The Commission was looking for changes to political institutions, as well as looking for signs of commitment by officials in the applicant countries towards continuing and furthering political, as well as economic reforms. This investigated whether institutions (such as the legislative, executive and judicial branches) were functioning correctly and were 'mindful of the limits of their competence and willing to co-operate with each other'.⁵¹³ For example, the Community's enlargement strategy and the Commission's assessment take into account judicial independence. This is one area examined with regard to membership criteria, because as has been noted by the European Parliament, 'the independence of the judiciary is one of the pillars upholding the rule of law and [is] fundamental to the effective protection of rights and civil liberties of all'.⁵¹⁴ In assessing whether the rule of law is operational in a country, the Commission has taken into account and examined, the 'main ways in which public authorities in each of the candidate countries are organised and operate, and the steps they have taken to protect fundamental rights'.⁵¹⁵ In its assessment and examination of a country, the Commission and other EU institutions have

taken into account how countries are governed at the time of assessment, although any stated intentions to reform particular areas are also taken into consideration.

However, reviews of prospective member states by the Commission went deeper than just investigating 'surface' observable changes.⁵¹⁶ The Commission was more interested in determining how the rule of law was operating in practice.⁵¹⁷ For example, in its opinions on Bulgaria, it stated that Bulgaria had adopted 'democratic institutions whose security seemed secure'.⁵¹⁸ Bulgaria believed it demonstrated its democratic stability through its holding of free elections in both 1994 and 1997. Despite this and other examples of Bulgaria's commitment to reforming itself to become more democratic and based on the rule of law, the Commission still felt that the stability of Bulgaria's democratic institutions 'need to be reinforced by fuller respect in practice for the rule of law'.⁵¹⁹ What this alludes to is the fact that on paper and as government policy, the country believes in the importance of the rule of law. However, what the EU is looking for with regard to the rule of law, is the actual practice and operation of institutions showing respect and support for this principle in everyday life. The EU feels that this is important for Bulgaria, but also for other countries in the region, because within the developing system of government, there are problems (founded and unfounded) with those associated with or trained under the previous regime, who once used law to serve their own interests or those of the governing regime.⁵²⁰

Another example cited in an interview with a source from the Commission, focused on corruption in Bulgaria. This source believed that the country needed to continue to work towards stamping out the wide-spread corruption within its system. There needed to be the creation of an 'atmosphere where people believe and understand the meaning of contractual agreements'. The creation of an atmosphere which respects the rule of law, would counter the way in which 'corruption undermines civil society' and

would encourage wider respect for rules by the people, thereby reinforcing fuller respect for the rule of law.⁵²¹ This reiterates the point made by the Commission in its November 1998 report on Bulgaria, where it concluded that while Bulgaria has met the Copenhagen political criteria, 'continuing efforts were needed in the fight against corruption and to reform the judiciary.'⁵²² It further added that 'progress in the fight against corruption' had been made and needed to be continued. The Commission, in its Report on Bulgaria, re-emphasised that 'continued attention also needs to be paid to respect for the rule of law at all levels of the administration and by the law enforcement bodies.'⁵²³

Another example focused on Bulgaria's administrative capacity. It was reiterated that although Bulgaria has democratic institutions in place, it must move towards the next level and it needs a well-functioning public administration for economic and political structural reasons, and development of civil society.⁵²⁴ For instance, Bulgaria has adopted a new legal framework, but this needs proper implementation and further reform of the judicial system.⁵²⁵ This and numerous other examples could be called upon to further illustrate that although Bulgaria (like other Central and East European countries) have made much progress in adopting democratic institutions and practices, the much more difficult task of reforming existing institutions, procedures and societal values, still remain.

Bulgaria is not alone in its need to improve upon the efforts it has already made towards ensuring the rule of law becomes a fundamental basis of the country. What Bulgaria's situation illustrates, is that while the rule of law has been identified as an important principle for EU membership, many CEEC governments and especially their citizens, do not wholly understand or fully comprehend the complexity of this principle and how it affects them. The lack of democratic values and practices whilst under the Soviet Union, have made it a challenge for such as fundamental principle like the rule of

law to become quickly instilled within the cultures and societies of these prospective EU member states.⁵²⁶

The Commission's fundamental concern has been with the operation and use of the rule of law in prospective member countries. Throughout its investigation and assessment of prospective member states, the Commission has not concerned itself with a 'formal description' of the rule of law, but rather has chosen to focus on assessing the extent to which the rule of law is supported, implemented and aiding in the proper functioning of institutions and procedures within prospective member countries.⁵²⁷ It is the actual operation of the rule of law in prospective member states that is of major concern and focus to the European Union, rather than observance of a particular conception of this principle or a formal declaration to be based on the concept.

An examination of the Commission's opinion of Estonia, illustrates its concern with the actual functioning of institutions based on the rule of law and not only with the manner in which Estonia is conceiving or understanding the rule of law. In its opinion of Estonia in meeting the political criteria for membership, the Commission stated that there existed respect by Estonia's political institutions, for the limits of each institution's sphere of responsibilities and duties. There also existed co-operation between the political institutions, especially in the fight against corruption, which the Commission has acknowledged as being at an acceptable level, but which needs to be intensified and sustained.⁵²⁸ It is important to the EU that in addition to correctly functioning institutions co-operating and working within their sufficient means, these institutions in supporting and being based on the rule of law should be protecting the interests and freedoms of individuals from coercive and discriminatory actions.

The point raised above regarding the Commission, and those to follow regarding the European Parliament's stance on defining the rule of law, although a common point

between the two institutions illustrates the lack of uniformity in implementation and application of the rule of law within the European Union. More importantly, it exemplifies the reason why concern and focus on implementation only, itself lacks uniformity. This is because the scope for understanding what the rule of law means is unlimited, thereby allowing for variation in implementation and application of this principle as a criterion of the enlargement process.

The European Parliament, much like the Commission, has concerned itself more with the use and implementation of the rule of law rather than with defining the rule of law as a concept. The Parliament has chosen to use the term 'the rule of law' without subscribing to or attaching a particular meaning to the term. It has instead chosen to use the term loosely, as a founding principle upon which institutions and the political infrastructure of an applicant country must not only rest upon, but also support and further develop. Despite use of the term without a formal or explicit definition, the manner in which the term is used implies particular features identifying it as a 'fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural.'⁵²⁹ This implies that there is a 'means of recourse enabling individual citizens to defend their rights'; that there are 'limitations on the power of the State' through 'a representative government drawing its authority from the sovereignty of the people'; and that it 'shapes the structure of the State and the prerogatives of the various powers.'⁵³⁰ The rule of law, as envisaged by the European Commission, revolves around the implementation and actual use of the principle in practice, rather than with defining this principle and producing detailed prescriptions for it.

An example of this was the European Parliament's utilisation of the term 'rule of law', when it stated that it 'believes that an efficient and trustworthy public

administration is a vital element in preparations for EU membership to strengthen the rule of law and economic and social cohesion'.⁵³¹ It has also noted that 'the independence of the judiciary is one of the pillars upholding the rule of law and fundamental to the effective protection of the rights and civil liberties of all'.⁵³² While it has made remarks in relation to the rule of law, these remarks have not described what the European Parliament means by the term, but rather it has declared that it is necessary for applicant countries to develop stable institutions that respect and strengthen the rule of law concept. The Parliament's reference to the term 'rule of law', reflects its understanding of this concept, as relating to the development and support for an independent judiciary, the protection of the rights and freedoms of individuals, and a trustworthy and transparent public administration. Like the Commission, the European Parliament, through its EU-Bulgaria Joint Parliamentary Committee, has also cited amongst other areas for continued improvements: 'efforts to fight corruption, and improving institutional capacity, particularly by strengthening the judiciary.'⁵³³

Similarly, the Council has concerned itself with operation and implementation of the rule of law, in its proposal 'on the development and consolidation of democracy and the rule of law and respect for human rights' stated that the 'Community shall in particular support operations aimed at:

- c) promoting or strengthening the rule of law, notably through measures to uphold the independence of the judiciary and strengthen it (the administration of justice, treatment of offenders, crime prevention) and for the activities of parliaments and other democratically elected institutions; supporting institutional and legislative reform⁵³⁴

What this section has illustrated is that the European Union institutions have stated that the rule of law is a necessary and fundamental principle for the development of democracy and ensuring protection for individual rights. Whilst citing the rule of law as a requirement for EU membership, it has at the same time, side-stepped and seems to

have decided that it is unnecessary to define what it actually means by its use of the term 'rule of law'. This has problematic implications, as there are, as seen in Chapter Two, different conceptions of the rule of law in use across the current Community of fifteen member states, and this Community will possibly increasing its size by another twelve in the future. These developing and potential problems and disturbances to an enlarged Community without a common conception of a founding principle will be explored in the next section.

Section Three - Discrepancies and a Return to the Idea of a Uniform Conception

This section will be reviewing two main points with regard to development of a uniform conception of the rule of law, (or lack there of). The two points discussed here are, firstly, it identifies and discusses the discrepancy between the Community's decision to make the rule of law a requirement for membership in the current enlargement proceedings and its decision to support differentiation in understandings across the Community and in prospective member states. Secondly, how the EU is assessing prospective member states on meeting the requirement of being based on the rule of law without a standard conception upon which to make such judgements, will be discussed.

As has been discussed in earlier sections of this chapter, the rule of law has gained eminence in the current enlargement proceedings and has been raised to the status of 'founding principle' upon which all states of the European Union must be based upon, as this principle is important for democracy and protecting individual rights. At the same time, one of the main problems with utilising the term 'rule of law' with regard to the current enlargement proceedings is that there is no uniform or standard conception that has been agreed upon. The discrepancy here is between the importance of the rule of

law to the Community, and at the same time, the lack of a shared understanding or conception of this fundamental principle.

This raises the question that if this principle is so vital to democracy in the Community, why has the Community shied away from developing a universal conception to be utilised by all member states? Some argue that there is in fact a general and shared conception utilised by the Community. One source from the European Parliament makes this point when asked about whether there was a uniform conception of the rule of law in use by the Community. The source stated that there is a consensus about a common experience of democracy, government, etc., within and across the EU member states.⁵³⁵ If so, why has the EU not put this in writing, especially for the benefit of prospective member states who lack understanding and practice of democracy and the rule of law?

As stated earlier, the European Union supports differentiation in conceptualisation of the rule of law, based on historical and cultural differences. This has been reiterated with respect to prospective member states from Central and Eastern Europe. It was also previously noted, in an interview with a source from the European Parliament, who believed that countries from Central and Eastern Europe would not develop conceptions of the rule of law that are exactly the same as in Western countries, 'as Western countries themselves do not have the exact same conceptions.'⁵³⁶ What is needed, stated this source, is to 'encourage other countries in the development of their conceptions of the rule of law' to 'build on practices [specific] to individual countries', taking 'into account each individual country's traditions and cultures.'⁵³⁷ However, the problem with this situation is that prospective member states are developing their own understanding of the rule of law based on historical and cultural experiences that lack the values necessary to develop an understanding and practice of democracy and the rule of law.

This in turn raises the question, previously identified in chapter two, of how the Community is determining whether prospective member states are meeting the requirement of the rule of law. It also questions how assessment can be made fairly and uniformly, if the Community accepts that variations in conceptualisations of the rule of law exist due to historical and cultural factors that influence the interpretation of the principle, by those conducting the assessment and those being assessed. For example, assessment of the rule of law in prospective member states have entailed looking at institutions like the judiciary, and determining whether the rule of law had been implemented within a country. The assessment of such institutions is problematic as government institutions have developed in accordance to and influenced by historical and cultural experiences of a particular country. Therefore, these influences also have a role in the understanding, development and support of the rule of law, producing divergence in the conceptualisations held. This is problematic because the lack of standard leaves assessment of this principle open to potential allegations of subjectivity and bias.

Another point is that despite such claims to support differentiation among prospective members, there seems to be a trend of steering these countries towards particular institutions and procedures associated with supporting and implementing the rule of law in a manner that is consistent with a particular conceptualisation of this principle. Such a discrepancy between accepted practice and actions by the European Union seems to illustrate how the absence of an accepted uniform standard of the rule of law is causing confusion and leading towards potential conflicts within the EU. Potential conflicts have been cited by some sources, that the EU, whilst stating one thing and demanding another, is setting a dangerous precedent for itself, in that it is requiring of new members, standards that current members have not met and in many cases, have no intention of meeting, as it would require a major overhaul of their own institutions. As

one source from the Commission stated, prospective member states are 'being asked to make systemic changes that not all [current] member states have made themselves'.⁵³⁸ Therefore, the support for differentiation of understandings seem to reflect in some ways, the desire of current member states of the EU to uphold the status quo and avoid changes that would be necessary if there were a set standard. This is because the development and utilisation of a uniform conception of the rule of law for use across the EU would entail the difficult job of defining this conception. This definition would entail some countries to make changes to their current systems, in some cases, potentially going against developments according to their particular histories, cultures, ideas, and values. How would a uniform understanding be determined in this situation, balancing these different traditions and understandings? Perhaps this has been one of the reasons a uniform conceptualisation of the rule of law has not been a priority amongst the Community and its member states. Such a move would cause tensions within the Community, as there will those countries who must make drastic changes to conform, whilst others have little or not changes to make.

