

LEGITIMACY OF THE EUROPEAN UNION

Introduction

The concept of political legitimacy within the European Union has gained considerable attention¹ since Weiler discussed it in his seminal article². However as Walker notes “there are many ways to cut the conceptual cake of legitimacy in the European Union”³ and so its meaning remains elusive⁴, compounded by a lack of structure to enable an analysis to be conducted⁵ and with different approaches tending to be adopted by different doctrinal disciplines (political science targeting political power relationships⁶ and law pursuing the law making process⁷ and its institutional structure⁸). This paper will assess the alternative methods for assessing

¹ See e.g. D Beetham, C Lord, *Legitimacy and the European Union* (Longman, London 1998)

² JHH Weiler, ‘The Transformation of Europe’ (1991) 100 YLJ 2403

³ N Walker, ‘The White Paper in Constitutional Context’ Jean Monnet Working Paper No 6/01, accessed at <http://www.jeanmonnetprogram.org/papers/01/011001.html> at 3

⁴ A Arnall, ‘Introduction: The European Union’s Accountability and Legitimacy Deficit’ in A Arnall, D Wincott, (Eds.), *Accountability and Legitimacy in the European Union* (OUP, London 2002) at 3. See also G de Búrca, ‘The Quest for Legitimacy in the European Union’ (1996) 59 MLR 349 at 349

⁵ D Beetham, *The Legitimation of Power* (Macmillan, London 1991) and D Beetham, C Lord, ‘Legitimacy and the European Union’ in A Weale, M Nentwich, (Eds.), *Political Theory and the European Union: Legitimacy, Constitutional Choice and Citizenship* (Routledge, London 1998) at 15 use a structure of legality, normative justifiability and legitimation to analyse the political legitimacy of the European Union. It is submitted that although a useful structure, it can be incorporated within, and then analysed more effectively, through the legal rationality lens.

⁶ Op. Cit. n.6 Beetham. See also R Barker, ‘Legitimacy, Legitimation, and the European Union: What Crisis?’ in P Craig, R Rawlings, (Eds.), *Law and Administration in Europe: Essays in Honour of Carol Harlow* (OUP, London 2003) at 157

⁷ TM Franck, *Fairness in International Law and Institutions* (Clarendon Press, Oxford 1995) at 26 and ‘Legitimacy in the International System’ (1988) 82 AJIL 705 at 706

⁸ See G Majone, *Dilemmas of European Integration: The Ambiguities and Pitfalls of Integration by Stealth* (OUP, London 2005) at 28, criticised by M Dougan, “And

the legitimacy of the EU as set out in the seminal work of Fritz Scharpf before constructing a new method for analysing the legitimacy of legal outputs of the EU polity under the title of legal rationality and its constituent requirements. Finally legal rationality will be set into a policy context to determine whether policy factors can objectively justify any findings of irrationality.

Legitimacy

Scharpf⁹ has suggested that legitimacy has two aspects with different roles: input-orientated legitimacy (henceforth input legitimacy)¹⁰; and, output-orientated legitimacy (henceforth output legitimacy)¹¹. Other observers have suggested alternative theories of legitimacy but it is suggested once they are analysed the theories can be broken down into Scharpf's legitimacy criteria and other non-legitimacy elements. Beetham and Lord¹² suggest that for a State to be legitimate it must demonstrate the necessary identity, democracy and performance¹³ in meeting the needs and values of citizens, which they then transpose to the model of the EU.

Some Fell on Stony Ground..." A Review of Giandomenico Majone's *Dilemmas of European Integration* (2006) 31 ELR 865. See also M Singer, 'Legitimacy Criteria for Legal Systems' (2006) 17 KCLJ 229

⁹ FW Scharpf, 'Economic Integration, Democracy and the Welfare State' (1997) 4 JEPP 18 and *Governing in Europe: Effective and Democratic* (OUP, London 1999)

¹⁰ Ibid. Scharpf 1999 at 7

¹¹ Ibid. at 10

¹² C Lord, D Beetham, 'Legitimising the EU: Is there a 'Post-Parliamentary' Basis for its Legitimation?' (2001) 39 JCMS 443

