The Legitimacy Crisis: The Rule of Law and the European Constitution

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This project will explore the degree of conformity of the European Constitutional Treaty to different conceptions of the rule of law. The European Constitutional Treaty has proven an extremely divisive issue in Europe, so much so that it received a resounding rejection from The Netherlands and France in 2005. Though many explanations have been explored as to why the Constitution failed to receive a popular vote of confidence, the role of one of the most basic political principles, the rule of law, has been largely ignored.

The European Constitution was highly anticipated as a clarification and unification of the many previous treaties of the European Community. It was the result of years of work and a great deal of compromise meant to solidify the growing union and give it a detailed direction for the future. Its failure to achieve ratification prompted predictions of "the end of Europe" and even though this declaration may be excessively pessimistic, the European Union is at least a stalled and confused mammoth superpower. As the European Union limps forward, it is important to decipher where the constitution fell short so that Europe can address its deficiencies and offer a stronger system, on which so many people and the global order depend.

The rule of law, unlike any other political principle in the world today, has received near unanimous support from the global community. Even states that do not support democracy or capitalism generally agree that governments and their people should be subject to clear, consistent, and predictable laws. As it is a staple of liberal government, it has concerned many theorists that they perceive a universal decline in the rule of law in recent years.

I begin with a brief definition of the rule of law and an explanation of its role in political systems and relationship with other political principles. A description of three models of the rule of law will follow: Fuller's "natural law model," Raz's "positive model" and Hayek's "free market model." I then sketch out the basic points of the European Constitutional Treaty and place it within a larger political context. The heart of the paper will be an evaluation of ways in which the European Constitution conforms to these three models of the rule of law, and the ways in which it does not. I will conclude by deciphering what the results indicate for the rule of law as a modern political principle and the future of the European project.

The Natural Law, Free-Market and Positive Models

The rule of law is the single political principle in the world which nearly everyone supports and on which no one can agree. Despite receiving near universal acclaim, few seem to really know what the rule of law is. Furthermore, there are about as many different, and often completely contradictory, conceptions of the rule of law as there are people who have ever given the thought to the theory and put pen to paper. To give a "true" definition of the rule of law would be impossible, as there is not really an accepted standard. What the rule of law has meant in history, and very generally means, is simply that man will be ruled by laws, not the whims of other men and that this is best achieved through clear, predictable and stable laws. Beyond this very skeletal guideline, the spectrum of economic, legal and moral notions of this concept constantly compete for preeminence in a political system.

An in-depth discussion of every conception of rule of law theory has filled the pages of many books. The three following models are among the most popular and analyzed of rule of law theories. To quantitatively or definitively determine whether the EU conforms ultimately to the rule of law as a general political principle would be, in my mind, an impossibility. However, it is quite feasible to determine the compliance of one document to a few similar theories of the rule of law, and so this is what I will attempt in this paper.

"The Natural Law Model"

All three models that will be utilized in constitutional analysis within this paper are what can be considered "moralized versions" of the rule of law, though they differ in the scope and relationship of the rule of law and morality.[1] It is in reference to this model, the natural law model, that the other two theories of the rule of law will be elaborated. According to Lon Fuller, author of the "natural law model," the presence of the rule of law does not automatically confer the presence of morality. Instead of morality and the rule of law occupying the same sphere, Fuller postulates that only in certain instances do law and morality overlap.

However, at the point where law does confer with morality there exists a spectrum of morality that begins at a morality of duty and finishes at a point that Fuller calls the morality of aspiration. The morality of duty starts at

[1] Michael Newman, *The Rule of Law: Politicizing Ethics* (Cornwall: Ashgate, 2002).

the bottom of the scale and serves to define "the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain goals must fail its mark." At the other end, the morality of aspiration is the point of maximum excellence, "the fullest realization of human powers." To further clarify his point, Fuller defers to an analogy proposed by Adam Smith in his *Theory of Moral Sentiments*. Smith compares the morality of duty to the basic rules of grammar and composition. Just as the rules of grammar provide "what is requisite to preserve language as an instrument of communication, the rules of a morality of duty "prescribe what is necessary for social living."[2] To complete the analogy, Smith compares the morality of aspiration to the attainment of eloquent writing. "The principles of good writing are loose, vague and indeterminate and present us with a rather general idea of the perfection we ought to aim at, rather than afford us any certain and infallible directions of acquiring it."[3] Therefore, it may be quite clear in purpose and simple in application to proscribe rules that can ensure comprehensible writing, but much more difficult to create rules that through mere compliance result in excellence. This is the relationship which Fuller explores in his theories of duty and aspiration within the law. There must be laws that create order and allow humans to explore their potential, but laws alone cannot lead human beings to "the fullest realization of human powers."

The crux of Fuller's "natural model" is that there is an internal morality of the law present when rules are put into place that create order in society and allow man to be governed by laws and not by other men, thereby fulfilling the morality of duty. The content of the laws (beyond the eight principles discussed below) and their degree of "fairness" is irrelevant in this case. This content is defined as the "external morality" of law, which Fuller implies should be considered a different morality from simply the fact that there should be laws in a coherent and comprehensible system. It is difficult, if not impossible, to create a set of requirements that will always produce fair and good laws. Instead, Fuller focuses on simply the requirements of laws in a procedural sense and their relationship with people generally which he explains has a morality all its own and protects against tyranny, regardless of its content.[4]

In order to attain internal morality, laws must comply with eight specific principles.[5] The first principle which Fuller proposes is "generality of the law". This is very simply that there must be rules, that there must be conditions that govern human conduct. This does not mean that there must be a law for every conceivable situation, just that there be a system of laws by which society can be guided. Another key component of generality is that everyone be subject to the laws, especially those that make them. Additionally, no laws should be made to favor or discriminate against any particular group.[6]

As a logical extension of the principle that there should be laws, Fuller next states that laws must be known or knowable. In order to not break laws, one must know what they are. This principle he terms "promulgation". As an absolute Fuller recognizes that educating every citizen about every law is an impractical endeavor and subject to the marginal utility principle. This principle originates in economic theory and applied here basically means that sometimes increasing the amount of something does not always consistently increase its usefulness. In other words, it may be very useful to know fifty laws, but knowing one hundred laws will not necessarily be twice as helpful as knowing the first fifty for a variety of reasons, such as the likelihood that at some point a person will no longer be able to retain that much information, or that the laws will not be relevant to his daily life. What is more important than simple memorization of all laws by all people, which Fuller describes as "absurd," is that everyone have access to the laws, that they be published for public consumption. The reasons for publication are threefold, first that everyone is entitled to the information should they want it, second that the laws may be available for criticism, and third that "in many activities men observe the law, not because they know it directly, but because they follow the pattern set by others whom they know to be better informed than themselves."