Another reason for the lack of a uniform rule of law conception within the Community has been alluded to by some sources in both the Commission and Parliament. Sentiments and understandings held by those within the Commission and Parliament seem to indicate that there is no clear idea of what the rule of law really means as a concept. It also reflects the feeling that with regard to prospective member states and the enlargement proceedings taking place, it is not necessary to define the term. To many, what is important is that the principle is operational and functioning within countries. Sources within the Community seem to have various ideas about what the concept entails. For instance, one source defined the rule of law 'as where a state has institutions such as courts and individuals such as judges that are functioning properly

and according to laws.¹⁵³⁹ Another source defined the rule of law as 'important for a body of legislation that incorporates human rights as codified internationally, [and] should be applied and observed.'¹⁵⁴⁰ What this difference reflects are variations in traditions, the former places emphasis upon judges and underlines a more institution-based rule of law conception, while the latter definition emphasises a rights-based conception of the rule of law, as discussed earlier in chapter one. These illustrate that understanding of the rule of law within Community institutions reflects the differentiation existent between various member states as illustrated and discussed earlier in chapter two. And it is these differences that make it difficult and very challenging, with regard to developing a uniform conception of the rule of law for the entire Community.

These differences not only illustrate the existent differences between EU institutions and make development of a uniform conception of the rule of law for the Community difficult and challenging, but they also influence assessment of prospective member states. Differentiation in understandings of the rule of law has focused different EU institutions on different aspects with regard to how prospective member states are assessed and on what areas assessment seems to be concentrated. One such example is the different emphasis exhibited in opinions of the Commission and the European Parliament, on their assessment of candidate countries' progress in reinforcing and strengthening their judicial systems. In its *Strategy Paper 2001*, the Commission concluded that,

Further progress was made in reforming and strengthening the **judicial system**, as a vital element in ensuring respect for the rule of law and in the effective enforcement of the *acquis*. Several countries advanced in adopting basic legislation, strengthening human resources and improving working conditions. Efforts in this area need to be further stepped up, with particular attention to ensuring the independence of the judiciary. ... However, while efforts to reform or strengthen the judiciary are slowly

starting to bear fruit, these should be further accelerated and reinforced, in particular to ensure effective enforcement of the *acquis*. The fight against corruption should be further stepped up. Tangible results in this domain are needed to respond to public concern and help ensure a transparent business environment.⁵⁴¹

On the other hand, the European Parliament's opinion notes that, 'the candidate countries have much ground to make up in guaranteeing legal certainty' and 'considers an efficient judicial system with independent courts, a sufficient number of trained judges, judgments given in a reasonable time and enforceability of judgments as one of the essential preconditions for the candidate countries' entry into the internal market, because the equitable protection of the rights of economic operators is essential in the interest of fair trade'.⁵⁴² It goes on to note that,

...despite progress in the reform of the courts and the police forces in the candidate countries, significant improvements are still needed in terms of the way in which democracy operates, the independence of the judiciary, coordination between departments and the qualifications of officials, for example in the fight against economic and financial crime⁵⁴³.

Although this example reflects similar ideas with regard to judicial system improvements in candidate countries, what it also suggests is that there is a lack of coordination in assessment and differences in emphasis upon which different individual EU institutions base their assessments and opinions of candidate countries' accession progress. It is illustrative of a trend in the EU to develop approaches and implement them, despite unclear definitions or ideas upon which these are based. Therefore, the EU's decision to leave the rule of law undefined is not an isolated case, but merely one of several instances.

Aside from disagreements between the various institutions on the extent and content of proposals for enlargement strategies to include countries from Central and

Eastern Europe into the Union, there is also the problem of differentiation in assessing individual applicants' preparedness for membership and its obligations, as briefly touched upon above. These differences are due to a number of factors- such as, differences in strategies by prospective member states towards fulfilling membership criteria and the EU's own enlargement strategy.

Conclusion

Transition of countries in Central and Eastern Europe will be a long and complex process in their bids for European Union membership. This is because it will take more than creating democratic institutions, a democratic governing system, or a market-oriented economy, to make these countries become more democratic and based on the rule of law concept. It will also necessitate reforms in the habits and the way of thinking, of the individuals in these countries. The changing of a country's infrastructure is difficult enough, but the necessity of changing society to support and further develop what changes have been made, is the next step, and in many ways, the more important step to building the country into one that is founded on democratic ideas, good governance and most importantly, the rule of law. This is where the absence of a uniform conception of the rule of law, combined with the European Union's support for differentiation in conceptualisation, could prove problematic for prospective member states attempting to meet the requirement of the rule of law for membership.

Currently, many citizens of countries in transition lack an understanding of how the reforms made to institutions and the governing system can be 'effectively used to voice grievances.'⁵⁴⁴ They lack an understanding of the rule of law in everyday life. The fundamental problem here is that citizens do not fully understand nor are they fully aware of their rights, freedoms, and what the relationship between individuals and the state

should now be, within such a new governing system based on the rule of law concept. As Ognian Pishev commented, it is 'easy to proclaim a belief in democratic ideals and values', but much of the previous governing system and its practices still remain.⁵⁴⁵ It is also important to acknowledge the fact that the histories of Central and Eastern European countries differ from those of western countries, and this will also have an effect on the development of their conceptualisation of the rule of law. Because without taking into account and without proper understanding of their histories and cultures, it is difficult to understand the conditions these countries are facing as they struggle to transform their countries. These conditions will have a direct effect on the development and implementation of the new political structures and institutions that support individual autonomy and rights according to the concept of the rule of law. Because of the differences in histories, culture, and their current developments, it is likely that these countries will have a general understanding of the rule of law, but the ways in which this concept is utilised and made a part of the new governing system and structures, will differ. While this is something that the EU is supporting and encouraging, it does not account for the fact that these prospective member states have little recent experience, if any, with democracy and the rule of law, to enable them to ensure that the rule of law is a fundamental basis for the reforms and restructuring taking place.

The other concern that has been brought out in this chapter, has been the fact that an absence of a uniform conception leaves the EU and candidate countries without a standard against which to measure candidates' progress. Thereby leaving assessment open to potential bias and non-uniformity itself. Podkaminer reiterates this, stating that 'on many specific questions the judgement on the maturity of individual candidate countries will have to be rather arbitrary.'⁵⁴⁶ Since there is a lack of a shared rule of law conception, any progress made by candidate countries, would be determined according

to 'policy makers' own preferences and beliefs... and not necessarily the distinct 'EU guidelines'.¹⁵⁴⁷ Podkaminer believes that this may 'reflect an ongoing change in views on further enlargement (and on internal reform) of the Union'.¹⁵⁴⁸

The European Union has chosen not to define the rule of law, but has instead concerned itself with the application and operation of this important principle in practice in candidate countries. In addition, the Community has insisted and stressed the need to make allowance for candidate countries to develop their own 'brand' of rule of law and democracy that reflects their individual situations, histories, and cultures. While this move has been looked upon favourably by the institutions and member states of the EU and candidate countries, it could prove to be more problematic than helpful to candidates and an enlarged EU. The problem with this strategy is the fact that candidate countries have little if any, experience with democracy, much less a principle the EU considers fundamental for the development of democracy and necessary for membership. The importance of this principle combined with the absence of historical understanding or experience of it in the CEE region, suggests that leaving it to candidates to determine and define the rule of law in accordance to individual circumstances is risky and potentially short-sighted on the EU's part. It raises the fundamental question of how candidate countries are expected to ensure the rule of law is operating properly, in order to build a democratic system of government upon it, when they lack knowledge, understanding, or guidance of this principle.

The EU has 'steered' candidates towards the reform or creation of particular practices and institutions that imply understanding of the rule of law, such as ensuring 'an independent judiciary, effective and accessible means of legal recourse, and a legal system guaranteeing equity before the law'.¹⁵⁴⁹ This steering of candidate countries seems to imply two things - firstly, that the EU seems to utilise a particular conception of the

rule with regard to assisting candidate countries. However, the EU is also contradicting itself by encouraging the development of certain institutions, when the development of these institutions are dependent upon particular conceptions of the rule of law, as determined by a country in accordance to its experiences, history, culture, and values.

⁴⁷⁶ European Parliament, *Proceedings of the Round Table on 'Special Rights and a Charter of the Rights of the Citizens of the European Community' and Related Documents*, Florence, 26-28 October 1978, 'Declaration on Democracy (Copenhagen, Denmark, 8 April 1978)', p.133.

⁴⁷⁷ *Official Journal of the European Communities*, No.C44/32, 'Part II: 1. Community accession to European Convention on Human Rights, A3-0421/93', Tuesday, 18 January 1994.

⁴⁷⁸ Resolution 1036 (1994) on the progress of economic reform in Central and Eastern Europe: Lessons and Prospects, <http://stars.coe.fr/ta/ta94/ERES1036.htm>.

⁴⁷⁹ The European Union Committee of the American Chamber of Commerce in Belgium, *Guide to the Enlargement of the EU*, Brussels, Belgium, 1998, p.6.

⁴⁸⁰ Office for Official Publications of the European Communities, *Treaties establishing the European Communities, Treaties amending these Treaties, Documents concerning the Accession*, Luxembourg, 1973, (regarding Article 237 - EEC Treaty), p.336.

⁴⁸¹ The Treaty on European Union, also known as the Maastricht Treaty.

⁴⁸² The EEC Treaty, also known as the Treaty of Rome, went into force in 1993.

⁴⁸³ Bulletin of the European Communities, Supplement 2/86, *Single European Act*, p.10, and The European Union Committee of the American Chamber of Commerce in Belgium, *Guide to the Enlargement of the EU*, p.6.

⁴⁸⁴ The European Union Committee of the American Chamber of Commerce in Belgium, *Guide to the Enlargement of the EU*, p.6.

⁴⁸⁵ The rule of law was not mentioned as a criteria for deciding EU membership until the Copenhagen Criteria in 1993, however, the principle itself has been cited in various other EU documentation prior to 1993 as an important principle, but has never been defined in any form.

⁴⁸⁶ Bulletin of the European Communities, Supplement 2/78, *Enlargement of the Community. Transitional Period and Institutional Implications*, February 1978, pp.5-17 of this document outlines a more detailed strategy for integrating new countries via a transitional period.

⁴⁸⁷ See Treaties of Rome and Maastricht, and Bulletin of the European Communities, Supplement 3/92, *Europe and the Challenge of Enlargement*, March 1992, p.11.

⁴⁸⁸ Bulletin of the European Communities, Supplement 3/92, *Europe and the Challenge of Enlargement*, p.11.

⁴⁸⁹ *Ibid*, p.11.

⁴⁹⁰ *Ibid*, p.11; The European Commission Background Report. *The Enlargement of the European Union*, B/3/97, February 1997, p.2; European Parliament, 'The Declaration on Democracy' (Copenhagen, 8 April 1978) in *Proceedings of the Round Table on 'Special Rights and a Charter of the Rights of the Citizens of the European Community' and Related Documents*, Florence, 26-28 October 1978, p.133. It stated that the 'Heads of Government confirm their will, ... to safeguard the principles of representative democracy, of the rule of law, of social justice and respect of human rights.' It also declared that 'respect for and maintenance of representative democracy and human rights in each member state are essential elements of membership of the European Communities.'

⁴⁹¹ Bulletin of the European Communities, Supplement 5/78, *Opinion on Portuguese Application for Membership* (transmitted to the Council by the Commission on 19 May 1978), p.7.

⁴⁹² European Parliament, 'Declaration on Democracy' (Copenhagen, 8 April 1978) in *Proceedings of the Round Table on Special Rights and a Charter of the Rights of the Citizens of the European Community and Related Documents*, Florence, 26-28 October 1978, p.133.

⁴⁹³ Communication from the Commission of 12 March 1998 on *Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenge of the Partnership between the European Union and the ACP States*, Annex I - Key Stages in taking account of human rights, democratic principles and the rule of law in external relations, March 1998, p.18,
http://europa.eu.int/comm/development/lex/en/pdf/com_98_0146.pdf

⁴⁹⁴ Communication from the Commission of 12 March 1998 on *Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenge of the Partnership between the European Union and the ACP States*, Annex I - Key Stages in taking account of human rights, democratic principles and the rule of law in external relations, March 1998, p.18.

⁴⁹⁵ European Parliament, Delegations to the Joint Parliamentary Committees, *EP Resolution on Enlargement*, 9 December 1997, JPC/CCEE/GH/md, PE 225.134, p.2.

⁴⁹⁶ The European Union Committee of the American Chamber of Commerce in Belgium, *Guide to the Enlargement of the EU*, p.7.

⁴⁹⁷ *Ibid*, p.7. Despite the fact that this was the first time clear rules for membership were made explicit, many of the ideas and practices existed prior to its citing, as 'understood' but non-stated practices for the enlargement of the Community.

⁴⁹⁸ *Ibid*, p.7.

⁴⁹⁹ *Ibid*, p.7.

⁵⁰⁰ Communication from the Commission of 12 March 1998 on *Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenge of the Partnership between the European Union and the ACP States*, Annex I - Key Stages in taking account of human rights, democratic principles and the rule of law in external relations, March 1998, p.18; The European Commission, *Background Report, The Enlargement of the European Union*, B/3/97, February 1997, p.3 - which similarly states that according to the Copenhagen European Council in June 1993, membership would be granted upon meeting obligations including: 'the establishment of institutions guaranteeing democracy, the rule of law, human rights and the respect for and protection of minorities.'