¹³ These three elements of a single theory can be contrasted with Horeth's three sources of legitimacy (M Horeth, 'No Way Out for the Beast? The Unsolved Legitimacy Problem of European Governance' (1999) 6 JEPP 249 at 251 – democratic decision-making at the EU level, technocratic and utilitarian justification, indirect democratic legitimacy granted by Member States) and Eriksen and Fossum's three modes of legitimation (EO Eriksen, JE Fossum, 'Europe in Search of Legitimacy: Strategies of Legitimation Assessed' (2004) 25 IPSR 435 at 438 – efficiency, collective and self-understanding, justice and norms of fairness)

The second and third criteria can be equated to input and output legitimacy whilst identity itself is a much contested concept that can be viewed from an individualistic perspective (how a person views their own position in society) or from a community perspective (how society determines who belongs and who does not). Instead of being an element of legitimacy it is submitted that it determines the construction of the political community, not its legitimacy.

Input-orientated legitimacy requires a clear accountability of political action to the citizens of the polity or as Bellamy and Castiglione state “the normatively conditioned and voluntary acceptance by the ruled of the government of their rulers”¹⁴. Democratic legitimacy has elicited considerable attention from EU commentators over the years especially over the perception of the lack of democratic accountability of EU institutions and decision-making to the peoples of Europe¹⁵. With each Treaty amendment another outbreak of academic writing appears on the existence of the “democratic deficit” and the failure to resolve it¹⁶. Menon and Weatherill¹⁷ point out

¹⁴ R Bellamy, D Castiglione, ‘Legitimizing the Euro-‘Polity’ and its ‘Regime’: The Normative Turn in EU Studies’ (2003) 2 EJPT 7 at 10

¹⁵ See A Moravcsik, ‘In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union’ in I Begg, J Peterson, JHH Weiler, *Reassessing the Fundamentals* (Blackwell Publishing, London 2003) at 77. The “democratic deficit” of the European Union has seen considerable academic debate. For a comprehensive summary of the debates see JHH Weiler, ‘European Democracy and its Critics: Polity and System’ in *The Constitution of Europe: “Do the New Clothes have an Emperor?” and other Essays on European Integration* (CUP, Cambridge 1999) at 264; P Craig, ‘Integration, Democracy, and Legitimacy’ in P Craig, G de Búrca, (Eds.), *The Evolution of EU Law* (2nd edn OUP, London 2011) 13 at 28; P Craig, G de Búrca, *EU Law: Text, Cases and Materials* (4th edn OUP, London 2008) at 133; C Chalmers, G Davies, G Monti, *European Union Law* (2nd edn CUP, Cambridge 2010) at 125

¹⁶ For example PL Lindseth, ‘Democratic Legitimacy and the Administrative Character of Supranationalism: The Example of the European Community’ (1999) 99 *Columbia Law Review* 628; M Nettesheim, ‘Developing a Theory of Democracy for the European Union’ (2005) 23 *Berkeley Journal of International Law* 358; R

that many of these observers judge the limitations of the EU against a strict nation-State model and this model can change depending on which nation-State is chosen as the blueprint. Attempting to theorise the EU through a nation-State lens fails to take account of the supranational nature of the majority of the decision-making conducted by the EU's institutions, let alone the intergovernmentalism that remains a feature of the EU even after the Lisbon Treaty. This objection culminates in the lack of EU statehood¹⁸ with Europe being made up of many peoples rather than a single people. There is thus no *demos* and "if there is no *demos*, there can be no democracy"¹⁹ with few mechanisms to promote a *demos* such as a common language, centrally organised political parties, harmonised education policies or a European rather than national mass media. As input legitimacy relies on public support²⁰ or "public control with political equality"²¹ then the lack of *demos* creates significant hurdles to democratic accountability.

However, as again noted by Menon and Weatherill²², this lack of democratic accountability or input-legitimacy should not create a "counsel of despair" over the

Bellamy, 'Still in Deficit: Rights, Regulation, and Democracy in the EU' (2006) 12 ELJ 725; A Etzioni, 'The Community Deficit' (2007) 45 JCMS 23; Y Devuyst, 'The European Union's Institutional Balance after the Treaty of Lisbon: "Community Method" and "Democratic Deficit" Reassessed' (2008) 39 Georgetown Journal of International Law 247; D Jančić, 'Caveats from Karlsruhe and Berlin: Whither Democracy after Lisbon?' (2010) 46 Columbia Journal of European Law 337