The next principle is very straightforward, with very few exceptions. This is that "laws should not be retroactive," that one should only be subject to the laws in existence at the time of an act. Laws should never punish people for acts committed before those laws were in place. Sometimes Fuller acknowledges, the internal workings of law suffer "various kinds of shipwreck" and that though the "proper movement of law in time is forward, we sometimes have to stop and turn about to pick up the pieces."[7]

Laws must also be clear according to Fuller, and as brief and specific as is appropriate.[8] Here he means that language must be clear enough that judges will rule similarly based on the same laws and that people will interpret them similarly. The need for clear laws becomes obvious, for if the same law is interpreted to have thousands of meanings, it will not be applied in way that fulfills the generality principle. Legislatures use such terms as "good faith" and "due care"

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[2] Lon Fuller, *Morality of Law* (USA: Yale University Press, 1965), 32.
[3] Fuller, 6.
[4] Neumann, 7
[5] Jonathan Rose, "The Rule of Law in the Western Word: An Overview," *Journal of Social Philosophy* 35, no. 4 (2004): 457-470.
[6] Fuller, 48.
[7] Fuller, 53.
[8] Rose, 457-470.

frequently, and though these terms may seem ambiguous, Fuller claims that sometimes the best way to achieve clarity is to incorporate into law common sense terms "that have grown up in ordinary life outside the legislative halls." [9] However, in order for the legislator to avoid fatal conflict with the generality principle, it is important for her to not use this as an excuse for making unclear laws in the hopes that the courts will make sense of the language.

The next two principles will now be addressed briefly, as extended discussion of them goes beyond what is necessary for this project and into the depths of jurisprudential analysis. Laws must also be consistent according to Fuller, they must not contradict one another for the quite obvious reason that one cannot follow two rules if they require opposite actions. This is much more complicated than it may appear, for it is incredibly difficult to always identify in an entire body of laws if a contradiction exists or for that matter how to even define a contradiction. The last two principles are that laws should remain constant through time and that there should be congruence between the official act and declared rule.[10] Laws that change on a daily basis would be nearly impossible to follow because they could not be made known in time, and the potential for conflict between them would be substantial. It is therefore very important that laws not be changed too frequently. Finally, the most logistically complicated of all the principles is that the declared law must be consistent in its enforcement. Difficulties in the enactment of this principle arises when lower courts find many interpretations of the same statute, or when police officers do not consistently arrest people for the same offense, or for a declared offense.

It is important to note seemingly paradoxical claims put forth by Fuller about the above eight principles. Fuller claims that the rule of law only exists if all eight principles are realized in a society - if you begin to lose one, the others will follow. However, he also claims that it is not necessary to fully realize each principle, and that in fact it is probably not desirable to do so. Instances in which complete compliance is impossible or undesirable are listed in the above discussions. The answer to this puzzle is that all of these principles exist on a spectrum, and that they can be realized without absolute compliance. It is important that each principle be complied with as fully as possible, but a departure in some instance from one principle usually does not mean a departure from the rule of law. It also bears repeating that though general compliance to these principles will make it more likely for law to be beneficial to its subjects, it does not ensure it. "There is no way open to us by which we can compel a man to live the life of reason. We can only seek to exclude from his life the grosser and more obvious manifestations of chance and irrationality. We can create the conditions for a rational human existence." In sum, Fuller's goal in his model of the rule of law is to create the general conditions essential for man to achieve his full potential, though they are admittedly not necessarily those that will be sufficient to achieve this end.[11]

"The Free-Market Model"

What is termed "the Free Market model" here was eloquently described in Friedrich Hayek's book *The Road to Serfdom* published in 1944. In the past sixty or so years this book has held tremendous sway over Western conceptions of the rule of law, particularly those in the United States and to a lesser extent in the United Kingdom. This rule of law system very basically holds that laws must be "general, equal and certain". "Stripped of all technicalities this 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 affairs on the basis of this knowledge."[12] Superficially this may appear very close to Fuller's model of the rule of law. However, upon closer inspection it becomes clear that Hayek goes beyond Fuller with a stricter definition of how these attributes must be realized.

The "generality principle" means, consistent with Fuller's model, that there must be abstract rules not made with any individual in mind. "Equality" extends this principle to additionally narrow its scope to the creation of laws that do not make arbitrary distinctions between groups that are not approved of by a majority of a society's population, and this Hayek contends happens only in very few circumstances such as in male-only military conscription.[13] "Certainty" states that individuals must be able to predict and interpret what rules will be applied to their actions and how those rules will be interpreted. It is quite dangerous, in Hayek's opinion for judges to be given any significant amount of discretion in rulings. He equates discretion with arbitrary will in the sense that it negates generality and the ability for individuals to know to what rules they will be subject. "Known general laws, however bad, interfere less with freedom than decisions based on no previously known rule."[14] Hayek's conception of justice is very heavily centered on precedent and close adherence to legal text.

For Hayek, economic liberty realized through the free market and the rule of law are inseparable in the cause of human autonomy. The focus of Hayek's model is a warning against the consequences of "planning" and the pursuit of

[9] Fuller, 64.
[10] Rose, 457-470.
[11] Fuller, 9.
[12] Neumann, 3.
[13] Brian Tamanaha, *On the Rule of Law* (United Kingdom: Cambridge University Press, 2005), 66.
[14] Tamanaha, 66.

social justice, which he believes will inevitably lead to the destruction of the rule of law and arbitrary, potentially tyrannical, government. There are two sides of social justice, substantive justice and distributive justice.

> Substantive equality is the notion that equality requires treating differently situated people differently in order to account for the inequality of their situations, (by contrast to formal equality, which treats everyone the same, making, making no accommodation for differences in circumstances. Distributive justice is the notion that there must be a fair distribution or allocation of goods in society, with fairness determined in accordance with some standard of merit or desert.[15]

State-directed economic activity for the purposes of furthering either substantive or social justice is not consistent with the rule of law, because there is no universal code of ethics that exists from which legitimacy can be drawn, which would therefore make all laws governing planning necessarily arbitrary. In other words, how can a single plan capture everyone's needs and rank them without giving arbitrary preference to certain individuals or groups? "The point which is so important is the basic fact that it is impossible for any man to survey more than a limited field, to be aware of the urgency of more than a limited number of needs."[16] Individuals, according to Hayek, are much better at determining what is most important for their success than governments, so even the poor are better off in a market economy than in one governed by "vague" and "arbitrary" rules. In addition, by not "imposing" any single plan on a population, other viewpoints are respected, because no "plan" or viewpoint is favored over another.[17]