⁵⁰¹ Juan J. Linz and Alfred Stepan, 'Toward Consolidated Democracies', *Journal of Democracy*, v.7, n.2, April 1996, p.18.

⁵⁰² This was illustrated in the European Commission document *Democratisation, State of Law. Communication from the Commission of 12 March 1998*, 'Part II. Strengthened aims of co-operation and partnership, A) Human Rights, the role of democratic principles', http://europa.eu.int/comm/development/lex/en/1998/com_98_0146_03.htm, p.2 - where under the rule of law section, it stated: '4. The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers. It implies, for example: a legislative respecting and giving full effect to human rights and fundamental freedoms; an independent judiciary; effective and accessible means of legal recourse; a legal system guaranteeing equality before the law; a prison system respecting the human person; a policy force at the service of the law; an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.'

⁵⁰³ Communication from the Commission of 12 March 1998 on *Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership Between the European Union and the ACP States*, Annex I - Key stages in taking account of human rights, democratic principles and the rule of law in external relations, p.18; COM(95) 216 Final, 23 May 1995.

⁵⁰⁴ European Parliament, Delegations to the Joint Parliamentary Committees, *EP Resolutions on Enlargement*, p.2.

⁵⁰⁵ *Ibid*, p.4.

⁵⁰⁶ Resolution 1036(1994) 1 on the progress of economic reform in Central and Eastern Europe: lessons and prospects, <http://stars.coe.fr/ta/ta94/ERES1036.HTM>, p.2.

⁵⁰⁷ Proposal for a Council Regulation (EC) No. of ... On the Development and Consolidation for Human Rights and Fundamental Freedoms, pp.7-8.

⁵⁰⁸ Commission of the European Communities, Report From the Commission on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995), Brussels, 17.01.1997, COM (96) 672 final, p.8; Proposal for a Council Regulation (EC) No. of ... On the Development and Consolidation for Human Rights and Fundamental Freedoms, p.9.

⁵⁰⁹ John Pinder, 'The European Community, the Rule of Law and Representative Government: The Significance of the Intergovernmental Conferences', *Government and Opposition*, v.26, n.2, Spring 1991, p.199.

⁵¹⁰ The 'Copenhagen criteria' are the criteria for membership required of prospective member states in the current enlargement process and negotiations. The criteria covers various political and economic requirements, including the rule of law, that must be met before membership into the European Union is given. The criteria were created at the 1993 European Council meeting in Copenhagen.

⁵¹¹ European Commission, *Agenda 2000 - Summary and Conclusions of the opinions of the Commission concerning the Application for Membership to the European Union presented by candidate countries*, DOC/97/8, p.2.

⁵¹² European Parliament, Delegations to the Joint Parliamentary Committees, *EP Resolutions on Enlargement*, p.5.

⁵¹³ European Commission, Bulletin of the European Union, Supplement 11/97 *Agenda 2000, Commission Opinion on Estonia's Application for Membership of the European Union*, p.13.

⁵¹⁴ European Parliament, Delegations to the Joint Parliamentary Committees, *EP Resolutions on Enlargement*, p.12.

⁵¹⁵ European Commission, Bulletin of the European Union, Supplement 11/97 *Agenda 2000, Commission Opinion on Estonia's Application for Membership of the European Union*, p.13.

⁵¹⁶ By 'surface' observable changes, what is meant here are the changes to institutions and procedures to align them to EU standards, but these changes do not necessarily indicate a change in the attitudes nor reflect understanding of the changes that have been made to institutions. For example, a declaration that the judiciary should be and is independent of the government does not necessarily mean it is, unless other aspects related to this are examined - like how judges are chosen, what they are paid, how long they are to hold office, etc. Surface changes are the 'easily' made changes to institutions and the governing system, what is also needed are changes in attitudes, perceptions, and understandings of the institutions, procedures, and laws made.

⁵¹⁷ European Commission, *Agenda 2000 - Summary and Conclusions of the opinions of the Commission concerning the Application for Membership to the European Union presented by candidate countries*, DOC/97/8, <http://europa.eu.int/rapid/cgi/rapcgi.ksh?relist>, 15.07.1997, p.2.

⁵¹⁸ European Commission, *Agenda 2000 - Summary and Conclusions of the opinions of the Commission concerning the Application for Membership to the European Union presented by candidate countries*, DOC/97/8, p.2.

⁵¹⁹ *Ibid*, p.2.

⁵²⁰ Interview F conducted in Brussels- 4 May 1999.

⁵²¹ *Ibid*.

⁵²² European Commission, Directorate-General I.A. - External Relations and Directorate-General II: Economic and Financial Affairs, Joint G-24/Consultative Group Meeting on Bulgaria, *Background Paper: Relations between the European Union and the Republic of Bulgaria*, Brussels, 21 April 1999, p.7.

⁵²³ *Ibid*, p.8.

⁵²⁴ Interview F conducted in Brussels- 4 May 1999.

⁵²⁵ *Ibid*.

⁵²⁶ Interview H conducted in Brussels- 4 May 1999. The source had stated that while the rule of law has been cited as a requirement for EU membership, there are those within the EU who feel that a lack of rule of law is not a dominating factor, depending on the development of [the] situation of [a] country. This comment goes against the Community's statement supporting the rule of law as a fundamental principle and as a principle necessary for democracy and protection of individual rights. It reflects the very problem the EU faces with regard to the rule of law - that there is little agreement about what it stands for and its importance across the current Community of members.

⁵²⁷ European Commission, Bulletin of the European Union, Supplement 11/97, *AGENDA 2000, Commission opinion on Estonia's application for membership of the European Union*, p.13.

⁵²⁸ European Commission, *Agenda 2000 - Summary and Conclusions of the opinions of the Commission concerning the Application for Membership to the European Union presented by candidate countries*, DOC/97/8, p.6.

⁵²⁹ The European Commission, 'Part II. Strengthened aims of co-operation and partnership, the rule of law', *Democratisation, State of Law, Communication from the Commission of 12 March 1998*, p.2.

⁵³⁰ *Ibid*, p.2.

⁵³¹ European Parliament, *Delegations to the Joint Parliamentary Committee - EP Resolutions on Enlargement*, p.4.

⁵³² *Ibid*, p.12.

⁵³³ *Enlargement - Weekly Newsletter*, Week of the 14 July 2000, 'EU-Bulgaria Joint Parliamentary Committee Sees Progress and Pitfalls', 14 July 2000, http://europa.eu.int/comm/enlargement/docs/weekly_1407.htm.

⁵³⁴ The Council of the European Union, *Proposal for a Council Regulation (EC) No. Of ... on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms*, COM 97/357, Chapter 1, Article 2 (c), p.9.

⁵³⁵ Interview A conducted in Brussels- Tuesday, 5 May 1998.

⁵³⁶ *Ibid.*

⁵³⁷ *Ibid.*; also reiterated in Interview I conducted in Brussels- Wednesday, 5 May 1999.

⁵³⁸ Interview I conducted in Brussels- Wednesday, 5 May 1999.

⁵³⁹ Interview C conducted in Brussels- Wednesday, 6 May 1998.

⁵⁴⁰ Interview A conducted in Brussels- Tuesday, 5 May 1998.

⁵⁴¹ European Commission, *Strategy Paper 2001*, <http://europa.eu.int/comm/enlargement/report2001/index.htm>

⁵⁴² *Ibid.*

⁵⁴³ European Parliament, *European Parliament resolution on the enlargement of the European Union (COM(1999)500 – C5-0341/2000 – 2000/2171 (COS))*, http://www3.europarl.eu.int/omnsapir.so/pv2?PRG=DOCPV&APP=PV2&LANGUE=EN&SDOCTA=1&TXTLST=1&POS=1&Type_Doc=RESOL&TPV=PROV&DATE=041000&PrgPrev=TYPEF@A5|PRG@QUERY|APP@PV2|FILE@BIBLIO00|NUMERO@250|YEAR@00|PLAGE@1&TYPEF=A5&NUMB=1@DATEF=001004

⁵⁴⁴ Smolar, 'Democratic Institution-Building in Eastern Europe', p.70.

⁵⁴⁵ Ognian Pishev, 'Dilemmas of the Transition Period', *Problems of Communism*, vol.41, n.1-2, Jan.-Apr. 1992, p.67.

⁵⁴⁶ Leon Podkaminer, 'EU Membership for the Transition Countries: A Moving Target?', *The Vienna Institute Monthly Report*, v.1, 1999, p.2.

⁵⁴⁷ *Ibid.*, p.2.

⁵⁴⁸ *Ibid.*, p.2.

⁵⁴⁹ The European Commission, *Democratisation, State of Law, Communication from the Commission of 12 March 1998*, 'Part II. Strengthened aims of co-operation and partnership, the rule of law', p.2.

Chapter Five - Other Understandings of the Rule of Law

The intention of this chapter is to provide an overview of other conceptualisations of the rule of law, as defined by other international organisations both in Europe and world-wide. This is of interest at the end of this thesis, as it underlines some of the deficiencies existent in the European Union's understanding and utilisation of what many writers and theorists consider a fundamental principle for the development and maintenance of democracy and democratic institutions or practices.

This chapter is split into two sections. The first section will provide a brief summary of three international organisation's understandings of the rule of law - the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), and the International Commission of Jurists (ICJ). It will include some comparison and contrast of these three perspectives with that of the European Union - its institutions as a whole, as well as with the larger Community including the member states- illustrating some of the deficiencies of with the EU's current approach to this principle.

Following this the section delves deeper into the reasons for the development of the diverse conceptualisations held in the wider community (world-wide). It will briefly underscore some of the factors that affect the successfulness- partial or whole, or lack of thereof, with regard to the development of international organisations' understandings of the rule of law.

In the latter half of this chapter examines whether the differences and similarities in understandings and factors, as demonstrated in the previous section of this chapter, has a bearing on the co-ordination between various organisations - on assistance projects and programmes to support and maintain the rule of law in Central and East European countries. It will identify some of the factors that may have a direct effect on the development of the rule of law and democratic institutions and practices in this region,

and how international organisations are working through these in their efforts to assist in the promotion of this fundamental principle.

Section One - An International-Wide Understanding of the Rule of Law?

The organisations reviewed, include the Council of Europe, the Organisation for Security and Co-operation in Europe (OSCE), and the International Commission of Jurists (ICJ). The former two organisations were reviewed because of their connections and work on democracy projects and programmes with and for Central and East European countries whom are currently prospective EU member states. The ICJ is also considered here, because its understanding of the rule of law provides a useful illustration and contrast to the EU's understanding of the rule of law. It is especially relevant with regard to the current EU enlargement eastwards, with the development and co-ordination of democratic assistance programmes and training to prospective member states.

The Council of Europe and Its Semi-Defined Understanding of the Rule of Law

The Council of Europe, whilst having placed more emphasis on the promotion and strengthening of the rule of law, seems to have done so through the development of its own understanding of the rule of law. Its understanding of the rule of law has provided it with a framework for supporting the rule of law, as illustrated in its official documentation. This is illustrated for example, in Article 2, section (c) of its proposal for a Council regulation. In this article, the Council states that,

...promoting or strengthening the rule of law, notably through measures to uphold the independence of the judiciary and strengthen it (the administration of justice, treatment of offenders, crime prevention) and for the activities of parliaments and other democratically elected institutions; supporting institutional and legislative reform.⁵⁵⁰

Within the same document (*Proposal for a Council Regulation*), the Council of Europe outlined priority areas with regard to the rule of law. The priority areas identified by the Council's inter-departmental Human Rights Co-ordination Group are as follows:⁵⁵¹

- (a) parliamentary business
- (b) judicial procedures
- (c) legal protection of civil and political liberties
- (d) government human rights institutions
- (e) institutional reform
- (f) training armed and security forces
- (g) administrative accountability

Through these seven priority areas, the Council of Europe provides an understanding of what it associates with the rule of law principle. The Council clearly illustrates that like the European Union, it has not necessarily been concerned with defining this important principle, but rather with how the principle is to be and is utilised in the transformation of countries developing democratic foundations.

However, in the case of the Council, unlike that of the European Union, the priorities it set out seem to illustrate a more defined and focused approach towards the rule of law, as compared to the approach taken by the European Union. What the Council's priorities demonstrates is that its conception of the rule of law can be identified in terms of both Shklar's approach to the rule of law as 'institutional restraints'⁵⁵², and Walker's 'institutional approach'. This institutional approach focuses on the 'principles of legal organisation of the society'⁵⁵³. More specifically, this institutional approach⁵⁵⁴ focuses upon the structure of the legal system and the institutions which support it, in order to better ensure the protection of individual rights from coercion and abuse, especially from the government itself. As explained in chapter one, this is significant, as the focus specifically on the judiciary and legal system are regularly associated with particular conceptualisations of the rule of law. The Council's utilisation of the rule of

law has traditionally been associated with both an institutional approach and what is known as the 'rights' conception of the rule of law.