¹⁷ A Menon, S Weatherill, 'Transnational Legitimacy in a Globalising World: How the European Union Rescues its States' (2008) 31 Western Union Politics 397 at 400

¹⁸ D Grimm, 'Does Europe Need a Constitution?' (1995) 1 ELJ 282. See also the German Federal Constitutional Court's judgments in Brunner [1994] 1 CMLR 57 and Lisbon [2010] 3 CMLR 13

¹⁹ Op. Cit. n.15 Weiler at 337

²⁰ P Ehin, 'Competing Models of EU Legitimacy: The Test of Popular Expectations' (2008) 46 JCMS 619 at 621

²¹ Op. Cit. n.12 at 444

²² Op. Cit. n.17 at 401

legitimacy of the EU as it opens up the possibility of alternative routes to establish the EU's legitimacy.

This alternative route can be discovered in the Scharpf's concept of output-orientated legitimisation (henceforth output legitimacy). Here the determination of the legitimacy of the EU is perceived through reference to its output and Majone suggests that as the Union is a "regulatory State" then that regulation is the route to measuring legitimacy²³. Much of the commentary on output legitimacy has focused on the economic side of the EU and in particular the internal market²⁴, equating legitimacy with efficiency that has provided observers with considerable flexibility but without structure or a model for determining the legitimacy of the EU. The key then to analysing the legitimacy of the EU is to provide a model through which the EU's outputs can be evaluated

Politics is concerned with power²⁵ and the capacity of social agents to maintain or transform their social environment and to create a regulated order for managing human conflict and interaction. Law can be considered to be "the enterprise of subjecting human conduct to the governance of rules"²⁶ or "the human attempt to establish social order as a way of regulating and managing human conflict"²⁷. As

²³ G Majone, 'Europe's "Democratic Deficit": The Question of Standards' (1998) 4 ELJ 5

²⁴ See Op. Cit. n.9 and 17 and see also J Neyer, 'Justice, Not Democracy: Legitimacy in the European Union' (2010) 48 JCMS 903

²⁵ D Held, *Models of Democracy* (2nd edn Polity Press, Cambridge 1996) at 309

²⁶ LL Fuller, *The Morality of Law* (Yale University Press, New Haven 1969) at 96

²⁷ D Beyleveld, R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London 1986) at 2

such law deals with human action and human social action, is the method used to enact the rules required to regulate this human social action and is the final outcome of the political process. From these definitions politics and law are inevitably intertwined with the laws and rules of the polity providing the positive evidence of the policy stance of the polity. Therefore to assess the political legitimacy of the outputs of the EU the laws and rules of the polity as the final embodiment of its policy must be analysed. It is the legal rationality model that provides the criteria for scrutiny of the law consisting of three elements, each mutually exclusive and essential: formal; instrumental; and, substantive rationality. Formal rationality requires legal doctrine to be free from contradiction and for rules to be the same for everyone, instrumental rationality requires these rules and legal doctrine to be action guiding whilst substantive rationality necessitates the norms underlying legal doctrine to be justified. They are mutually exclusive as they are comprised of different factors and have different ends, namely the avoidance of conflict between laws, guidance for action and the justification for such action. They are essential as the failure of a desideratum of rationality leads to a conclusion that the law is defective. Legal rationality enables the outputs of political endeavour, the substantive law in action, to be scrutinised for legitimacy utilising practical reason that then reflects on politics. The methodology provides a structured analysis that can enable specific recommendations to be made for improvement and reform when areas of concern are identified.

It must be acknowledged however that there are limitations to the extent that rationality can measure or enhance the ideas of legitimacy. The first is inherent in the main premise of the theory, namely to assess political or output legitimacy rather

than democratic or input legitimacy. This can be criticised as the application of the term legitimacy to those who rule appears to require some input from those that are ruled. It is conceded that this would be a credible criticism if the focal point was to legitimise the accountability of the political process to the people. However, the focal point here is the final output of the political process that are the laws and rules of the polity thereby assessing the law against a measurable benchmark. That measurable benchmark is the concept of legal rationality but this leads to a further limitation. The notion of legal rationality can be viewed as an ideal, abstract and precise scientific tool for analysis in a hermetically sealed, politically neutral world. In reality however the political world is not neutral and policy formation is influenced by a range of factors. Therefore once the legal rationality assessment has been conducted it must be located within the policy purpose, which acts in the same manner as the doctrine of objective justification and only comes into play when there is a finding of legal irrationality.