Planning is also incompatible with the rule of law because "as soon as the particular effects of the law are foreseen at the time a law is made, it ceases to be a mere instrument to be used by the people and becomes instead an instrument used by the lawgiver upon the people for his own ends."[18] When the state tries to direct activity to reach a certain outcome, it is essentially imposing a certain morality upon its subjects, and in doing so will eventually need to rely on judges to interpret that morality of what is "fair" case by case and according to no prospective law. In order to make things more "fair" for a certain group of people, it is necessary for those people to be treated differently than others. Which group is singled out to be favored above others is inescapably the arbitrary choice of those in power. This confers legal privileges on judges to decide the ranking of interests and on the beneficiaries of that ranking. The absence of legal privilege is the essence of equality before the law, the opposite of arbitrary rule, and the heart of the rule of law. Therefore, the appropriate operation of the law is as a "piece of utilitarian machinery intended to help individuals in the fullest development of their individual personality," and not as a means of trying to improve the situation of any particular groups.[19]

Few other theorists have "expressed such unshakeable faith" in the rule of law. To Hayek the rule of law, albeit only his conception, is the "essence of justice" and the "mainstay of liberty."[20] While Fuller views his model of the rule of law as a starting point for freedom, Hayek perceives his model as the starting point and the finishing point, in effect the one race truly worth running for individual liberty. Democracy Hayek applauds, but one gets the feeling – with only lukewarm enthusiasm. Because justice and morality are simply achieved through universalization in his eyes, democracy serves a limited purpose, and can very easily collapse into tyranny. The process by which legislation passes can be reduced to apportioning the "spoils of government" to the "winners in the political process." This coupled with powerful special interest groups constantly threaten the generality of the rule of law. Even the Bill of Rights, Hayek deems insufficient compared to the protective power of the rule of law. "Such a clause [requiring adherence to the Rule of Law] would by itself achieve all and more that the traditional Bills of Rights were meant to secure; and it would therefore make any separate enumeration of a list of special protected fundamental rights unnecessary."[21]

In conclusion, the "Free-Market model" of the rule of law, as espoused by Hayek, has an inherent morality derived from its impartial relationship with individuals much like that of Fuller's model. Unlike Fuller, he is very concerned with the content of laws and claims the incompatibility of "social justice efforts" with the rule of law. The "immorality" or problematic consequences he dismisses as not important enough to outweigh the benefits of the free-market system "It cannot be denied that the rule of law produces economic inequality – all that can be claimed for it is that this inequality is not designed to effect particular people in a particular way."[22] Though this explanation has satisfied many followers of Hayek, it has also produced a wave of backlash from legal positivists such as Joseph Raz who refuse to abandon the pursuit of substantive equality through the law.

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[15] Tamanaha, 67.
[16] F.A. Hayek, *The Road to Serfdom*, (Chicago: Chicago University Press, 1978),85.
[17] Hayek, 42.
[18] Hayek, 85.
[19] Hayek, 85.
[20] Tamanaha, 71.
[21] F.A. Hayek, *Law, Legislation and Liberty*, vol. 3 (Chicago: University of Chicago Press, 1978), 110.
[22] Tamanaha, 68.

"The Positive Model"

In a direct challenge to Hayek's model, Joseph Raz points out two main "fallacies" of the rule of law and proposes to deconstruct the fundamental assumptions underpinning the free-market model. First, Raz declares that the rule of law is frequently, as in the case of Hayek, overrated in importance. Second, the term the "rule of law" has been so overused it often holds very little of its original meaning. According to Raz, equating the "rule of law" with "the rule of good law" is at best confusing, and at worst, dangerous because it is reduced to "lacking any useful function."[23]

To the predictability, clarity and stability principles laid out by our other theorists, Raz adds an independent judiciary as essential to the rule of law. This includes open and fair hearings, judicial review and courts with easy accessibility.[24] Although Raz agrees with most of Fuller's model concerning stability and clarity, he is concerned that Fuller's model and Hayek's models could be consistent with all manner of undesirable, even evil laws. "It is humanely inconceivable that law can consist only of general rules and it is very undesirable that it should." It is a mistake, Raz claims, for us to equate generality of the law with the advancement of equality in society.

> A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the Rule of Law better than any of the legal systems of the more enlightened Western democracies… It will be an immeasurable worse legal system, but it will excel in one respect: in its conformity to the rule of law. [25]

In fact, the rule of law could even be consistent with the institution of slavery, according to Raz. This may seem like an extreme and altogether unlikely scenario, but is widely accepted that the U.S. adhered to the rule of law in its period of legal slavery and racial discrimination laws.[26] According to many theories, laws that are general, clear and prospective are compliant with the rule of law, regardless of the morality of their content.

There exists, beneath general rules, another level of necessary particular rules. This does not create a conflict with the rule of law as long as these particular laws are "guided by open, stable, clear and general rules." This introduces flexibility into the law that makes it far more useful than Hayek's model. Imagine if we had to make general rules for a police officer to regulate traffic, or a license authority to grant a license under "general conditions." [27] It is necessary in each situation for the police officer or the license authority to use his expertise to determine the particular set of specific conditions.

Raz disagrees with Fuller that the rule of law has an internal moral virtue, because the benefits of the rule of law can easily go unrealized even if the principle is closely conformed to. Instead the rule of law is helpful in that it is necessary for the laws to be able to serve the purposes for which they were created. To Raz, the rule of law is a tool, much like a knife. A knife may be dull or sharp, but it will be much more effective at whatever task it is set if it is sharp. The ability to cut does not automatically mean that a knife will be used for a good purpose. Knives can be used to murder or to prepare nourishing food, but being sharp simply means that it is always desirable to use it for either purpose. "Thus the rule of law is a negative virtue in two senses: conformity to it does not cause good except through avoiding evil and the evil which is avoided is evil which could only have been caused by the law itself."[28] So the rule of law is like the knife, it is not inherently good simply because it was sharp and was not used to murder anyone today.

Raz does not see conformity to the rule of law as an ultimate end. Other ideals such as democracy, social equality, and human rights are also incredibly important to society, and sometimes they might require a deviation from the rule of law. "A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals." A conflict with the rule of law should be expected according to this model. This conflict does not mean the end of the rule of law, and the weakening of the rule of law would not necessarily mean anything as drastic as a "road to serfdom" or tyranny. In fact a greater balance of values in a society may allow for greater individual freedom than any strict adherence to one principle. Raz sums his argument with a call for balance. "After all, the rule of law is meant to enable the law to promote social good, and should not be lightly used to show that it should not do so. Sacrificing too many social goals on the altar of the rule of law may make the law barren and empty."[29]

A Constitution for Europe: Ratification and Rejection

The European project of "ever closer union" has propelled it from economic community to political community and now to world power. It has gained such momentum over the past half century that, many would argue, a European Constitution was a structural inevitability. European law,

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[23] Joseph Raz, "The Rule of Law and Its Virtue" *Liberty and the Rule of Law* (Texas: Texas A&M Press, 1979), 210.
[24] Raz, 218.
[25] Raz, 211.
[26] Tamanaha, 93.
[27] Raz, 216.
[28] Raz, 224.
[29] Raz, 229.

as elaborated by the seven treaties ratified in the EU's lifespan, has culminated in a messy labyrinth of bureaucratic incoherence. The European Constitution would have unified and codified the existing treaties into one European Union governed by one document. Despite the fervor that has surrounded the constitutional venture, as Professor Glyn Morgan of Harvard University pointed out at a recent symposium at Indiana University, in effect, the constitution is "a document that does little more than formalize present arrangements and propose a very limited set of institutional reforms." [30] In the end this argument did not resolve the deeply-rooted concerns of millions of European citizens.