The Council of Europe has 'identified particular legal instruments which have served to give concrete form to the principle of the rule of law.'⁵⁵⁵ In fact, this emphasis was also reiterated by the Council of Europe during a Round Table meeting attended by a number of participants, including the ministers of justice from several Central and Eastern Europe countries. At this meeting, the Council stated and emphasised that the main aim of the round table was 'to reassert these new European democracies' commitment to judicial independence as a key element of the rule of law'.⁵⁵⁶ What this does not explicitly state, but does allude to, is the influence of both the institutional and rights-based conceptions of the rule of law on the Council's own understanding, to support a more active role for the judiciary.

Examples such as those mentioned above, allude to the Council of Europe's understanding of this important principle, despite the lack of any formal definition. It also provides reasons for its emphasis on the judicial and legal systems (traditionally linked to conceptions of the rule of law) with regard to its assistance towards developing the rule of law in prospective member states. In its emphasis on the development of independent judiciaries and legal systems to 'give a more concrete form to the principle', it has provided a framework to assist efforts of Central and Eastern European countries in transition.

Examples to further illustrate how differences in understanding of the rule of law affect assistance programmes, will be covered in the next chapter section focusing on what bearing similarities or differences of understandings have on co-ordination of programmes between the various international organisations. The next sub-section will

review the Organisation for Security and Co-operation in Europe (OSCE) and its understanding and utilisation of the rule of law.

The OSCE (Organisation for Security & Co-operation in Europe) and the Rule of Law

Having reviewed the Council of Europe's understanding of the rule of law and how it has chosen to define the rule of law, the OSCE's understanding seems to be well-grounded in comparison. Despite this comparison however, there are some contradictions with the OSCE's understanding of the term, which will be further elaborated upon throughout this section. One such contradiction is that the idea of the rule of law is said to consist of values and not institutions, while at the same time, the OSCE has focused on the 'defining' the rule of law as a restraint on discretionary powers bestowed upon particular governmental institutions. This is not so much a contradiction as it is a melding of two distinct understandings of the rule of law. Hayek himself alluded to similar conclusions when he concludes that despite the rule of law forming a restraint on government, there needed also to be order to ensure the proper use of power by institutions and creation of procedures to support these institutions. However, what is left unsaid here is that there also seems to be values at the foundation of these institutions and procedures. This leads to a second conflict in the OSCE's understanding of the rule of law- the need to balance restraint of discretionary powers as a check on power, with statements that the State should be the principle custodian of the rule of law.

It was acknowledged at an OSCE seminar, that 'at a popular level, it is generally agreed, even if somewhat hazily, that the rule of law is concerned with what government can do and how government can do it.'⁵⁵⁷ This statement leads one to conclude that the OSCE's understanding of the rule of law centres on the restraint of governmental discretion. This, as described in chapter one, is a perspective of the rule of law that is

shared by both Montesquieu and Hayek. Both of these writers have similarly characterised and defined the rule of law, although Hayek has stressed that although restraint on government is necessary to ensure legal certainty, this restriction should be 'only in its [government's] coercive actions'. More importantly, Hayek points out that although this is important, it is not enough, as he believes that there still needs to be a 'moral tradition' upon which such procedures are founded, because without such foundations, there is always the possibility that society would 'relapse into a state of arbitrary tyranny.'⁵⁵⁸

The OSCE has also acknowledged that 'the principle of political pluralism is an essential element of the rule of law.'⁵⁵⁹ By political pluralism, the OSCE is referring to the idea that governments should be 'representative of the diversity of public opinion.'⁵⁶⁰ This corresponds to earlier discussions regarding the relationship between the rule of law and various forms of democracy. Here, the OSCE has emphasised and seems to imply, whether intentionally or not, a connection between an understanding of the rule of law as it relates to a 'representative' form of democracy. Discussion of this relationship was detailed in the first chapter of this thesis, making the point that while the rule of law is seen by many writers as necessary for democracy, this principle can also be viewed as a check on representative democracy's overpowering of the 'minority voice' and of individuals. It is these connections that have served as the basis for the development of the OSCE's definition of the rule of law.

During the past decade, the OSCE has 'stroved to give more meaning to the rule of law concept both with respect to national institutions as well as a means of conflict prevention.'⁵⁶¹ Its commitment to the rule of law and giving meaning to it is illustrated by both its *Copenhagen Document* of 29 June 1990, and in the *Charter of Paris for a New Europe*.⁵⁶² The former of these documents reinforced the idea that political

pluralism was essential to the rule of law. It is essential, as it acts as a safeguard against abuses of discretionary powers granted to the government by law.⁵⁶³ The latter document (the *Charter of Paris*), reiterated the basic norm held by the OSCE with regard to the rule of law, 'that no one is above the law.'⁵⁶⁴

In its commitment to the rule of law, the OSCE has also prompted many discussions focused on defining some of the basic elements of the rule of law, and threats to this very concept. The identification of some basic elements and threats to the rule of law, have enabled the OSCE to focus current and future projects to better support and further the rule of law in practice. What these discussions highlighted were that participating OSCE countries and the OSCE itself, believed that some of the basic elements of the rule of law were:

a clear and transparent judicial system, an independent judiciary, equality before the law as well as equal and unimpeded access to the institutions of the system, civilian control of the police and army, and safeguards against the abuse of discretionary powers.⁵⁶⁵

Besides these basic elements, the OSCE also identified what it considered to be problem areas that 'attempt to curb the basic value inherent in the rule of law'. A few of the areas indicated were 'violation of human rights; threats to independent media; electoral fraud; and xenophobia'.⁵⁶⁶

At the recent OSCE Mediterranean Seminar⁵⁶⁷, Justice Filletti stated that the rule of law 'might have started as a legal rule', and that some people consider the rule of law to 'represent a symbolic ideal against which proponents of widely divergent political persuasions measure and criticise the shortcomings of contemporary state practice.'⁵⁶⁸ In his statement, Filletti reiterates that the rule of law is a way of restraining discretionary powers of the government, and he illustrates this by citing De Smith and

Brazier's description of the rule of law. De Smith and Brazier describe the rule of law as:⁵⁶⁹

The concept is one of open texture, it lends itself to an extremely wide range of interpretations. One can at least say that the concept is usually intended to imply:

- (i) that the powers exercised by politicians and officials must have a legitimate foundation; they must be based on authority conferred by law; and
- (ii) that the law should conform to certain minimum standards of justice, both substantive and procedural.

However, Filletti also states that 'the difficulty with the rule of law is that essentially it consists of values and not institutions.'⁵⁷⁰ The idea of the rule of law consisting of values rather than institutions, creates difficulties in trying the concept to a 'precise core definition that allows divergent views from the extreme or opposite poles of the political spectrum in the pursuit of their partisan political goals.'⁵⁷¹ It also illustrates awareness of the contested nature of the concept by the OSCE. Earlier, Filletti commented that the rule of law was designed as a safeguard for restricting discretionary powers. Yet, it was later commented that the difficulty with the idea of the rule of law is that it consists of values, not institutions. These two understandings/conceptions of the rule of law are tackling the concept from two distinct but connected, angles. The former conception defines it in terms of institutions and institutional powers, and allows room for little discretion, while the latter conception encourages differences, and with these differences, a certain degree of discretion.

There is another contradiction in the OSCE's understanding of the rule of law, from what Justice Filletti has stated in his address. Earlier it was commented that Filletti stated that the rule of law was designed to hold in check, the powers of the state and those in positions of power. He then later states in his address, that 'It is the State that should be the principal custodian of the rule of law.'⁵⁷² Does not making the state the

principal custodian of the rule of law, leave it open to possible abuse by the state and those in positions of power, for their own self-benefit? Does it not defeat the purpose of having a check on state powers, if the state is to be the overseer of this check to its own powers? There seems to be a contradiction between the proposed theory and practice of the rule of law here. In theory, the rule of law holds the state's powers in check. In practice however, as the application and implementation of the rule of law should begin at the national level, with state institutions overseeing this, how can a state hold its own powers in check, as it would, according to Justice Filletti.

The OSCE has made attempts to overcome some of the difficulties of formally describing the rule of law and the application of it in practice. Reconciling the two requires taking an in-depth look at the structure of state institutions, the basis for them, and ensuring that everyone understands that no one is above the law. The assistance programmes, projects, and seminars developed and instigated by the OSCE, for ensuring support for and the application of the rule of law, illustrates their commitment to the principle, and how it is developed in practice, from description and theory. Despite illustrating their commitment to the rule of law, the projects developed only reinforce a part of their total understanding of what the concept is. Projects such as those to create and develop non-governmental organisations (NGOs) and grassroots organisations reinforce the rule of law as a restriction on discretionary powers, but it does not reinforce the OSCE's depiction of the rule of law as based on values instead of institutions. It is again illustrated, this time by the OSCE, that there are inherent flaws with the understanding of the rule of law throughout the international community. Section two of this chapter will elaborate further upon and illustrate how these flaws and inadequacies are not acknowledged, and are in fact ignored by those creating and developing assistance projects for and in, Central and Eastern Europe.

The International Commission of Jurists (ICJ) and the Rule of Law

The International Commission of Jurists (ICJ) has taken a definition like the one developed by the OSCE, a step further. It shares a similar understanding of the rule of law with the OSCE, through defining the term as:

The principles, institutions and procedures, not always identical, but broadly similar, which the experience and traditions of lawyers in different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be important to protect the individual from arbitrary government and to enable him to enjoy the dignity of man.⁵⁷³

However, the ICJ expanded further upon their definition presented above, encompassing areas beyond civil and political rights, in the pursuit of ensuring that 'man's legitimate aspirations and dignity may be realised.'⁵⁷⁴ The ICJ advanced the concept of the rule of law beyond safeguarding individual rights, to include the 'establishment by the State of social, economic, educational and cultural conditions' that it felt the rule of law was also concerned with.⁵⁷⁵ Many of the jurists at the New Delhi Conference of the International Congress of Jurists in 1959, believed that the concept should be further enlarged to include social, economic, educational and cultural areas, because they believed that 'the basis of *all* law, ...comes from a respect of human personality.'⁵⁷⁶ As well as the fact that it was believed that,

this social content of the rule of law and the recognition of the necessity to make law and find law with due regard to the ever-changing conditions of human existence, expands the concept of the Rule of Law from the limited scope of static notions and approximates it with the Rule of Life.⁵⁷⁷

The ICJ has taken the rule of law from the realm of protector of individual rights, (as understood to be protection from the improper use of state powers), to protector of individual *human rights*. The difference between the two is the potential scope that the latter could include, that would not necessarily be included under the former. In fact,

one of the main purposes of the ICJ New Delhi Conference in 1959, 'was to clarify and formulate, in a manner acceptable to different legal systems, operating in varying political, economic and social environments, the basic elements of the Rule of Law.'⁵⁷⁸

What the ICJ's understanding illustrates, is the expansion of Shklar's conception of the rule of law, as described in chapter one. For Shklar, the rule of law stands for a limited number of protective arrangements for the 'benefit of every member of society'.⁵⁷⁹ The International Commission of Jurists has merely expanded the 'limited number of protective arrangements', having expanded the scope and range of these arrangements in its belief that this is a part of the rule of law. It defines the rule of law in terms of both institutions and values, as well as alluding to a substantive 'rights' conception of the principle, an eclectic conception that conflates and melds the distinctions outlined previously in the first chapter of this thesis.

Summary

The various understandings of the rule of law briefly covered above, demonstrate both the existence of diverse conceptions, whilst also illustrating some of the deficiencies with the European Union's conception of this important principle. From examination of these three international organisations/bodies (the OSCE, the Council of Europe, and the ICJ), some of the differences and similarities in understanding the rule of law have become clearer. In comparison to the EU's understanding of the term, other international organisations seem to have developed a more concrete conception which has played a major role in the development of assistance projects and programmes to support the rule of law. However, these organisations, despite their attempts to develop more concrete and defined understandings of the rule of law in comparison to the EU, seem also to lack coherence, as they conflate distinctions between various conceptions, as identified earlier

in chapter one. While some organisations may have been striving to understand the rule of law through a more narrowed scope, others, like the ICJ, have enlarged its scope and define the term beyond the politic and civic realm, to embrace an understanding and definition that attempts to provide a way of life definition for the rule of law, against a background of cultural diversity. This accounts for the abstractness of its rule of law definition.