Legal Rationality as a Tool for Analysis

The justifications for using legal rationality as a tool for analysis first need to be explored. As such the origins of the concept of rationality will be discussed, followed by a detailed examination of the factors involved in the rationality analysis, before considering alternatives and the reasons for employing legal rationality.

a. Philosophical Rationality

Rationality is an extremely complex idea that could be considered to mean all things to all men²⁸. Rationality conveys a two-dimensional notion in philosophical terms. The first is the broad or general view that all philosophers aspire to using reason to provide force for arguments and placing special emphasis on man's rational capacities²⁹. Rationalism in the strict or narrow sense has caused considerably more debate as it has conflicted directly with the ideas of empiricism. Rationalists believe in the possibility of a *priori* knowledge, where a proposition is a *priori* if its truth can be established independently of any sensory observation³⁰. The acquisition of this knowledge is achieved by employing reason. To establish pure truth, free from experiences, emotions and sensory input, pure reason needed to be applied. This position was attacked by empiricists who questioned the isolation of facts and truth and developed the belief that all human knowledge derived from the senses³¹. Rationalism approached human knowledge from a purely objective stance whilst empiricists employed a purely subjective approach. Following Hume philosophers have attempted to synthesise empiricism within rationality. Kant³² attempted to achieve this with his synthetic *a priori* truth, involving a transcendental deduction, that every event is determined by a cause so long as it is related to the empirical world of phenomena. In more recent times the search has turned to the use of practical reason rather than pure reason. The acquisition of knowledge is still considered to be a good, not in itself but as knowledge of human action. Reason is

²⁸ See JA Simpson, ESC Weiner, (Prepared), *The Oxford English Dictionary Vol.XIII* (2nd edn Clarendon Press, Oxford 1989) at 220 for a multifaceted definition

²⁹ J Cottingham, *Rationalism* (Thoemmes Press, Bristol 1984) at 2

³⁰ Ibid. at 7; see e.g. the philosophical stance of René Descartes collected together in ES Haldane, GTR Ross, *The Philosophical Works of Descartes* (CUP, Cambridge 1911)

³¹ See e.g. D Hume, (LA Selby-Bigge (Ed.)), *A Treatise of Human Nature* (3rd edn OUP, London 1975)

³² I Kant, (N Kemp Smith (Ed.)), *The Critique of Pure Reason* (The Macmillan Press Ltd, London 1929)

used to establish belief rather than pure truth and is shaped by the evidential nature of empirical facts³³. As Nozick³⁴ states this is a fusion of concepts allowing *a priori* knowledge to be supported by evidential facts. Modern day philosophical rationality then looks at practical reasons for human action. This has allowed philosophers to develop rational principles from human action³⁵.

b. Sociological Rationality

Rationality as advanced in sociology has its origins in the works of Max Weber. It is unfortunate, however, that Weber's thoughts are complex, dense and at times appear to be contradictory. Brubaker³⁶ identifies Weber's social thought on rationality as a relational concept where a thing can only be rational from a certain point of view and this thing cannot contain inherent rationality. Rationality as a relational notion is then applied to an analysis of social structure. Thus formal rationality is a matter of fact referring primarily to the calculability of means and procedures. The action of calculation requires facts to be without contradiction to avoid the possibility of an irrational situation. Substantive rationality on the other hand is a matter of value referring principally to the worth of ends or results³⁷. As this concept is value-laden, substantive rationality must be underpinned by morality.

³³ R Nozick, *The Nature of Rationality* (Princeton University Press, Princeton 1993) at 112

³⁴ *Ibid.* at 108

³⁵ See A Gewirth, *Reason and Morality* (University of Chicago Press, Chicago 1978)

³⁶ R Brubaker, *The Limits of Rationality* (Allen & Unwin, London 1984) at 35

³⁷ *Ibid.* at 36

In *Economy and Society*³⁸ Weber suggests that human social action may be orientated in four ways³⁹. The first is 'instrumental rationality' determined by expectations as to the behaviour of objects and other humans and used as conditions for the attainment of an individual's rationally pursued and calculated ends. This then is action guiding and can be connected to but not incorporate formal rationality⁴⁰. The second is 'value-rationality' determined by a conscious belief in an absolute value and its implementation independently of the prospects for its successful realisation. As with substantive rationality, value rationality is value-laden and is thus imbued with moral concerns. The third is 'affectual orientation' determined by an individual's specific effects and states of feeling, and fourth is 'traditional orientation' determined by ingrained habituation. These latter two orientations are not considered rational as they lie on the borderline, often on the wrong side, of meaningfully orientated action⁴¹. So from Weber's ideas on rationality we can identify three specific types: formal; instrumental; and, substantive (equating this with value rationality). Other sociologists have attempted to add other kinds⁴² but Weber's three rationalities remain dominant.