In 2005 national politics, sovereignty concerns and a strong anti-neoliberal sentiment dragged ratification of the Constitution, and European integration to a screeching halt. During the summer and fall of the previous year, the 25 member states and three candidate states had signed and adopted the treaty. All that was left was to enter the treaty into force through each country's constitutional procedures, either through a popular referendum or a parliamentary vote. Though many countries did vote to put the constitution into effect, two key countries voted it down. France and the Netherlands voted in popular referendum against the Constitutional Treaty, destroying the unanimity necessary to put the constitution into force. While the EU certainly did not cease its operations, the rejection of the constitution slowed Europe to a laborious crawl. Alarmists heralded the impending demise of the European Project but many scholars and officials dismissed such pessimistic speculation. Jean Asselborn, Deputy Prime Minister of Luxembourg assured "the setbacks of 2005 have not led to an institutional stalemate, nor have they sounded the death knell for the constitutional project"[31] Reassured that the constitutional project would chug along, the focus shifted to what became the buzzword of post-constitutional referendum years – "legitimacy."

Nearly everyone who writes about the European Constitution addresses some sort of deficit in justification, validity or popularity. The perhaps overly-simplistic idea has emerged that if there is a means by which the "legitimacy gap" can be filled, Europe could be off and running to world dominance, Constitution in hand, in the next few years. Nearly every kind of legitimacy attainable by a government or legal document has been analyzed inside out and resolved dozens of times over. However, as future projections become increasingly gloomy, no solution has yet provided a "quick fix" to the legitimacy issue. "The rest of the world will not wait for Europe while it bickers over institutional reform and external policy issues" says Joschka Fischer, former German foreign minister, "Europe is increasingly fading away beyond the horizon in the Atlantic."[32]

In the face of such prophetic calamity, Spain, the UK, the Netherlands, Germany and France have begun applying pressure to have a reformed version of the European Constitution finished by the end of 2007, though it is unclear whether the new constitution would be a slightly altered version of the 2004 constitution or an entirely new draft altogether. Germany's Angela Merkel has been a particularly active proponent of pursuing constitutionalism, by holding confidential talks with national officials and sparking a fragile optimism. Meanwhile, the official Europa statement ambiguously and tantalizingly promises that the ratification process is "continuing according to plan."[33]

Is the European Constitution a Constitution?

The first question that needs to be addressed here is if it is even relevant to determine whether or not the European Constitution is a constitution in the same sense as other constitutions worldwide. At this point, one might ask, is it not important that legislation be consistent with the rule of law no matter what it is legislating? This author believes that it does matter if the European Constitution is a constitution, in the commonly used sense of the word, or simply another treaty. A constitution establishes a new form of government either where there was none, or as a reform of a previous government. All legislation, and how that legislation will be produced, its very legitimacy, is based on the legitimacy of the founding document. Therefore a Constitution must be held to a higher degree of consistency with the rule of law than other documents; its consistency will immediately affect that of every other law in the nation, even before that law is considered in isolation. If the Constitution is not consistent within itself, it is nearly impossible for the laws on which it is based to achieve consistency. Similarly, if the Constitution requires the impossible, then for laws to be "constitutional" they may also require the impossible. Promulgation as well is incredibly important for a constitution; as a sort of "contract of the people" it is essential that the people know on what general agreement they are being required to act. It is true that constitutions must necessarily be more vague than other laws, and in this sense it does require a greater departure from the rule of law, but not a complete one. Constitutions can have an intended vagueness that will allow it longevity and flexibility without entering into the realm of verbal obscurity. It is essential, even more so than for other laws that obscurity is not reached, or it will be nearly impossible to determine if future laws comply with it. Particularly pertinent though, is that often

[30] Glyn Morgan, "Sovereignty, Democracy and European Political Integration" (paper presented to the symposium Transitional Democracy at the Crossroads? The EU's Constitutional Crisis, Indiana University, December 2, 2006.
[31] Jean Asselborn, "An Unwarranted Pessimism." *Harvard International Review* 28, no. 3 (2006).
[32] Mahoney Honor, "Europe is Increasingly Fading Away." http://www.euobserver.com March 30, 2007.
[33] www.europa.eu

constitutions are the source and guarantors of fundamental rights and liberties. If the language of these liberties is too obscure, or if they blatantly contradict one another, or if no one knows what these rights are, there is very little further legislation can do to protect them. Plainly, degree of realization of the rule of law in the European Constitution is far more critical if the document is, in fact, a constitution.

When beginning a discussion of constitutionalism in Europe it is important to ground our discussion by remembering that the European Community was not formed out of any grand sense of shared ideals or patriotic fervor or commitment to social progress, as was the case in the founding of many other constitutional governments. The European Community was formed essentially and unromantically for the practical necessity of furthering economic interests, basically that the whole is greater, or at least more profitable, than the sum of its parts. Integrating Europe was not a revolution in ideas, per se, as occurred in the American war for independence or the French Revolution, but was instead a mechanism to increase prosperity and avoid future wars. The first documents of this institution were not a Declaration of the Rights of Man or a Declaration of Independence; they were documents legalizing a joint trading venture in coal and steel. The lofty ideals of pursuing "human dignity" and "political freedom" as espoused in the proposed Constitutional Treaty represent a great departure from the Community's origins. Pursuing these ideals presupposes shared values, interests and goals for all of Europe.

The European Constitution diverges from many other constitutions particularly in its supremacy over other law. In legal terms, it is still a treaty in a long succession of treaties past and future, and it is the first constitution that unifies and simultaneously recognizes many states. Still, according to Merriam –Webster's Dictionary of Law, a constitution contains "the basic principles and laws of a nation, state, or social group that determine the powers and duties of the government and guarantee certain rights to the people in it."[34] The European Constitutional Treaty is certainly an attempt to do this, regardless of its efficacy. A summary of the treaty published by the official European Union website explains,

> The integration of the Charter for Fundamental Rights into the text, the clear acknowledgement of the Union's values and objectives as well as the principles underlying the relationship between the Union and the Member States, allows us to call this basic text our "constitution.[35]

While it may never be referred to with the deference accorded to some Constitutions, nor is it the first or last important document of the EU, it does represent a level of integration that would, if enacted, transform the body and purpose of the European Union. In this sense, it is the Constitution, the founding document, whose ratification would have a huge and lasting impact of a new direction in governing the Union.