In comparison to the conceptions outlined earlier in this section, the European Union also seems to lack a cohesive and uniform conception of the rule of law, which can be attributed to historical and cultural differences, and differences in traditions across the EU. This is because, as described in chapter two, the EU favours variations in the development of the rule of law, taking into account differences in understanding, based on cultural and historical differences, which have an effect on individual member states' understanding of the rule of law. This is their view with regard to both current member states and applicant states from Central and Eastern Europe. During interviews conducted with contacts in both the European Commission and Parliament, this idea regarding the differences in development of the rule of law was reiterated. One contact stated that, "There is consensus about a common experience of democracy, government, etc. across member states", but that there existed "differences, nuances" that seem to run along North/South differences or Anglo-Saxon/Continental differences due to "different attitudes and traditions."⁵⁸⁰ It was also observed, that there is a "need to encourage other countries in the development of their conceptions of the rule of law...that builds on practices of individual countries and develops particular aspects, taking into account each individual country's traditions and cultures."⁵⁸¹ This can be illustrated by comparing the differences in understanding of the rule of law between EU member states such as Britain and Germany. Their individual understandings are based on the idea each has of

the role of the state (government), individuals in the state, and the role of those in positions of authority, such as judges. For example, in Britain there is practice of judges as more than mere applicators of the law. Judges in Britain have in practice, more discretion than their counterparts in Germany.⁵⁸²

The European Union readily uses the term 'rule of law' throughout their official and internal documents and correspondence. In its documentation, the rule of law is usually linked to ideas of democracy and/or human rights. Therefore, it does appear that the European Union institutions itself, have a similar understanding of what the rule of law should encompass. This can be illustrated through extracts from interviews conducted in Brussels will be utilised. In one interview with a contact in the European Parliament, the interviewee stated that, "My understanding of this concept [the rule of law] is that it is important for a body of legislation that incorporates human rights as codified internationally; it should be applied and observed."⁵⁸³ In another interview, a contact in the European Commission commented in response to the question 'How would you define the concept of the rule of law?' in following way: that "The rule of law is seen as where a state has institutions such as courts and individuals such as judges that are functioning properly and according to laws."⁵⁸⁴

However, it has shied away from attaching a particular 'formal description' to the term, or even from identifying boundaries on the use of the term to assist in developing a uniform understanding across the entire EU. This is the case because as was reiterated by a member in the European Parliament, "...Western countries themselves do not have the exact same conceptions [of the rule of law], but they do share common ideas" with regard to the term.⁵⁸⁵ There is not a single, shared understanding of the rule of law across member states that allow for an official definition. Attempting to co-ordinate the various understandings of the rule of law across current member states would probably

include a 'watering-down' of the conception in order to ensure inclusion of all member states under this 'EU definition' of the term. So rather than having an elastic definition, the European Union has chosen not to define what the rule of law is, and has instead, chosen to focus on implementation through institutional means, by emphasising the need for particular institutions in both current and potential member states.

The emphasis on specifying a need for particular institutions, 'pushes' states towards uniform implementation and application of the rule of law. In practice, there appears to be more uniformity in the creation of certain institutional structures for supporting the rule of law. This can be illustrated by the EU's emphasis on the development and creation of certain institutions, like judicial review and procedures for appeals, which have been identified as institutions important for ensuring and supporting the rule of law. However, this emphasis presumes a shared basic understanding of what the term means and encompasses. The differences here, in theory and practice, in and between EU member states and institutions, seem to stress certain shortcomings of the European Union's understanding of the rule of law. The apparent differences across the EU illustrate the EU's lack of an overall shared understanding of the rule of law. At the same time, it also emphasises the possible inadequacies inherent in its approach to assisting Central and Eastern European countries in supporting and ensuring the application of the rule of law. These inadequacies in approaches to assistance are based on the fact that the EU lacks a uniform, shared basic understanding of the concept, on which to focus its goals for assistance to Central and Eastern Europe upon.

A shared understanding on a basic level will likely enable easier co-ordination between international organisations in the development of assistance programmes. The differences between them may be both a benefit and a deterrent to co-ordinated assistance. It may be a benefit, in that it allows for opportunities that none of the

organisations could have taken on individually, due to limited resources or expertise, or due to lack of foresight and experience to identify such a need. Differences in understandings could also be a deterrent, because most international organisations set their agendas in accordance to their individual understandings, alluding to potential clashes in perspectives and priorities.

International organisations are under pressure to co-ordinate assistance programmes and projects, due to dwindling resources and unnecessary overlaps. However, careful considerations need to be taken to ensure that their understandings of particular factors are also aligned and compatible, in order to make co-ordination efforts successful, rather than a battle of wills. This will be the focus of the next section.

Section Two - Do the Similarities and Differences in the Understanding of the Rule of Law Have a Bearing on Co-ordination Between the Organisations identified?

There is, and has been, much co-ordination of programmes and resources between the European Union and other international organisations, for implementing and supporting the rule of law. The programmes which will be examined in this chapter, are those co-ordinated between the European Union (EU), the Organisation on Security and Co-operation in Europe (OSCE)/ Office for Democratic Institutions and Human Rights (ODIHR), the Council of Europe and its European Commission for Democracy through Law, and the International Commission of Jurists (ICJ). Some of the areas in which co-ordination has concentrated, include: judicial independence, training of the judiciary (judges, lawyers, judicial staff, ombudsmen, prosecutors), training of other supporting infrastructures (i.e. police forces, border patrol/guards, etc.), development of civil society through education of the public and creation/development of NGOs and interest groups, constitution drafting and implementation, and the set-up of government institutions.

The aim of this section is to examine and compare how differences in the conception and understanding of the rule of law, across the international spectrum, emphasises the inadequacies inherent in those conceptions. Particular understandings of what the rule of law is and represents, either ignores or does not take into consideration, problems and flaws inherent in that particular conception. To illustrate this, references will be made to projects and programmes developed by international organisations, emphasising the fact that these programmes ignore certain inadequacies because they are based on flawed understandings of the rule of law.

Judicial Independence/Training of the Judiciary

The various international organisations are working together to develop and extend assistance programmes in this particular area. If they are not working directly together, then efforts have been towards co-ordinating individual projects and programmes to ensure minimum repetition occurs, in order to maximise the limited resources of most organisations, while still ensuring good coverage of areas that are considered a necessity for the further development of Central and Eastern European countries.

For instance, 'it was also broadly recognised that the independence and authority of the judiciary was a crucial element in safeguarding the rule of law and securing effective implementation of human rights and fundamental freedoms.'⁵⁸⁶ Judicial independence has been deemed as one of the most important supports for the rule of law. Therefore, many programmes that have been co-ordinated, emphasise the creation and support for an independent judiciary. This is something many in the field, working with countries in transition, realise will not be easy, nor will it occur overnight. It is the reason why the ODIHR, along with other international organisations, have focused their

programmes specifically on training programmes for judges, judicial staff, prosecutors, and lawyers, and the distribution or translation of relevant documents.⁵⁸⁷

Training programmes for judges, lawyers, prosecutors, and judicial staff, are implemented with the assistance of governmental offices of individual countries. For example, in Hungary, the training of judges and judicial staff fall under the control of the Ministry of Justice in co-ordination with international organisations such as the OSCE and the EU. Such training sessions provide judges with knowledge of EU laws and legislation, international treaties and conventions, but also the knowledge of how these various types of 'legal documents' are to be implemented and applied within their own home country. The training seminars provide judges with the opportunity to also visit other countries (EU member states, and other Western countries), to see how the judicial processes work and how the law is currently applied elsewhere in the world.⁵⁸⁸ This should provide them with a better understanding of the workings of EU legislation in practice, and how other member states have implemented these legal documents into their national legislation and have carried out the application of such Community legal commitments.

Through these training programmes, judges gain both knowledge of the text and mechanics of how judicial processes operate in other countries. The emphasis of these projects reflect an understanding of the rule of law in terms of development and reform of the procedures and structure of an institution- in this case, the judiciary. What these programmes do not acknowledge are the inadequacies of reforming or developing an institution, especially one with as important a role as the judiciary, without emphasising the need for changes in attitudes and values, along side changes in structure and procedures. These changes in attitudes are not just of those positions of authority like judges, but also those of the average person, the citizen. The need for such changes is

evident from comments about how citizens currently perceive law and the courts, in Central and Eastern Europe. This is illustrated by comments such as, the “laws and courts [of certain EU applicant states] are viewed as not accessible to citizens” and that there is a “perception of the courts as not being for citizens”, from an EU Commission source.⁵⁸⁹

For example, in Hungary, “judges, lawyers and judicial staff are learning new techniques in the judicial and legal spheres”, the learning of law is implicit rather than explicit, as “programmes are not really focused on changing their thinking about what the law is or the role of law”, but focuses on participants (judges and judicial staff) acquiring both knowledge of EU laws and the implementation/application of these into the national system.⁵⁹⁰ Without changes to attitudes and values, especially in the way that judicial staff regard law and the protection of individual rights, changes to procedures and institutions are hollow. This was further illustrated by comments that “there is not a culture of following legal rules” and “there is no recognition at the moment in Hungary of or about the role of law.”⁵⁹¹

Despite this, the programmes co-ordinated and operated by the EU, in co-operation with governments in Central and Eastern European countries, reflect the EU’s focus with regard to its understanding of the rule of law. It also reflects the deficiencies inherent in the programmes developed, as a result of the EU’s understanding and commitment to the rule of law through development of particular institutions, without thought or effort for assisting with changes at a more fundamental level. The changing of attitudes towards the role of law and role judges are to have in protecting individuals from the potential abuses of governmental powers and authorities, is important for ensuring that the rule of law is upheld, supported, and properly applied.

A major deficiency in the EU's approach to assistance is due to its lack of a uniform conception. The lack of uniformity has had and continues to present, contradictions between how the rule of law should and is supported across the EU. However, its lack of a basic defined conception has also begun to present problems with support for the rule of law within Central and Eastern European countries applying for EU membership. This is readily illustrated in the contradictions the EU presents, in what the role of judges should be and what they are in practice. In many EU member states, judges are seen as applicators of the law, they lack discretionary powers that would allow them to act as 'law-makers', in their interpretation of the law and through the decisions passed on cases. This idea is also very prevalent and reinforced, in many Central and Eastern European countries. For example, the "law is not judge-made in Hungary like it is in Britain." Some see the "judges role as applying the law only".⁵⁹² Despite this practice in most member states and many applicant states, the EU's Court of Justice however, has been fighting for more discretionary powers over national courts, in order to lend strength and enforce their recommendations on national courts, who are at the moment not obliged to act upon the recommendations handed down to them by the Court of Justice. This dilemma illustrates some of the confusion of deciding how best to support the rule of law, due to the lack of uniformity across the European Union (both its institutions and member states), regarding the conception and understanding of the rule of law.

However, this is not the only problem to have come about as a result of a lack of a uniform understanding of the rule of law. This lack of uniformity has also acted as a deterrent to both the development of judicial review in many applicant countries, as well as a deterrent to the proper functioning of this institution in many current member states. At heart, there is a fundamental contradiction here. On the one hand, the EU

wants states to instil judicial review, as it has been identified as an important institution for ensuring that the rule of law is properly supported and applied. Yet, judicial review, by its very nature, demands a degree of discretionary power in order to perform its task independently, efficiently, and according to procedures set out in many constitutions. Despite the good intentions of assistance programmes by international organisations like the EU, to provide Central and Eastern European judges with knowledge and technical know-how, what they lack or do not provide, is the most important training needed for ensuring proper support and application of the rule of law in these countries. What these judges need, is to be taught a different way of 'looking' at the law, as well as to be given support, assistance, and powers that would enable them to interpret and review new legislation, to ensure that these new laws are not contradicting nor violating the rights of individuals, according to the constitution.

One project that is currently in operation in Hungary and Slovenia, that provides an example of the inherent deficiencies, problems and contradictions due to a lack of uniformity, is the 'Asylum judges support project'. This project has been designed to transfer principles which have developed in the EU, to applicant Central and Eastern European countries. The asylum judges project aims to 'develop regional and Europe-wide capacity building by creating an environment whereby judges can analyse the status of civil society, rule of law and the gaps necessary to fill in order to implement EU best practice.'⁵⁹³ It also looks to be encouraging a change in the role judges are to have, from only passively applying the law, to taking more initiative and to play a more prominent role in shaping the judicial system. There is the potential for clashes between these two very distinctive views and understandings of the role judges are to play in the judicial systems of countries. At a more fundamental level, these clashes are due to differences in the understanding of the rule of law.

The central aim of the project mentioned above, provides examples of contradictions in two areas. The first contradiction is about the development of Central and Eastern European countries. The EU has stated time and time again, that these countries should be allowed to develop with regard to their own cultural and historical background in mind, yet the asylum judges project has been designed to transfer principles and practices from current EU best practices, implying that if they are best practices in the EU, then Central and Eastern European countries should also take these practices on board. Secondly, what is 'EU best practice' and how has this been decided and identified? If it were EU best practice, then one would assume that it is a practice that is common among the majority of member states. However, the practice of judges 'analysing the status of civil society and the rule of law' and to 'fill gaps' in the law, requires that they have discretionary powers conferred upon them, and this is not a common practice in many current member states of the EU. How then, can it be considered to be an EU best practice?

This project illustrates how the understanding of the role of judges are to have in the judicial process, are affected by differentiation in conceptualisation of the rule of law across the European Union. The Asylum Judges Project seems to illustrate a desire for a shift in the role judges are to play, and demonstrates the confusion in practice of supporting the rule of law within the EU, without a uniform conception of the rule of law. This confusion has the potential to affect and cause damage to the further development of judicial systems in applicant states from Central and Eastern Europe. There are and will continue to be contradictions in the role judges are to play at the national and European levels, because of the European Union's refusal to define its conception and understanding of the rule of law in a uniform manner.