³⁸ M Weber, (G Roth, C Wittich, (Eds.)), *Economy and Society: An Outline of Interpretative Sociology* (University of California Press, Berkeley 1968) at 24

³⁹ See J Elster, 'Rationality, Economy, and Society' in S Turner (Ed.), *The Cambridge Companion to Max Weber* (CUP, Cambridge 2000) 21 at 31

⁴⁰ Weber equated legal legitimacy with this concept of formal rationality in Op. Cit. n.38 at 34 but this has been criticised by R Grafstein, 'The Failure of Weber's Conception of Legitimacy: Its Causes and Implications' (1981) 43 *The Journal of Politics* 456 at 467

⁴¹ Op. Cit. n.38 at 25

⁴² See e.g. J Habermas, *Communication and the Evolution of Society* (Heinemann Educational, London 1979); *The Theory of Communicative Action Volume One* (Polity Press, Cambridge 1984) in which Habermas identifies perceived gaps left by Weber and attempts to fill them in by developing the concept of communicative rationality from human communicative action. Although an attractive theory, cogently argued, it is submitted that this simply takes elements of formal and substantive rationality to apply them to an ideal speech situation

c. Legal Rationality

As already observed, law can be considered to be “the enterprise of subjecting human conduct to the governance of rules”⁴³ or “the human attempt to establish social order as a way of regulating and managing human conflict”⁴⁴. As such it deals with human action and human social action. Nozick⁴⁵ states that “to term something rational is to make an evaluation; its reasons are good ones (of a certain sort), and it meets the standards (of a certain sort) that it should meet”. Law is built on judgment rather than chance⁴⁶ and thus the evaluation of the legal enterprise must be grounded by practical reason⁴⁷. Academic writers, with the supposed advent of a political, and thus legal, legitimation crisis⁴⁸ across the western world, have begun to explore rationality⁴⁹. An important participant in the debate is Professor Roger Brownsword⁵⁰ with his use of rationality as an instrument of analysis of contract law under the heads of formal, instrumental and substantive⁵¹ rationality that represent

⁴³ LL Fuller, *The Morality of Law* (Yale University Press, New Haven 1969) at 96

⁴⁴ D Beylveled, R Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell, London 1986) at 2

⁴⁵ Op. Cit. n.33 at 98

⁴⁶ R Brownsword, *Contract Law: Themes for the Twenty-First Century* (Butterworths, London 2000) (henceforth CL) at 209

⁴⁷ See S Toddington, *Rationality, Social Action and Moral Judgment* (Edinburgh University Press, Edinburgh 1993) chapter 6 in which he confirms the claim of John Finnis (J Finnis, *Natural Law and Natural Rights* (Clarendon Press, Oxford 1980) chapters 1 & 2) that the practically reasonable point of view is the required viewpoint for social science. He goes on to agree with Finnis that this practically reasonable point of view can be shown to be a moral point of view but dismisses, it is submitted correctly, Finnis’ attempts to do so

⁴⁸ J Habermas, *Legitimation Crisis* (Heinemann, London 1976)

⁴⁹ Weber considered rationality of law but only approached this from the position of formal rationality – see Op. Cit. n.38 at 656

⁵⁰ Op. Cit. n.46 chapter 9; R Brownsword, ‘Towards a Rational Law of Contract’ in T Wilhelmson (Ed.), *Perspectives of Critical Contract Law* (Dartmouth, Aldershot 1993) at 241; J Adams, R Brownsword, *Key Issues in Contract* (Butterworths, London 1995) chapter 10 (henceforth TRLC and KIC respectively)

⁵¹ See G Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17 *Law & Society Review* 239 at 252 where he proffers the alternative labels of internal, system and norm rationality

“the standards that we judge that [the law] should meet and the reasons that we count as good ones”⁵², where the “we” is society in general⁵³.