A Basis for Legitimacy? The European Constitution and the Rule of Law

Promulgation

As a basic principle, the EU Constitution appears to comply with the promulgation principle, which as explained earlier, means that laws must be published and accessible to the citizenry. This is essential for the rule of law because citizens are entitled to know what laws they might be punished for violating and so that legislation may be given adequate public criticism. Even more basically, there is an increased likelihood that people will follow laws if they know what they are. That enacted laws will be published is clearly guaranteed by Article I-39 in Clause 1. "European laws and framework laws shall be published in the *Official Journal of the European Union* and shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following their publication." [36] However, just because laws are published does not ensure that they are accessible. Imagine if only one copy of the nation's laws were published and kept in a museum, or even if many were published, but in a language no one could read. And so the promulgation principle becomes more complicated.

While neither of the two previous problems is particularly pertinent here, there are still serious concerns about the ease of use. While the Constitution guarantees every citizen the "right" to access information, it does not ensure that citizens will be able to exercise this right. "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State shall have, under the conditions laid down in Part III, *a right of access* to documents of the Union institutions, bodies, offices and agencies, whatever the medium." (emphasis added) [37] A "right of access" does not address the fact that the Constitution is 60,000 words (in English) consisting heavily of highly technical language that even specialists have difficulty deciphering. Perhaps it would have been quite useful to have included a legal glossary at the end. According to the 2006 Progress Report towards the Lisbon Objectives, 6 million people, or 15%, of the EU population have left school prematurely and did not reach post secondary education,[38] which legitimates very serious concerns that the European Constitution is not comprehendible to the general population. While Fuller acknowledges the "absurdity" that every

[34] Miriam Webster's Desk Dictionary of Law, 1996.
[35] www.europa.eu
[36] European Constitutional Treaty, Article I-39, Clause 1.
[37] European Constitutional Treaty, Article I-50, Clause 3.
[38] "Progress Towards the Lisbon Objectives in Education and Training." Commission of the European Communities; Brussels, (2006):5.

citizen be able to sit down and read all laws, the accessibility issue does present the concern that only those with enough education, or money to hire a specialist, have a "right of access" to the published laws.

Michael Neumann expands on Fuller's definition of promulgation by adding a "politically observable principle" meaning that "we must understand the rules; we cannot be expected to do so if they refer to things of which we have no knowledge."[39] The limitations of accessibility due to language and complexity of the Constitution will affect people to varying degrees, but if even specialists have difficulty in its interpretation then it is not exaggeration to claim that nearly everyone will encounter obstacles in accessing the laws, making adherence to the promulgation principle suspect. The complexity and length of the document will also present problems for other principles of the rule of law, such as clarity and congruence.

Reading further into Fuller's work we find that promulgation does not only have external, but also internal requirements. At first glance it may seem that the widely held concerns about the lack of transparency and accountability in European lawmaking are more associated with democratic legitimacy than with compliance to the rule of law. However, as Fuller explains, a high degree of transparency and accountability are necessary for achieving the spirit of the promulgation principle and the rule of law more generally. Many agencies and military tribunals argue that the internal rules and procedures of lawmaking are irrelevant as long as the final result is published. However, Fuller explains, "Every experienced attorney knows that to predict the outcome of cases it is often essential to know, not only the formal rules governing them but the internal procedures of deliberation and consultation by which these rules are in fact applied."[40] In order to know if one's actions will be interpreted as in violation of the law, one must know the logic of how the laws have been interpreted in the past.

The Constitution recognizes the call for greater transparency in its deliberations acknowledging "that Europe … wishes to deepen the democratic and transparent nature of its public life." It even goes further to reaffirm the commitment to this goal stating, "The institution shall maintain an open, transparent and regular dialogue with representative associations and civil society." [41] It is, however, less clear on the mechanisms designed to overcome what may be the biggest threat to European legitimacy. The European Constitution may meet promulgation standards at the bare level of publication, but accessibility and internal visibility render any greater level of compliance impossible.

Clarity

The clarity principle dictates that once the laws are published and physically accessible, they must be clear enough so that they can be followed by the people and interpreted by judges, lawmakers and the general populace. Even more than for the promulgation principle, the complexity and so-called "legalese" of the wording utilized in the European Constitution is extremely problematic for the clarity principle. Not only can people not follow rules if they cannot understand them, but courts cannot decipher if rules are violated. The absence of one rule of law principle can, and usually does, create a domino effect for all the principles of the rule of law; as one falls, many others collapse in its wake. For example, if laws are not clear, it is difficult to make them consistent; if laws are retroactive then they are often contradictory. The generality and congruence principles suffer because of the lack of clarity.

To determine if clarity is deficient, it must first be illustrated that clarity and specificity are not completely synonymous. There are two dominant reasons that clarity is sacrificed in law-making. Specificity for its own sake can be more damaging than "honest open-ended vagueness." Consequently sometimes terms such as "good faith" or "undue burden" are used as commonly understood terms that, if made more specific, would render them meaningless in the application of the law. It is important to note though, that Fuller's acceptance of an "honest open-ended vagueness" to excuse a lack of clarity is not acceptable to all theorists. Hayek condemns the use of such flexible phrases, "one could write a history of the Rule of Law… in terms of the progressive introduction of these vague formulas into legislation and jurisdiction."[42] Fuller takes a more moderate (and some would say realistic) approach and elaborates the dilemma of many lawmakers, "a government wants its laws to be clear enough to be obeyed, but it also wants to preserve its freedom to deal with situations not readily foreseeable." [43] Fuller's application of the clarity principle, while always a hair's width away from arbitrariness, is generally accepted by many rule of law theorists.

The more substantial concern is that all too often legislators write vague laws that they assume can be delegated to the courts and administrators for interpretation. This is where generality and congruence find themselves in extreme danger. When courts must interpret extremely vague laws, they will inevitably interpret them in thousands of different ways depending on the court and those who sit on it that day. If generality means that there must be laws, and they must apply equally to everyone, a law that can be intepreted in many different ways depending on the variability of the

[39] Neumann, 28.
[40] Fuller, 50.
[41] European Union Constitutional Treaty, Article I-47.
[42] Hayek, 78.
[43] Fuller, 212.

court inevitably creates inequality before the law. A law cannot apply equally to everyone if courts interpret the law to mean completely opposing things from day to day. In addition, the congruence principle, which states that the declared law and its enforcement should be consistent, finds itself in murky waters. If everyone is unsure of what the law says, how can it be enforced?