In contrast to the European Union's assistance programmes in this area, the ICJ provides a good contrasting example. The ICJ's approach to assistance in the area of judicial independence and judicial training reflects its attitude toward, and understanding of the rule of law. It believes, as many other organisations and many countries, that 'an independent judiciary is an indispensable requisite of a free society under the Rule of Law', where 'independence does not mean that the judge is entitled to act in an arbitrary manner'.⁵⁹⁴ However, the ICJ does break from other organisations and some countries, in its belief that the judges duty is to 'interpret the law and the fundamental assumptions which underlie it to the best of his abilities and in accordance with the dictates of his own conscience'.⁵⁹⁵ Therefore, the legal technical assistance it provides, focuses upon providing seminars on topical issues relating to support and application of the rule of law, as well as a network for the exchange of ideas, and for countries to secure information on specific questions with regard to its pursuit of developing stable legal systems and efficient judicial systems.⁵⁹⁶ The ICJ's programmes reinforce its understanding of the rule of law and how it could be better supported through judges and judicial committees or panels, who have a degree of interpretative and discretionary powers to make reviews of the law, when necessary. One such project was established in Romania, where PHARE provided five million ECU for a programme for the Ministry of Justice in 1997. This programme was developed to provide 'support for strengthening the training activities of the National Institute of Magistrates, improving the documentation-library facilities available to the judiciary and improving the case and documentation management system'.⁵⁹⁷

These projects provided examples of co-ordination between the European Union, the OSCE, and national institutions within individual countries, despite differences in their understanding of the rule of law. However, they also illustrated the actual internal

problems and confusion evident within individual states and within the European Union as a whole, due to the different understandings of the rule of law being promoted through various assistance programmes developed. It also identified the potential for further problems unless discrepancies in understandings can be overcome to develop a basic uniform conception that will encourage support and application of the rule of law in a more uniform manner. This is especially true, in the case of the judiciary. It is important for the judiciary and therefore, the rule of law, as the judiciary is the primary institution for ensuring proper support and application of the rule of law in a state, that a uniform conception is developed. The significance of this would be that it would establish a framework for ensuring that the judiciary (i.e. the Court of Justice and national courts) functions independently, properly, and according to the powers vested in them to perform the tasks it has been given. The next sub-section will focus on programmes designed for encouraging the development of civil society and NGOs in transition countries of Central and Eastern Europe. It will examine whether there are any deficiencies in the focus of programmes developed in this area, which can be attributed to the conceptions international organisations have of the rule of law.

Development of Civil Society and NGOs

Other methods and programmes that have been developed in Central and Eastern Europe to support and foster the rule of law, have been through the building of civic education projects and the development of NGOs and interests groups at all levels, (local, regional, and national levels).

The development of civil society through NGOs has been the focus for many projects in this area, because NGOs were concluded to be of importance in 'advocating the interests and concerns of ordinary citizens in the social dialogue with the political

elite.⁵⁹⁸ The purpose of NGOs is an important one and is also the reason why the OSCE, Council of Europe, and the EU, amongst other international bodies, have focused their projects and programmes around financing and providing technical assistance to NGOs. In examining the assistance for the creation and development of NGOs, projects were designed with the need to show that these non-governmental organisations were transparent, in order to ensure their impartiality and credibility. For example, this was reaffirmed during the discussions, by a proposal put forth, for the development of a 'Code of Conduct for NGOs', which would lend more credibility to their objectives and actions at all levels, (local, regional, national, and international).⁵⁹⁹

However, another reason why international organisations have chosen to focus on NGOs and interest group development in the projects they support, is because NGOs assist with the dissemination of information and the education of citizens. An example of projects co-ordinated between NGOs, (recognised by both the CSCE/ODIHR and the United Nations Development Programme), that have aimed at fostering civic education in Central and Eastern European countries, has been an initiative developed by the League of Women Voters Education Fund (USA) and the Foundation in Support of Local Democracy (Poland). This project was launched in 1992 and focused on building political participation in Poland. It was funded by the following organisations: Per Charitable Trusts, the United States Information Agency's Office of Citizen Exchanges, the National Endowment for Democracy, and the United States Institute of Peace.

After the initial project, which saw twenty women from Poland, who 'demonstrated active involvement in community or governmental affairs and strong leadership potential' and 'with particular interest in building grassroots institutions in Poland', participate in a four-week Fellowship to the United States.⁶⁰⁰ During the fellowship, the Polish women not only had workshops and training sessions about

building grassroots institutions, but also some experience working with 'civic organisations in building citizen participation techniques', 'covering a variety of issues and concerns specific to their communities', and had the opportunity to take part in activities that covered a range of things such as: 'coalition building, networking, citizen education, voter registration, and lobbying'.⁶⁰¹ This opportunity gave these Polish women not only the knowledge of how to build and organise grassroots institutions in Poland, but also gave them the practical experience of working with existing grassroots organisations to get a better understanding of the purposes and aims of these organisations, to take back to Poland with them and incorporate or apply. Other grassroots- civic education projects have also begun in other Central and Eastern European countries. For instance, the League of Women Voters Education Fund have been working closely with the 'Democracy After Communism Foundation' to co-ordinate civic participation programmes in Hungary.⁶⁰²

Other projects include a project developed in the Czech Republic in which PHARE allocated ECU 900,000.00, for strengthening of civil society organisations. The project was to expand on 'previous PHARE activities to strengthen civil society organisations, with focus on grant support to improve the regional presence and sustainability of civil society organisations.'⁶⁰³ The assistance from PHARE is to go towards support for information and training to: 'develop the infrastructure of civil society organisations at the national and regional levels; expand information activities and services, including information on EU accession issues; and to increase the capacity of civil society organisations and development of the quality of staff training courses.'⁶⁰⁴

The major deficiency that has gone unacknowledged by international organisations with regard to civil society development is to look at the reasons behind low participation by citizens, beyond voting in elections. The projects covered, illustrate

international organisations' focus on the need to develop skills of individuals to organise interest groups in Central and Eastern European countries. It is a very good start, however, most of these projects and their organisers, only tangentially examine ways to sustain these interest groups once they have been founded.

As was the case of programmes created with the judiciary and its related institutions in mind, projects focused on assisting with the creation and founding of NGOs and interest groups do support some international conceptions of the rule of law. For instance, the creation and support for development of NGOs would support the OSCE's understanding of the rule of law as a restraint on government discretionary powers. This is because NGOs and interest groups provide a means for individuals to voice their opinions, especially if they feel the government or one of its institutions, is violating or abusing its discretionary powers for self-benefit. Despite this kind of connection and support for a particular understanding of the rule of law, projects and programmes such as these, still do not address a fundamental factor. They do not attempt to develop changes in citizens' attitudes towards the government or the role of governmental institutions in relation to their needs. And these programmes have not acknowledged the economic impact on levels of citizen participation and development of a civil society in countries across Central and Eastern Europe. The fact is that interest group and NGO development projects have not considered that "people have serious everyday material problems, ... they don't have time to deal with these problems of government/public life, even if it is closely related to their everyday lives."⁶⁰⁵ This was reiterated in a comment made by one source in the European Commission who stated that, "if people have food and bread, they are not likely to riot or worry too much about [a] democratic deficit" in their country.⁶⁰⁶

Despite the programmes developed and implemented in Central and East European countries, with the expertise and aid assistance of several international organisations in co-operation with local and national governments, the majority of CEECs (Central and East European countries), still lack a developed civil society, a legal culture, and actual support for the rule of law. These three factors, (civil society, legal culture, and the rule of law) are directly linked to one another. The lack of a developed legal culture, where individuals know and understand what their rights are, and how the legal system functions in order to use it, weakens the rule of law in a country. The programmes developed reflect awareness of a need for further education and development of the rule of law, but does not necessarily show awareness by international organisations, of the complexity of the rule of law as a concept. The last sub-section on assistance programmes outlines some of the programmes in operation in the Central and Eastern European region to reform the organisation of government and its institutions. It also investigates whether deficiencies exist in these programmes.

Organisation of Government and Its Institutions

Some specific examples of collaboration in the area of organisation of government institutions, are the observations and reviews completed of both the Hungarian parliamentary elections in May 1998 and the Czech parliamentary elections in June 1998. Conclusions from these reviews stated that 'authorities had conducted efficient and transparent elections in line with OSCE standards' for parliamentary elections.⁶⁰⁷ With other election reviews conducted, the OSCE/ODIHR made recommendations for further improvements and on areas where the observation team had concerns. For example, in a preliminary review conducted of the Slovak National Council Elections, the observation team voiced their concerns 'over amendments to the law' and 'suggested necessary

improvements' in response to clarifications that were made by the Slovak government regarding the potential problem areas in its preparation for the parliamentary elections.⁶⁰⁸

Another activity that illustrates the kind of co-ordination that has been taking place in recent years between international organisations, has been the Human Dimension Ombudsman Seminar organised by the ODIHR, the United Nations Development Programme (UNDP), the Council of Europe, the Polish Ombudsman's Office, with the participation of 43 OSCE states, international organisations and Non-Governmental Organisations (NGOs). At this seminar, participants and organisers discussed the various issues related to the creation of this position/institution, the pros and cons of such an institution, and they made recommendations 'both to nations considering creating ombudsmen, to the institutions themselves (current ombudsmen), and to the international organisations that assist such institutions.'⁶⁰⁹ The seminar provided a meeting ground for those countries who have experience with having an ombudsmen, those countries who are considering creating and implementing such an institution, and for those organisations and NGOs who work with ombudsmen, to ensure that it is fulfilling the objectives for which it has been created for.

Many of the Central and East European countries have ombudsmen, or are considering the creation of this institution. This is not surprising, as was mentioned in the previous chapter, since many of these countries in transition are turning to current EU member states, especially to Germany and Austria, for ideas on the reform and development of their governmental institutions and the legal system. The reform and transition in this example illustrates the underlining trend of prospective member states to turn to current EU member states for advice and assistance. This in turn allows for the transfer of ideas across borders as prospective member states seek to emulate current members without the same experiences or understanding, in the hope of obtaining

membership themselves. Another reason for the interest in creating the institution of ombudsman in these countries has been based on the experience of many experts who have expressed that,

...the institution of ombudsman has proved useful in dealing with administrative abuse. By examining the legality of administrative acts, it has a complementary function to the courts. In this way, confidence in the rule of law is strengthened. The supervisory functions of the Ombudsman institution promotes fair administrative practices and encourage confidence in government.⁶¹⁰

This institution assists in making clear the separation of powers between the different branches of government, but also making them accountable for their actions and decisions to one another without the threat of reprisals that would act as a deterrent to their individual independence.

Aside from programmes it has collaborated on, and the discussions it has initiated on topics related to supporting the rule of law, the OSCE has, through a study of parliamentary transparency of twenty OSCE states, furthered the rule of law. It has accomplished this through its assessment of the openness of plenary sessions, record of publication of parliamentary records, access to draft laws, and transparency of committees. By assessing these areas in the twenty OSCE states across Western, Central and Eastern Europe, it provided a comparison and demonstrated the range in each area. There were 'common approaches' in a number of areas in the more consolidated democracies.⁶¹¹

This study has provided a beginning for re-assessment by national parliaments within EU member states, EU institutions, as well as other international bodies, with regard to transparency. From this, international bodies, and Central and Eastern Europe have 'been instituting reforms for greater openness.'⁶¹² The EU heralds greater transparency in applicant states, as paving the way to a process that will be "closer to the

citizen”⁶¹³, as they themselves, have in recent years, come under increasing pressure to ensure greater transparency in the running of EU institutions. Greater transparency has been concluded by many international organisations, to further support the rule of law through openness by institutions, for further understanding and participation of citizens, and to protect citizens from arbitrary or coercive government actions.

Another example of a project focusing on the organisation of institutions that support the government’s structure was developed in Hungary. The emphasis of the project, ‘Establishing the groundwork for the prevention of corruption in the Hungarian National Police’, was on ‘developing training and devising and monitoring prevention measures to provide defences against corruption at the individual and organisational levels.’⁶¹⁴ This particular project involved the training of police trainees and practitioners on ‘case study material and administrative measures and behavioural development necessary to control corruption.’ The PHARE Democracy Programme invested 189,540.00 ECU into this particular project to prevent and control corruption in Hungary.⁶¹⁵ Another example to illustrate this focuses on the organisation of the judiciary to ensure judicial independence in the OSCE region. One of the most significant threats to the rule of law that has been identified, is corruption. Corruption is seen as a threat not only due to the very low salaries of judges, especially regular court judges, but also due to the poor working conditions, the lack of respect and status given to them as judges, and the fact that ‘regular judges are often hostile or indifferent to new constitutional courts’.⁶¹⁶ This lack of cohesion and lack of respect for higher courts and the judgements they have made with regard to the law and its legality in general, weakens the judicial system, thereby making it nearly impossible for the rule of law to survive. The rule of law cannot survive if judges, or other individuals in a position of power, ‘use their power to obstruct, evade or ignore the law.’⁶¹⁷

A good example of this type of abuse of power is illustrated by a Czech case from 1995. In this case, two Czech judges used their powers to have a man arrested and prosecuted for alleged verbal abuse. This man (Jiri Wonka) is the brother of a Czechoslovakia political prisoner who died in police custody under suspicious circumstances, and the judges who made the allegations, were the presiding judge and prosecutor who had sent Jiri Wonka's brother to prison. Jiri Wonka's alleged crime was that he verbally abused the two judges who, 'in accordance with the special protections government officials in the Czech Republic reserve for them themselves', 'sought to have Wonka criminally prosecuted for his statements.'⁶¹⁸ This particular case underscores the necessity of judicial independence and impartiality in order to ensure the proper protection of individual rights, especially in criminal trials. The case illustrated before, is one of the main reasons why international organisations have been working with countries in transition for the better part of the past ten years, through programmes that will encourage judicial independence and prevent abuses of power and corruption from those in power, as a method of reinforcing the rule of law principle from the 'top down', (government officials down to the general public.)