The practical application of legal rationality could be considered to be somewhat vague and uncertain⁵⁴. Irrationality in English law is one of the grounds for judicial review in administrative law and is often used interchangeably with unreasonableness, although it is only one aspect of unreasonableness. In the GCHQ⁵⁵ case an irrational decision was one “so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it”. In ex parte Smith⁵⁶ it was held to be one which was “beyond the range of responses open to a reasonable decision-maker”. From these two judgments we can glean that irrationality involves the lack of logic, reason, and comprehensible justification for a decision made by a body with legislative powers that operates on the human social order.

⁵² Op. Cit. n.46 at 209

⁵³ See J Gardner, T Macklem, ‘Reasons’ in J Coleman, S Shapiro, (Eds.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP, London 2002) at 440 who have questioned the existence of legal rationality as a separate concept. Their position, however, originates firmly within the area of philosophical rationality, considering the broad view of providing reasons in a narrow context that is grounded within empiricism

⁵⁴ See e.g. H Collins, *Regulating Contracts* (OUP, London 1999) chapter 6 entitled ‘Rationality of Contractual Behaviour’ in which no definition or explanation of the term “rationality” is provided

⁵⁵ Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374 at 410 per Lord Diplock

⁵⁶ R v Ministry of Defence ex parte Smith [1996] 1 All ER 257 at 263 per Sir Thomas Bingham MR

In the USA there is a constitutional doctrine that legislative action must be rationally related to the accomplishment of some legitimate state purpose⁵⁷. As Sunstein⁵⁸ notes this only expressly prohibits the exercise of raw political power, as the review does not attempt to establish a separate category of impermissible government ends. However, some justification of legislative action is required that must be of some public value. Sunstein⁵⁹ identifies that a public value justifying the exercise of government power “acts as a check on the danger of factional tyranny” and “that the role of government is not to implement or trade off pre-existing private interests, but to select public values”. Once again rationality would appear to require the justification of a legislative political decision based on some value-laden societal norm.

The EU has been slow to elaborate a deliberately labelled concept of rationality⁶⁰. Article 296 TFEU requires Union acts to “state the reasons on which they are based”. Article 263 TFEU allows the ECJ to review the legality of legislative acts with paragraph 2 containing the grounds for review: lack of competence; infringement of an essential procedural requirement; infringement of the Treaties or of any rule of law relating to its application; or, misuse of powers. Again a concept of legal rationality could be constructed that requires legislative political action to be justified by reasons⁶¹ with correct procedural fairness, under the rule of law and without the

⁵⁷ RW Bennett, “Mere” Rationality in Constitutional Law: Judicial Review and Democratic Theory’ (1979) 67 California Law Review 1029

⁵⁸ CR Sunstein, ‘Naked Preferences and the Constitution’ (1984) 84 Columbia Law Review 1689 at 1697

⁵⁹ Ibid

⁶⁰ Commission Communication on a Community immigration policy COM(2000) 757 final, para.3.4.2, in which the concept of rationality is equated with transparency

⁶¹ Joined Cases C-71, 155 & 271/95 Belgium v Commission [1997] ECR I-687 para 53, “It must show clearly and unequivocally the reasoning of the institution which

abuse of power. General principles of EU law are also applied by the Court and can be considered to provide an equivalent of the societal moral norm apparent in both English and US review.

1. Formal Rationality

Formal rationality states the requirement that legal doctrine must be free from contradiction and that the rules should be the same for everyone. At first blush this would appear to repeat a traditional view of legal scholarship in which laws should be interpreted consistently and the irreconcilable avoided, provided laws apply to all. However, elevating boundaries between different legal disciplines (e.g. between rules in EU and international law or criminal and civil law) will not satisfy the requirements of formal rationality as the two legal positions may contradict one another. Furthermore, tension between two principles may not be contradictory where they complement decision making rather than contradict it.

Formal irrationality then may arise in one of three ways⁶². First, doctrinal positions from outside Union law may contradict those within. Second, different doctrines within European law may be contradictory. Third, situations within an area of EU law may be inconsistent.