The European Constitution, as all legal documents, must tread carefully between the necessarily unspecific and dangerously obscure. Unfortunately, while there may be various instances of necessary vagueness, too often the language extends far beyond any such standard into the realm of nearly incomprehensible. For example, Article I-3 states, "the Union shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Constitution." [44] This is the entire fifth clause of Article I-3 without further explanation or clarification. Roughly one could translate this as saying, "the Union should do what it needs to do as long as it is appropriately doing what the Constitution allows it," or even more concisely "the Union can do anything that the Constitution says it can do." This appears as either so redundant it needs no such affirmation, or if it is not redundant, the clause is so vague that it becomes almost utterly meaningless.

Consider the following statement in Article I-59, "the council may adopt a European decision determining that there is a clear risk of a serious break by a Member State of the values referred to in Article I-2." [45] The most seriously troubling language here is "a clear risk of a serious break … of values." First of all, it is very difficult to fairly determine if any party is ever upholding certain values, and this issue is compounded by the fact that the Member State will be judged based on its *risk* of not upholding values. So basically, legal action can be taken against a member state if it fails in the future to realize clearly defined ideals. It is very unclear how courts could possibly consistently interpret if a member state were acting in opposition to this statement. The exact meaning of Article I-59 is so elusive that it would seem inevitably arbitrary.

Raz allows that conformity to the rule of law is not always in a society's best interest. "A lesser degree of conformity is often to be preferred precisely because it helps realization of other goals" for example, human rights. [46] The grandiose, if noble, vision for the European Union to ensure individual liberties is illustrated in the clause, "fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of Union's law." [47] This clause may well dash the hopes of human rights advocates; it is a far cry from an enumerated Bill of Rights or Declaration of Human Rights. It must be allowed that a tradition of respecting the dignity of individuals without specifically enumerating certain rights is rooted in many countries' governments. However, this clause indicates that there are specific and inviolable human rights, but does not list them in any definitive manner or require the government to observe them. Indeed all that is assured is that they will "constitute general principles of the Union's law." Consequently the clause neither conforms to the clarity principle of the rule of law, nor does it appear that it is specific enough to guarantee any rights at all. A simple recognition that rights exist, rather than enumerated rights, is frequently deficient when courts attempt to define whether or not a government has infringed upon the constitutionally guaranteed liberties of the individual. Consider the seemingly endless controversy surrounding the amendments in the constitution of the United States – and those rights are enumerated. The European Constitution may have several areas that only weakly comply with the rule of law, but the dearth of clarity is most severe and potentially most problematic of all.

Not Requiring the Impossible

On the surface, the "possibility principle" as it will be referred to here may seem obvious or unnecessary – surely no rational lawmaker or lawyer would require what is impossible. Yet time and again this principle loses its footing when lawmakers attempt to push the law past its capabilities and appropriate place in society. Requiring what cannot be quantified or defined, what is not practical in government administration or what is clearly beyond the reach of governmental regulation is not only frustrating and potentially tyrannical, but also extremely injurious to the credibility of law. It is commonly understood that laws that cannot be enforced weaken the entire body of law. Fuller, far more than either of the other theorists presented here, goes into significant depth explaining the common ways in which laws attempt to govern the ungovernable.

Article I-16, Clause 2 of the European Constitution requires that the Union respect and "unreservedly support" certain policies "in a spirit of loyalty and mutual solidarity." The issue here may be more apparent than in many other cases; how can one legislate the "spirit" in which anything is done? This enters the realm of deciphering the intent behind actions. "The required intent is so little susceptible of definite proof or disproof that the trier of fact is almost inevitably driven to asking… 'does he look like the kind who would stick by the rules?"[48] A juror would necessarily be left to decipher intent based upon his own biases, a requirement

[44] Article I-3, Clause 5.
[45] Article I-59.
[46] Raz, 228.
[47] Article I-9, Clause 3.
[48] Fuller, 72.

that would be inevitably arbitrary. Fuller reminds us that "law is the enterprise of subjecting human conduct to the governance of rules." [49] Key here is the word "conduct". If we may assume that conduct is the observable action of an individual, than subjecting intent to "the governance of rules" is not the purview of the law.

Beyond requiring certain intents be present in actions, sometimes laws require achieving what has no set standard or commonly shared definition. The clause stating, "It [the Union] shall …ensure that Europe's cultural heritage is safeguarded and enhanced"[50] sounds reassuring at first glance , but after further scrutiny falls short of the scope of the law. There is no set or commonly understood standard that can measure if Europe's cultural heritage is safe. In addition, ensuring that Europe's cultural heritage is safeguarded and enhanced is impossible if for no other reason than that the passage of time, the forces of globalization and the evolution of cultural identity constantly shift the definition and demographic of cultural understandings. "The principle that the law should not demand the impossible of the subject may be pressed toward a quixotic extreme in which it ends by demanding the impossible of the legislator."[51] The task the Union has set before itself in the European Constitution is doomed to never achieve success either because the task is beyond the Union's control, or simply because no measure of compliance with this law exists. By requiring of the law what is not within its scope, and often what is not even possible for it to attain, the European Constitution is an outright contradiction with one of the eight principles of the rule of law.

Constancy

In Fuller's discussion of constancy of the law through time, he is occupied largely by the problem of laws changing too frequently, which leads to the confusion and exhaustion of courts and the general public. Berggren points to both the "perpetual revolution" of rules inflicted on the Chinese by Mao and the "poor institutional evolution" of Russia as prime examples of lawmaking run amuck. "History shows time and again that both inertia in constitutional change and dramatic reversals in the rule system can endanger social peace, prosperity and freedom." [52] All founders must carefully balance the desired longevity with the essential flexibility required of constitutions. Unfortunately, no formula for constitutional success or compliance with the constancy principle exists. In fact, Raz goes so far as to claim that constancy or "stability" "cannot be usefully subject to complete legal regulation. It is largely a matter for wise governmental policy."[53]

Despite the absence of a solid standard of constancy, there is considerable question as to the staying power of the European Constitution as a "constitutional document." As a "constitutional treaty" it is far more treaty than constitution in both the American and European senses. Written constitutions, though there are exceptions, tend to divide powers among the bodies of government and establish overarching principles and doctrines to which all futures laws must comply. In maintaining a level of abstraction, constitutions remain relevant guidelines for lawmakers over decades or even centuries. The European Constitution takes a very different approach. It is simultaneously very specific and very vague. Its 6,000 words detail how nearly every area and sub-area of government in the EU must be operated, with many contingencies for a variety of possible events. Yet this thoroughness is constructed in vague, complex wording that will surely have an army of lawyers arguing for years over minutia.