However, even in these programmes operating to assist in the development and organisation of the governmental structure and supporting institution in applicant countries, there exists, deficiencies that are a result of the varying conceptions and understandings of the rule of law, held by the different international organisations, who are through assistance, thereby passing some of these deficiencies on to EU applicant countries.

Summary

In this section, projects and programmes undertaken within Central and Eastern European countries, were examined. These programmes illustrated flaws and deficiencies with the projects in operation and those being considered for support in the CEECs. These programmes are flawed because they lack an understanding of the complexity of this principle and have not taken into account certain important factors. For example, programmes to assist in supporting and ensuring judicial independence and the development of judicial review, have been shown to illustrate some inherent contradictions between how these institutions should be developed and supported in theory, as compared to the reality of the situation. Judicial independence and judicial review are dependent on the development and change of attitudes and values, of both those in positions of authority and the average citizen. Yet, the majority of the programmes introduced and operational in the CEE region, do not emphasize, much less acknowledge that these changes are necessary. This is especially true as countries are in transition from a Soviet/Communist understanding of the role of law, judges, and the courts, to the idea that these three factors should operate independently and properly for ensuring the protection of individual rights a degree of restraint of governmental discretionary powers.

Conclusion

The main focus of this final chapter has been to gain a better understanding of how the rule of law is perceived by a few international organisations that are involved in the transition of Central and East European countries. This involves not only their definitions (if any) of the rule of law, but also the reasons and factors upon which these are based.

The second half of the chapter builds upon the findings from the previous section. It investigates whether assistance projects and programmes developed to support or maintain the rule of law, reflect an organisation's understanding of the rule of law and the complex nature of this important principle.

What this chapter has demonstrated, is that the three international organisations covered (the Council of Europe, the OSCE and the ICJ) each have their own conceptions of the rule of law. In comparison to the EU's conception of the rule of law, these international organisations have shown more developed understandings of this principle. Despite the seemingly developed conceptions, the Council of Europe, the OSCE and the ICJ have also demonstrated a lack of coherence and weaknesses in their conceptions similar to those of the EU. The international organisations covered have like the EU, conflated distinctions between various understandings of the rule of law, (as identified previously in chapter one). This gives the impression that whilst they are aware of the importance and complexity of this principle, there are still deficiencies in their conceptions because of its complex nature. It is this complex nature that has allowed for the enlarged scope which the ICJ's understanding of the rule of law takes, as well as the more narrowed scope of other organisations in setting the boundaries upon which this term is defined and utilised.

The differences between the various organisations' conceptions of the rule of law outlined in this chapter, are important with regard to co-ordination of projects and programmes set-up in prospective EU member states. The understanding of the rule of law by an organisation will in many ways dictate the type of programmes and projects it develops and supports - i.e. the restructuring of the judicial system or the creation of particular procedures like judicial review. Projects associated with the transition to and support of the rule of law have been shown to reflect the priorities and conceptions of

the organisations involved. This has been a challenge to the co-ordination of limited resources towards transition of CEE countries to the rule of law. At the same time, it has also left these countries with an eclectic perspective of the rule of law that in some ways, prompts them to transpose rather than integrate the rule of law into the reform of their governmental structures, procedures, and more importantly, its integration into their societies.

⁵⁵⁰ Council of Europe, *Proposal for a Council Regulation (EC) No. of ... On the Development and Consolidation of Democracy and the Rule of Law for Human Rights and Fundamental Freedoms*, COM97/357, Strasbourg, 1997, p.9.

⁵⁵¹ *Ibid*, p.21.

⁵⁵² This was previously outlined in further detail in Chapter 1, on page 6 of this thesis.

⁵⁵³ Walker, *The Rule of Law*, pp.9-11; Shklar, 'Political Theory and the Rule of Law', pp.1-2.

⁵⁵⁴ This approach - an institutional approach to the rule of law, was compared earlier in Chapter 1 with what has been termed as a 'way of life' approach, emphasising a more values-oriented understanding of the rule of law as a fundamental principle.

⁵⁵⁵ Arnold Koller, 'The Legal Heritage of the Council of Europe. Its role in reinforcing links with the countries of Eastern Europe', *Human Rights Law Journal*, v.11, n.1-2, 1990, pp.203-216.

⁵⁵⁶ Council of Europe, *The Role of the Judiciary in a State Governed by the Rule of Law*, Warsaw, Poland, April 4, 1995, p.5.

⁵⁵⁷ Address by the Hon.Mr.Justice Joseph A. Filletti (Malta), "The Rule of Law: International Commitments and National Institutions", *OSCE Mediterranean Seminar on the Human Dimension of Security, Promoting Democracy and the Rule of Law*, Valletta, October 19-20, 1998, p.1.

⁵⁵⁸ Hayek, *The Constitution of Liberty*, p.206.

⁵⁵⁹ Statement by Mr Mario Buttigieg (Counsellor), 'Promoting Democracy- Free Elections: Basis for a Democratic Society', *OSCE Mediterranean Seminar on the Human Dimension of Security, Promoting Democracy and the Rule of Law*, Malta, October 19-20, 1998, p.1.

⁵⁶⁰ Buttigieg, 'Promoting Democracy- Free Elections: Basis for a Democratic Society', p.1.

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- ⁵⁶¹ Filletti, “The Rule of Law: International Commitments and National Institutions”, p.6.
- ⁵⁶² Held during the CSCE Summit of 21 November 1990.
- ⁵⁶³ Filletti, “The Rule of Law: International Commitments and National Institutions”, p.2.
- ⁵⁶⁴ *Ibid*, p.6.
- ⁵⁶⁵ OSCE, The Secretariat, Department of General Affairs. OSCE Mediterranean Seminar on the Human Dimension of Security, Promoting Democracy and the Rule of Law, 19-20 October 1998, Valletta, Malta, 10 November 1998, p.13.
- ⁵⁶⁶ Filletti, “The Rule of Law: International Commitments and National Institutions”, p.6.
- ⁵⁶⁷ OSCE Mediterranean Seminar on the Human Dimension of Security, Promoting Democracy and the Rule of Law, took place in Vallenta on 19-20 October 1998.
- ⁵⁶⁸ Filletti, “The Rule of Law: International Commitments and National Institutions”, p.1
- ⁵⁶⁹ *Ibid*, p.3.
- ⁵⁷⁰ *Ibid*, p.3.
- ⁵⁷¹ *Ibid*, p.1.
- ⁵⁷² *Ibid*, p.5.
- ⁵⁷³ International Commission of Jurists, *The Rule of Law In A Free Society- A Report on the International Congress of Jurists*, New Delhi, India, January 5-10, 1959, p.324.
- ⁵⁷⁴ *Ibid*, p.VII.
- ⁵⁷⁵ *Ibid*, p.3.
- ⁵⁷⁶ OSCE, “The Rule of Law: International Commitments and National Institutions”, p.5.
- ⁵⁷⁷ ICJ, *The Rule of Law In A Free Society*, p.VII.
- ⁵⁷⁸ ICJ, ‘A Working Paper on the Rule of Law in a Free Society’, *The Rule of Law In A Free Society*, p.187.
- ⁵⁷⁹ Shklar, ‘Political Theory and the Rule of Law’, p.2.
- ⁵⁸⁰ Interview A conducted in Brussels- Tuesday, 5 May 1998.
- ⁵⁸¹ Interview A conducted in Brussels- Tuesday, 5 May 1998.
- ⁵⁸² Further details and evidence to support this claim, were discussed earlier in chapter two, regarding judicial discretion and differences in perspectives of this issue within the EU (focus was on Britain, Germany and France to illustrate variation within the EU member states).
- ⁵⁸³ Interview A conducted in Brussels- Tuesday, 5 May 1998.

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- ⁵⁸⁴ Interview C conducted in Brussels- Wednesday, 6 May 1998.
- ⁵⁸⁵ Interview A conducted in Brussels- Tuesday, 5 May 1998.
- ⁵⁸⁶ Seminar of Experts on Democratic Institutions, *Report to the CSCE Council from the CSCE*, Oslo, Norway, 4-15 November 1991, p.4.
- ⁵⁸⁷ Statement of Kate Schertz, 'The Rule of Law: The Independence of the Judiciary and Fair Trials', *Implementation of the Helsinki Accords. The 1995 OSCE Meeting on Human Dimension Issues*, January 1996, p.42.
- ⁵⁸⁸ Interview Q2 conducted in Budapest- Monday, 21 June 1999.
- ⁵⁸⁹ Interview K conducted in Brussels- Thursday, 6 May 1999.
- ⁵⁹⁰ Interview O conducted in Budapest- Wednesday, 16 June 1999.
- ⁵⁹¹ Interview O conducted in Budapest- Wednesday, 16 June 1999.
- ⁵⁹² Interview Q2 conducted in Budapest- Monday, 21 June 1999.
- ⁵⁹³ European Commission- PHARE, *The Democracy Programme Compendium 1997*, p.21.
- ⁵⁹⁴ ICJ, *The Rule of Law In A Free Society*, pp.318-319.
- ⁵⁹⁵ *Ibid*, pp.318-319.
- ⁵⁹⁶ *Ibid*, p.333.
- ⁵⁹⁷ PHARE- Operational Programmes, *Programme on Justice and Home Affairs- Romania*, 1997, p.3.
<http://secservr.ip.lu/cgi-bin/phare?20002=&62=527!2357!rulle+of+law>
- ⁵⁹⁸ OSCE Mediterranean Seminar on the Human Dimension of Security, *Promoting Democracy and the Rule of Law*, 19-20 October 1998, p.13.
- ⁵⁹⁹ *Ibid*, p.14.
- ⁶⁰⁰ Malgorzata Bueltel, CSCE/ODIHR, *CSCE/ODIHR Bulletin*, 'Building Democracies at the Grassroots Level- Civic Education Projects in Central and Eastern Europe', Warsaw, Poland, Spring 1993, v.1, n.2, pp.16-17.
- ⁶⁰¹ *Ibid*, p.17.
- ⁶⁰² *Ibid*, p.18.
- ⁶⁰³ PHARE- Operational Programmes, *Programme on Justice and Home Affairs- Czech Republic for 2000- 2001*, 1997, p.5. <http://serservc.ip.lu/cgi-bin/phare?20002=&62=527!2357!rule+of+law>

⁶⁰⁴ PHARE- Operational Programmes, *Programme on Justice and Home Affairs- Czech Republic for 2000-2001*, 1997, p.5.

⁶⁰⁵ Interview P conducted in Budapest- Monday, 21 June 1999.

⁶⁰⁶ Interview C conducted in Brussels- Wednesday, 6 May 1998.

⁶⁰⁷ Office for Democratic Institutions & Human Rights, *Semi-Annual Report*, Spring 1998, 1 July 1998, p.18.

⁶⁰⁸ *Ibid*, p.19.

⁶⁰⁹ *Ibid*, p.21.

⁶¹⁰ Report to the CSCE Council from the CSCE, *Seminar of Experts on Democratic Institutions*, 4 - 15 November 1991, p.11.

⁶¹¹ Edwin Rekosh, 'Parliamentary Transparency: An Essential Element of Democratic Legitimacy and the Rule of Law', *OSCE/ODIHR Bulletin*, Winter 1995/1996, v.1, n.1, p.23.

⁶¹² *Ibid*, p.23.

⁶¹³ *Ibid*, p.23.

⁶¹⁴ European Commission-PHARE, *The Democracy Programme Compendium 1997*, p.38.

⁶¹⁵ *Ibid*, p.38.

⁶¹⁶ OSCE/ODIHR, 'Judiciary Independence in the OSCE Region', *OHIHR Background Reports - OSCE Human Dimension Implementation Meeting*, 12 - 28 November 1997, Warsaw, Poland, 15 October 1997, p.4.

⁶¹⁷ OSCE/ODIHR, 'Judiciary Independence in the OSCE Region', *OHIHR Background Reports - OSCE Human Dimension Implementation Meeting*, 12 - 28 November 1997, p.2.

⁶¹⁸ Schertz, 'The Rule of Law: The Independence of the Judiciary and Fair Trials', p.41.

CONCLUSION

The intention of this thesis has been two-fold, firstly, to understand what the rule of law *is* and *means* to the European Union (both member states and institutions), since it has been repeatedly stated as an important principle to which countries within the Community and those proposing to join it, should be committed. Secondly, this thesis intended to demonstrate that the EU's commitment to the rule of law has not extended to actually defining this principle. This lack of definition is problematic for the EU, especially with regard to its further enlargement to include countries that have little recent experience of democratic values and ideas.

The intention of this work has not been to develop yet another definition for the rule of law, (which should be utilised by the European Union), but to demonstrate that understandings of the rule of law are diverse. The diverse understandings reflect the fact that the rule of law is a contested concept⁶¹⁹, as is evident from the work of other authors such as Habermas, Shklar, Craig, and Walker⁶²⁰. More importantly the thesis has illustrated and highlighted some of the ambiguities and deficiencies associated with various conceptualisations of the rule of law.