2. Instrumental Rationality

Instrumental rationality can be sub-divided into two types, generic and specific. Generic instrumental rationality requires legal doctrine to be capable of guiding action and so, as Fuller observes, certain minimum principles must be

adopted the measure so as to inform the persons concerned of the justification of the measure adopted...”

⁶² Op. Cit. n.46 at 211

presupposed⁶³. This so-called “inner morality of law” is made up of legal rules that should be general, promulgated, prospective, clear, non-contradictory, and relatively constant. They should not require the impossible and there should be congruence between the law as officially declared and the law as administered. The Fullerian principles can be categorised as procedural matters as they are not underpinned by a moral conception and can be equated with the concept of the rule of law⁶⁴. Brownsword and Beyleveld⁶⁵, Hardin and Lewis⁶⁶, Allan⁶⁷, Simmonds⁶⁸, Boyle⁶⁹ and Murphy⁷⁰ have attempted to construct a substantive conception of the rule of law, with Fuller’s procedural requirements infused with moral values, a position Fuller himself advocated. It is submitted that moral values may be sufficient but not necessary requirements for instrumental rationality, for which instrumentality is the key⁷¹. As legal rationality requires all three elements for justification of legislative

⁶³ Op. Cit. n.43 at 39

⁶⁴ See FA Hayek, *The Road to Serfdom* (Routledge, London 1944) at 54

⁶⁵ Op. Cit. n.44 at 314

⁶⁶ I Harden, N Lewis, *The Noble Lie: The British Constitution and The Rule of Law* (Hutchinson, London 1986); P Birkinshaw, ‘Supranationalism, The Rule of Law, and Constitutionalism in the Draft Union Constitution’ (2004) 23 YEL 199 at 203

⁶⁷ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP, London 2001)

⁶⁸ NE Simmonds, *Central Issues in Jurisprudence* (2nd edn Sweet & Maxwell, London 2002) and ‘Straightforwardly False: The Collapse of Kramer’s Positivism’ (2004) 63 CLJ 98

⁶⁹ J Boyle, ‘Legal Realism and the Social Contract: Fuller’s Public Jurisprudence of Form, Private Jurisprudence of Substance’ (1993) 78 Cornell Law Review 371

⁷⁰ C Murphy, ‘Lon Fuller and the Moral Value of the Rule of Law’ (2005) 24 Law & Philosophy 239

⁷¹ For an interesting academic discussion on whether the rule of law is infused with morality see the debate between Simmonds, Op. Cit. n.70, who argues for the infusion, and MH Kramer, *In Defense of Legal Positivism* (OUP, London 1999) and MH Kramer, ‘On the Moral Status of the Rule of Law’ (2004) 63 CLJ 65 who argues against. For the purposes of this thesis the question of the moral underpinning of the rule of law is negated by the necessary requirement of substantive legal rationality

action, the moral issues can be analysed under the substantive element of rationality thereby removing controversy and confusion⁷² from the debate on the rule of law.

It must be noted that the principle of non-contradiction plays an important role in instrumental rationality, as well as being the basis of formal rationality, when it is set alongside the principles of clarity, constancy and promulgation. Furthermore the distinction between contradiction and tension observed in formal rationality is of no importance in instrumental rationality as a legal matter will be clear or unclear without considering why the problem exists.

Generic instrumental rationality is a necessary, if not always sufficient, condition of action-guidance and is complemented by specific instrumental rationality. Legal intervention, either by legislation or by the judiciary, must display an informed and competent attempt at promoting given ends. Legislative officials must consider which legal technique, or combination of techniques, would be most effective to achieve the task. Furthermore if the legal act is intended to facilitate then it should do so, if it is intended to provide protection then it should protect. Finally, the judiciary will employ different ideologies, based on personal or normative beliefs, when interpreting legal instruments.