The European Constitution elaborates in nearly the same scope as those relatively temporary treaties that preceded it. This should not be surprising as it was meant to be the "treaty of all treaties" and unify all existing legislation into one coherent document. However, the fact is that however "constitutional" this document may be, it is still one treaty in a succession of treaties that have been enacted for the very reason that the previous one did not reflect the needs of the current Union and did not further integration. The longest interval between European treaties has been about twenty-two years, between the Merger Treaty and the Single European Act.[54] It is unclear exactly why this treaty, if enacted, would have greater permanence than those in European history. While concerns about longevity may not as blatantly conflict the rule of law as clarity or promulgation issues, there is little evidence that the European Constitution can fulfill the congruence principle.

Generality and Subsidiarity

The fundamental principle of the European Union is subsidiarity which means, in most simple terms, that matters ought to be handled by the smallest or most local authority. The Europa website, the official website of the European Union, elaborates that "specifically, it is the principle whereby the Union does not take action (except in the areas which fall within its exclusive competence) unless it is more effective than action taken at national, regional or local level."[55] Subsidiarity has been established in EU law since the ratification of the Maastricht Treaty in 1992, and the formulation that is in effect today was detailed by the

[49] Fuller, 74.
[50] Article I-81.
[51] Fuller, 88.
[52] Berggren, Nicolas. *Why Constitutions Matter* (New Jersey: Transaction Publishers, 2002).
[53] Raz, 215.
[54] www.europa.eu
[55] www.europa.eu/glossary

Treaty Establishing the European Community. It declared that:

> In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[56]

The implementation of this strategy has been very successful largely due to its wide appeal to national governments that continually feel threatened by the ever centralizing power of the European Government. If the union government is constrained to administer only those actions that are necessary on a supranational scale, theoretically at least, nation-states can maintain a fairly high degree of national sovereignty. The European Constitution reiterates and emphasizes this principle in Article 9:

> Under the principle of subsidiarity, in areas which do not fall within its exclusive competence the Union shall act only if and insofar as the objectives of the intended action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.[57]

This concept is not unique to the European Union; it is inherent to nearly every federal system in the world. In Germany, Canada and the United States, lander, provinces or states are left to legislate those items which are considered best dealt with at the local level. In the United States only states, and not the national government, are permitted to legislate school curriculum, for example.

Despite its popularity, subsidiarity presents some conflicts with the rule of law, depending on its administration. If a law is made at the Union level but left to the states to administer or interpret in the way they see as best fitting their needs, the generality and congruence principles are sidelined. Applying the subsidiarity principle to Union law effectively creates different laws in each Member State as they apply the law to fit their own needs. How can everyone be equal before the law and the law be consistently enforced if everyone has a different idea of what it means? Take for example Article I-51, Clause 1, "Everyone has the right to the protection of personal data concerning him or her."[58] In one state this might mean that all publicly collected data, medical, legal, and financial information for an individual is inaccessible to the government without express permission. In another, this might protect financial records but allow the government to file an individual's DNA sequences.

Hayek might loosely equate this sort of approach with that used in the pursuit of social or distributive justice –which often means that the same law does not apply to everyone in the same way. "To produce the same result for different people, it is necessary to treat them differently," [59] he acknowledges. But the law is not meant to work that way, he explains; people cannot plan their lives and future actions if they do not know how the law affects them, regardless of the inherent unfairness of the policy. It is difficult to extend Raz's discussion of the positivist model to the principle of subsidiarity, but even his more tolerant approach to substantive justice would not eliminate basic generality and congruence conflicts.

Hayek's Generality

What may seem to be the most straightforward of Fuller's eight principles, the generality principle, is potentially the most contentious. Fuller's attention to generality is relatively brief; he states that in order for the rule of law to exist, there must be laws and everyone must be subject to them. Hayek's understanding of generality is far more sophisticated, as was described earlier in this paper. Equality under the law cannot be achieved, according to Hayek, if laws are made that try to achieve particular results for any person or group of people. The European Constitution implies fairly directly that in fact, it may do just that. "It [the Union] shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between men and women, solidarity between generations and protection of the rights of the child." [60] Hayek would very likely assert that this is exactly the sort of misguided good intention that leads many socialist societies into lawless tyranny. Laws must consider everyone "collectively and all actions in the abstract, it does not consider any individual man or any specific action,"[61] asserts Rousseau in full agreement with Hayek's theory. The purview of government should be simply to ensure the security of the people and the security of the free market. Some excerpts from the constitution might be very promising to Hayek. "The Union shall offer its citizens an area of freedom, security, and justice without internal frontiers; and an internal market where competition is free and undistorted."[62] This clause emanates just the sort of laissez-faire attitude essential to Hayek for the rule of law.
It may be too quick, however, to jump to the conclusion that Europe has finally backed a Hayekian version of the rule of law. Governments often attempt to use laws or

[56] Treaty Establishing the European Community, Protocol 30.
[57] Article 9.
[58] Article 51, Clause 1.
[59] Hayek, 88.
[60] Article I-3.
[61] Rousseau, "The Social Contract." 82.
[62] Article I-3.

economic policy to steer society in a desired direction. Such "planning" in policymaking in order to be entirely fair, and not simply based on the arbitrary will of those in power, would presuppose that everyone shared the same idea of optimal society; there would have to be a set of universally shared values in the society. There is a significant amount of evidence that in fact, this is precisely what the European Constitution does assume, and in fact declares proudly. The preamble proclaims, "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the *universal values* of the inviolable and inalienable rights of the human person, freedom democracy, equality and the *rule of law*."[63] (emphasis added) Again, later in Article 3 the Constitution reaffirms this assumption, "In its relations with the wider world, the Union shall uphold and promote its values and interests." [64] In Hayek's opinion it is absurd to believe that any society would have members so like-minded that they would value all of the same things to exactly the same degree or have "universal values and interests." To apply this already "absurd" idea to a Union of twenty-five culturally and politically diverse nation-states might border on insanity.

As a logical extension of Hayek's objections to governmental "planning" in general he also strongly opposes attempts to implement distributive or substantive justice. When Hayek refers to planning he says, "we mean that sort of planning which is necessary to realize any given distributive ideals."[65] A society that attempts to aid its most disadvantaged through its policies, Hayek demands, cannot possibly consider all people in the abstract, and so cannot be making law in a general sense. Distributive and substantive justice has long been championed by European countries, and the trend does not appear to halt at this constitution if Article I is any indication. "Believing that Europe…intends to continue along the path of civilization, progress and prosperity for the good of all its inhabitants, including *the weakest and most deprived*; that it wishes to remain a continent open to culture, learning and *social progress*." (emphasis added) Such blatant acknowledgement of the pursuit of substantive equality would clearly indicate for Hayek, that in many portions of the constitution, generality, and subsequently the rule of law, are absent and that we continue "to move progressively away from the basic ideas on which Western civilization has been built."[66]

The Razian Rebuttal

Bemoaning the end of justice, civilization, freedom and Western society is not only overly-dramatic, but it fundamentally misunderstands the nature of the rule of law, Raz might respond to the distressed Hayek. The rule of law is not inherently moral nor the ultimate guide to morality, according to Raz. It is simply a tool of free societies, and like any tool, it is only as good or "moral" as the task to which it is set. If we are going to use the rule of law tool, we should make sure that it is realized to a high degree, that it is sharp so that it can be effective. But if we need to consciously make room for other tools in our metaphorical societal toolbox, setting aside the rule of law at times in favor of a more precise tool is simply what is to be expected. It should not surprise anyone that we have moved away from some of the more traditional ideas of previous centuries, he could continue: that is simply the nature of progress. There are many ideas that, if implemented in their original form, would seem archaic in today's world.