For instance, a notable ambiguity covered in chapter one of this thesis, dealt with the conflation of the rule of law and democracy. The relationship between these two important concepts is a complex one.⁶²¹ Conflation of these concepts neglects the fact that there are three possible ways of looking at the relationship between the rule of law and democracy. The three ways in which one can contemplate this relationship are 1) democracy is important for the effectuation of the rule of law; 2) that the rule of law can also be judged as a retardant to the development of democracy; or 3) that democracy itself, can be used to justify suppressing the rule of law.⁶²² The importance of this

review was that the ambiguities alluded to and described earlier in this thesis, have not been dealt with sufficiently to-date, by current EU member states and institutions.

Moreover, what was found in EU documentation and in interviews, was that the European Union currently lacks any formal universal understanding of the rule of law. Throughout EU documents there is mention of the term 'rule of law', but this term, usually connected with democracy and human rights, has not been defined in any of the Community's documentation. What is more interesting with regard to this term is the fact that the EU has stated that this principle (the rule of law) is a fundamental principle upon which member states and the European Union itself are based. However, in examining pre-requisites for previous enlargements, the term rule of law was not specifically mentioned. It is with the Copenhagen summit and the development of the Copenhagen criteria for the current enlargement discussions, that the rule of law is mentioned specifically, although again, without a definite sense of what is meant by use of the term. In previous enlargements, it was assumed that countries applying for membership shared similar ideas and conceptions of important values, so no formal set of procedures or criteria for enlargement existed. There were informal procedures and practices for enlarging the Community, without a formal or specific set of guidelines listing procedures, practices, and the criteria comparable to the Copenhagen criteria now established for future enlargements of the European Union.⁶²³

The finding was at first surprising, because of the EU's statements that the rule of law is a fundamental principle upon which the European Union and its member states are based. However, there are some significant reasons for the lack of development of a uniform conception within the European Union. The historical and cultural differences and experiences between various member states, has been one reason for national differences in the understanding and defining of the rule of law. For example, differences

between British, French and German notions of the rule of law⁶²⁴ have been shaped by each country's historical and cultural developments and experiences. These have shaped their understandings of law - its role and the basis of its legitimacy, as well as their understandings of the relationship between individuals and the government. In turn, these have been important factors in the development of democratic institutions, procedures, and values in these member state countries. These differences, which are a part of the entire culture and society of individual member states, makes it difficult to see member states developing a uniform definition of the rule of law that would satisfy all without anyone having to make specific changes to their political and legal systems. This is the underlying reason for the rule of law remaining vague in definition.

However, problems are beginning to appear which can be attributed to variation in understandings of the rule of law. Differences in defining the rule of law have had an impact upon the various levels within the Community system. For example, three key issues examined with respect to this were a) potential challenges to the Community legal order; b) different attitudes to judicial discretion; and c) citizenship, taken at the three different levels of decision-making in the EU.⁶²⁵ The variation in perspectives on such issues as citizenship or judicial discretion, or the issue of primacy of Community law, have served to illustrate the existent problems and difficulties a lack of uniformity produces. These problems exist even before compounding the problem with a further expansion of the Community to include countries with different legal systems, and some would say, less developed legal cultures.

Understanding of the rule of law within countries from Central and Eastern Europe are in general, not as developed as in western European countries. This assessment was made by several contacts from the European Union and the associated countries.⁶²⁶ The reasoning for the lack of a developed understanding of this principle by

citizens and government officials was attributed to several factors. Two of the main factors identified by interviewees, were the focus on improving economic conditions and situations, and the past abuse of the rule of law. With respect to the first factor, one interviewee commented, 'the most important problem, consists in the economy - people have serious everyday material problems; if people have such material problems, they don't have time to deal with these problems of government/public life, even if it is closely related to their everyday lives.'⁶²⁷ Another interviewee stated that 'if people have food and bread, they are not likely to riot or worry too much about democratic deficit, although political and administrative progress and development is also of importance.'⁶²⁸ These comments illustrate the feeling of those working in institutions assisting with the democratic development and transition of associated countries from Central and Eastern Europe. It also reflects some of the common problems experienced by ordinary citizens, which impedes the development of understanding the rule of law. The prevalence of these problems is confirmed by the findings of opinion polls conducted in several Central and East European countries.⁶²⁹

In assessing the second factor mentioned above, (past abuse of the rule of law), one interviewee felt that associated countries may not be 'attaching great attention to the rule of law as they should.' This was attributed to 'historical and cultural reasons: Soviet rule [was] strong, making [the] rule of law idea difficult for Baltic states especially, but also has had [an] influence on other countries in [the] region.'⁶³⁰ What this alludes to, is the fact that the Soviet Union used and abused the law for its own purposes, making it difficult for individuals to now think of the law as something that exists to protect their rights and interests. Similarly, the practice of treating the rule of law in a purely instrumental fashion to further government policies has established a political culture which is a barrier to the subordination of rulers to the rule of law. This point is well

made by Carothers, when he states that 'the primary obstacles to such reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law.'⁶³¹

The difficulties faced by these regimes are being compounded by the EU's inconsistency. On the one hand the EU has encouraged these states to develop their own 'brand' of the rule of law.⁶³² This fits in with the status quo within the current EU, which is characterised by diversity of approaches to the rule of law. Since, however, these states lack the experience and traditions of the existing member states, which are the source of diversity, the EU has encouraged them to model their approaches to the rule of law on 'partner' states of the existing EU.⁶³³ On the other hand the EU has been preoccupied with the reform or creation of particular institutions or procedures in the prospective member states.⁶³⁴ Thus, they have insisted upon the creation or reform of particular institutions and procedures in prospective member states.⁶³⁵ The inconsistency of the EU in its treatment of the prospective new members is not however the main problem. The main problem is the enlargement threatens to exacerbate the existing problem of diversity that the EU has refused to face up to.

Differences in understandings have already led to differences in the implementation of the same law across the current Community of 15 states. Problems of differentiation in application of law and understanding of the relationship between Community and national domains are beginning to appear within the European Union. Discrepancies regarding laws in direct conflict with parts of national constitutions and laws have occurred in some member states.⁶³⁶ The problems illustrated within a Community of fifteen states has the potential to become magnified with the further enlargement of the European Union to include countries as diverse as those from Central and Eastern Europe. This is of particular significance to this thesis, as it demonstrates

some of the real and potential problems the European Union face from its lack of a formal, shared understanding of the rule of law.⁶³⁷ The reluctance to respond to the problems of diversity the European Union desires is also at odds with the deeper integration plans it is seeking to implement.⁶³⁸ The issue of further integration is one that will not be easily solved. This is set to become worse with a larger number of diverse member states involved in the process.

This thesis investigated merely one aspect - one principle (the rule of law) considered an important aspect and criterion for determining future European Union membership. Future investigation and research should take into account development and reform of specific institutions, such as the judiciary and quasi-judicial institutions. These institutions are very important, as they seem to have a direct impact on the development and maturation of democratic values within newly formed democracies.

⁶¹⁹ Chapter Two, Section One, best illustrates the diverse conceptions of the rule of law which exist across European Union member states. Here, it examined the understanding of the rule of law held by Britain, Germany and France. These three member states were focused upon two reasons. Firstly, they illustrated Dyson's Anglo-Continental dichotomy of the rule of law (Britain and Germany); Germany and France were examined because although Dyson's dichotomy was useful, it was also limited in the fact that it did not account for differences in understandings of the rule of law held by different Continental countries. And secondly, these three were countries were chosen in particular, as they illustrate the differences in traditions and form a natural point of reference for smaller countries (especially those in Central and Eastern Europe seeking EU membership).

⁶²⁰ This list of authors is not conclusive, but merely a short list of a few of the writers examined and whose work has been used within this thesis.

⁶²¹ See Chapter One, Section Two. This section outlines in detail, the ambiguities and concerns related to the relationship between the rule of law and democracy. Most problematic in this relationship is the fact that the two terms have at times been used interchangeably, whilst neglecting the contradictions that crop up between what the two ideas mean and the manner in which they have traditionally and contemporarily been understood.

⁶²² See Chapter One, Section Two, for further detailed discussion about the conflation of the rule of law and democracy.

⁶²³ The Copenhagen criteria, developed out of the European Council's meeting in Copenhagen in June 1993, was the 'first clear rules for membership of the EU, and continue to form the basis for all negotiations with applications.' The European Committee of the American Chamber of Commerce in Brussels, *Guide to the Enlargement of the EU*, The EU Committee, 1998, p.7. Prior to this criteria, previous enlargement procedures were derived from ongoing practices, following Article 98 of the ECSC Treaty, Article 237 of the EEC Treaty, Article 205 of the EAEC Treaty, and Articles O and F of the Maastricht Treaty (Treaty on European Union).

⁶²⁴ As commented on in Footnote 1 on the conclusion, Dyson's dichotomy was used with additional materials to compensate and explain differences that existed even within Dyson's dichotomy of Anglo-Continental differences in understanding of concepts like the rule of law.

⁶²⁵ Chapter Two, Section Two discusses the impact of different legal cultures on three particular issues: 1) the potential challenges to the Community legal order; 2) examination of the different attitudes towards the idea of judicial discretion; and 3) looking at the issue of citizenship from the three different levels of decision-making existent in the European Union (Community level, national level, and individual level).

⁶²⁶ Statements from interviewees from EU institutions and from a few of the associated countries (conducted between March 1998 and June 2000), indicated that there was some understanding of the rule of law amongst government officials, but even these people at times were likely to conflate understanding of the rule of law with ideas of democracy, seeing no differentiation between the two concepts. At the individual level of citizens at-large, there was little understanding or real desire to understand what this principle (indicated by the EU as important) meant - other than that it assisted in protecting their rights from abuse by the government.

⁶²⁷ Interview P conducted in Budapest- Monday, 21 June 1999.

⁶²⁸ Interview C conducted in Brussels- Wednesday, 6 May 1998.

⁶²⁹ Surveys/Opinion Polls were presented in the *New Democracies Barometer* and in Richard Rose, *Survey Measures of Democracy*, Studies in Public Policy no.294, University of Strathclyde, Glasgow, UK, 1996. Research and surveys were conducted by the Centre for the Study of Public Policy, University of Strathclyde, Glasgow, UK.

⁶³⁰ Interview K conducted in Brussels- Thursday, 6 May 1999.

⁶³¹ Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, vol.77, no.2, March-April 1998, p.96. Comments that arose during various interviews suggested and stated that particular associated countries modelled their legal systems and laws on current EU member states, while taking into account differences between themselves and these member states. It was also acknowledged that it would take more than the mere transfer of institutions and ideas from western European countries, implanted into Central and East European countries for the rule of law to be developed and supported. This was also reiterated in the work of Thomas Carothers, 'The Rule of Law Revival', *Foreign Affairs*, vol.77, no.2, March-April 1998, pp.95-106.

⁶³² Comments similar to this one, were made during Interviews A and C conducted in Brussels on the 5 and 6 May 1998.

⁶³³ Chapter Three of this thesis emphasised the diversity of conceptualisations that exist across prospective member states in Central and Eastern Europe. What this provided was glimpse at the reasons behind particular developments regarding the rule of law in this region. For example, the chapter illustrated how the Czechs seem to be developing their own 'idea' of the rule of law, but are unsure of what it should do. While the Hungarians on the other had, have developed an understanding of the rule of law similar to the German conception discussed earlier in Chapter Two. Then there are the Poles, who have shown more positivist inclinations in their conceptualisation of the rule of law. All of these illustrate the differences in understandings which exist in the region.

⁶³⁴ What this illustrates is the lack of uniformity and diversity that the Community is emphasising on the one hand, while at the same time, it is prescribing that prospective members include certain institutions or procedures that are connected with a more uniform understanding of the rule of law. This demonstrates the uncoordinated developments that have been taking place across the Community. It supports the conclusion, that while the Community is saying one thing, its actions are 'saying' the opposite. They want to encourage diversity and have stated that prospective countries will develop their own 'brand' of rule of law that is culturally sensitive. What this is supporting it seems, is the support of the status quo in the Community - that current member states can have variations in their understandings of the rule of law. This has potential implications on the integration process of the Community, that is only beginning to come to light.

⁶³⁵ For example, the EU has encouraged associated countries to have written constitutions, a Constitutional or Supreme Court with judicial review powers, and have emphasised the importance of the separation of powers to ensure the independence of the judiciary. These are factors that define the rule of law as a set of institutions, thereby allowing for differentiation in the application of law, and understanding of the relationship between individuals, government, and law.

⁶³⁶ Examples of this can be cited from France and Germany. This was covered in detail in Chapter Two- in examination of member states' understandings of the rule of law.

⁶³⁷ In much of its documentation containing the term 'rule of law', the European Union has linked it with the idea of democracy - linking the two terms as synonymous or invariably intertwined and necessarily connected. This perspective does not take into account that the two concepts are at times, at odds with one another and contradict what the other proposed to stand for.

⁶³⁸ For example, the EU has criticised some associated countries for lacking the proper implementation of particular institutions and procedures. (Signs from the Community have pointed to their move towards placing more emphasis on the proper implementation of institutions and procedures and not just with having them in place.) They are concerned with the operation of these in practice in prospective member states, but perhaps have overlooked the fact that within its current Community, there are some member states who perhaps either lack these same institutions or who have them, but

lack proper implementation of them, which has been sometime 'required' by prospective members in the enlargement process.

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