Raz would most likely view the very same statement in the preamble that Hayek would find "absurd", as an acknowledgement that many, sometimes conflicting, values deserve realization, not simply the rule of law. "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and *inalienable rights of the human person, freedom, democracy, equality and the rule of law*" (emphasis added). After all, Raz reminds us, the rule of law is meant to exist so that the law can benefit society. We should take very seriously claims that the law is not there to promote social good.[67] Perhaps the rule of law is not realized in the European Constitution, but that may not be negative if the rule of law hinders Europe from [striving] for peace, justice and solidarity throughout the world."[68]

Conclusions: A Rule of Law Deficit

As a standard for success, the European Constitutional Treaty does not solidly meet any of our models' criteria for a strong rule of law. Concerns about clarity, accessibility, congruence, consistency and generality would prevail, according to this analysis, for all three of our theorists, and very likely for many more in this field. Hayek would rail against declarations of pursuing social justice and altering the laissez faire principle of the Free Market to enhance "fairness." Even Raz would admit that the European Constitution struggles to prove that it is stable, clear, and above all prospective. "The violation of the rule of law… may lead to uncertainty… when the law does not enable people to foresee developments or to form definite expectations."[69] The problem of promulgation, of people even knowing or understanding the laws, combined with the lack of clarity and potential lack of consistency within the European Constitution, according to Raz, makes it impossible for

[63] Preamble to the Treaty for Establishing a Constitution for Europe.
[64] Article I-3, Clause 4.
[65] Hayek, 39.
[66] Hayek, 16.
[67] Raz, 229.
[68] Article 1.
[69] Raz, 222.

this document to be adequately prospective. For Fuller it is less clear to what degree he would consider the rule of law absent because of his broader definitions of the criteria for compliance. He claims that the rule of law cannot, and probably should not, be complied to absolutely but also offers no specific point where departure from the principles becomes critical. Evidenced, however, by his argument that if you start to lose one principle, you begin to lose them all, we can safely assume that the European Constitution would not be his rule of law prototype since it "starts to lose" as many as five of his eight principles. In effect, we imagine Fuller continuing, the European Constitution far exceeds the standard of meeting a "morality of duty" and enters the much more legally ambiguous, and potentially dangerous, realm of the "morality of aspiration."

As a constitution, it also extends far beyond an acceptable amount of open-ended vagueness present in many constitutions worldwide. While the constitution of the United States may also be unclear at times, the European Constitution is much more technically worded, and the problem of clarity is compounded by its inordinate length. Whereas in the US Constitution, courts may find two or three interpretations of a clause, a clause in the European Constitution could easily have dozens and dozens of interpretations. Its 6,000 words mix principles with minute details of policy so that the "spirit" or intentions of the laws are buried in technicalities to an extent that all three theorists would be forced to conclude that in no way does it comply with the clarity principle.

The large majority of revolutions in modern history have grounded their philosophies and new governments in the principle that those governments will be ruled by the people and their laws and not by any single person or group of persons – in other words, by the rule of law. While claiming that the European Constitution marks a counter-revolution of the rule of law may be a bit alarmist, the trend away from strong rule of law principles is increasing on both sides of the Atlantic. The expansion of emergency powers and the covert detention, trial by tribunal and sentencing of both American and foreign citizens has generated outrage in legal and academic communities, though relatively less in the general populace. In Europe, formal conceptions of the rule of law have recently been less popular and show few signs of gaining appeal in the future. This all begs the question, is the rule of law going out of style?

We are left with three possible conclusions; first that the rule of law is being sidelined because it cannot respond to today's fast-paced, globalized world and will therefore become less and less relevant in the future: second that the rule of law is taking on a new place and definition in the world of political principle: or third, that the rule of law is embattled with the forces of arbitrary government and is losing a battle that may have serious repercussions for political and economic liberty worldwide.

There are certainly instances in the last decade in which the rule of law has been abandoned for the good of a particular government and not for its people. However, the trend in Europe has always had a very different flavor than across the Atlantic. Claiming that the rule of law is being defeated by tyrannical government within the European Constitution because it lacks clarity and strives for social progress is probably far too extreme for anyone save Hayek. Mostly likely the case here is that the rule of law has taken a seat at an international roundtable of political values at which it must negotiate and justify itself to a series of increasingly powerful humanitarian values. Yet, there are still very serious issues at stake that threaten to make the European Constitution ineffectual; a higher degree of compliance with the rule of law might begin to resolve these difficulties.

A potentially more immediate issue regards the ever increasing skepticism of European Union legitimacy. It is widely regarded as problematically undemocratic, with leaders left unaccountable for their actions. This analysis has exposed serious gaps in the rule of law and such gaps only become at least somewhat acceptable for Raz, if they are in the pursuit of greater cause – for example human rights. Unfortunately the European Constitution's claim to grant certain rights is vague and potentially unenforceable. If the democracy and the rule of law are both deficient, and the protections of citizens are weak, the only legitimacy left to the EU is outcome legitimacy – that good things have resulted from its laws. This may have been enough to support the EU to this point, but we see it faltering as it claims greater and greater powers. The alternative to this union is considerably grim; a Europe in which wars rage every few years and poverty is rampant. For those that would face these conditions, a semi-legitimate government may be a better ruler than hunger and violence. For now though, integration has slowed considerably and the crisis of confidence in the EU that voted down the EU Constitutional Treaty is deepening, and it is unlikely that this treaty or perhaps any others will be ratified before some of these issues are addressed and resolved.

Are we on a "road to serfdom" and inevitable tyranny as Hayek declares, or has Europe progressively taken its less formal conception of the rule of law a step further? Perhaps the West's view of democracy, the rule of law and legitimacy must be rewritten in an age in which laws transcend nations and the dearth of instantaneous information makes null every previous moment. This analysis raises more questions than it is able to answer. But this is consistent with how governments are legitimated; the legitimacy of rulers is not decided by scholars, but by the people that are subject to them.

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