3. Substantive Rationality

Substantive rationality requires that all rules of law should be based on good reasons. It is here that we encounter again the ideas of practical reason. First, there is a requirement that the empirical facts sustaining particular legal doctrines should

⁷² See T Bingham, 'The Rule of Law' (2007) 66 CLJ 67 at 75 and *The Rule of Law* (Allen Lane, London 2010) chapter 7 who it is submitted wrongly includes the protection of fundamental human rights in his list of elements for the rule of law

be plausible. Second, and moving beyond empirical plausibility, the principle underpinning the doctrine must itself be defensible as legitimate. However, this requirement that the substance of legal doctrine should be justified or legitimate can be interpreted in at least three ways⁷³. First, law may be substantively rational if its norms are by and large accepted as justified and legitimate. Problems occur if legal norms are not considered legitimate and so either have to be amended or public perception adjusted. Law may certainly be used to mould public opinion over time but it is extremely difficult to change public perception swiftly, unless in an emergency situation, and thus the acceptance of the law. Second, law is substantively rational if norms follow the first requirement but can also be shown to be a consistent set. This interpretation raises the same problems as the first but even if legal norms are considered to be legitimate they may fail the requirement of consistency. However, Brownsword⁷⁴ suggests that so long as this inconsistency is only noted by legal theorists then the law can still be effective. Third, law to be substantively rational does not depend upon acceptance. If, and only if, its norms form a justified and legitimate set may law display substantive rationality. Thus problems occur on this view when the legal norms cannot be coherently defended and justified, regardless of their acceptance. The interpretations involving acceptance include a substantial subjective element. It is submitted that if one is attempting to base rules of law on good reasons, the dictates of practical reason require an entirely objective approach. Thus the only logical meaning of substantive rationality is that of the third interpretation. However, the justification of norms underlying legal doctrine is by definition value-laden and as such suffused with moral considerations.

⁷³ Op. Cit. n.50 TRLC at 250; KIC at 338

⁷⁴ Ibid.

Three options are available to establish how the determination of the moral criterion of substantive rationality is to be achieved⁷⁵. First, it could be left to be determined by the judiciary to interpret the law, without outside direction on the positions to be taken. Judges with their training in fairness and impartiality combined with their separation from the legislative, political process could be considered to be an august and ideal body of moral deliberation⁷⁶. However, as Griffith⁷⁷ has argued, the judiciary's social and educational background combined with their age and awareness of their position tend to make most judges susceptible to the adoption of highly conservative attitudes when faced with hard cases⁷⁸. Dworkin⁷⁹ has answered Griffith by claiming that a rights culture would change the social base of the legal profession and that a professional judiciary steeped in such a culture would consider cases on the basis of social justice rather than social status quo. This is adequate as a general social observation and ideal but as Griffith points out the "principal function of the judiciary is to support the institutions of government as established by law"⁸⁰ or to uphold the rule of law⁸¹. As such the principal value of the judiciary specifically and the legal profession in general is to "preserve and protect the existing order"⁸²

⁷⁵ Op. Cit. n.46 at 223

⁷⁶ See N Browne-Wilkinson, 'The Infiltration of a Bill of Rights' [1992] PL 397; J Laws, 'Is the High Court the Guardian of Fundamental Constitutional Rights?' [1993] PL 59

⁷⁷ JAG Griffith, *The Politics of the Judiciary* (5th edn Fontana, London 1997) chapter 9

⁷⁸ Cf R Dworkin, *Taking Rights Seriously* (Duckworth, London 1978) chapter 4

⁷⁹ R Dworkin, *A Matter of Principle* (Clarendon Press, Oxford 1985) at 28-31

⁸⁰ Op. Cit. n.77 at 343

⁸¹ A constitution would provide the external moral guidelines to direct the moral guidelines for substantive rationality. See GF Mancini, 'Politics and the Judges – The European Perspective (1980) 43 MLR 1 for a consideration of European judicial law making in the shadow of a constitution and without a practicing background, especially in the Italian legal system

⁸² Op. Cit. n.77 at 342

thereby perpetuating the social status quo. Without some form of external moral guidance it is difficult to see how the judiciary could provide a socially just moral criterion for substantive rationality⁸³. The equivalent position to that being advanced here is the situation in the UK before the Human Rights Act 1998 (henceforth HRA) came into force with the Court of Appeal's judgment in ex parte Smith⁸⁴ epitomising the limitations without an external moral guide. Dickson⁸⁵ highlights a similar situation in the House of Lords since the HRA in regard to international human rights standards that are unincorporated in UK law.

That external guidance could be provided by the second option⁸⁶, the standards of fairness already recognised, either expressly or impliedly, in positive legal doctrine. Thus Sir John Laws suggests that by following common law precedent, UK judges are able to uphold fundamental constitutional rights without a written constitution⁸⁷. A system of precedent may limit judicial idiosyncrasy, indeed conforming to the requirements of formal rationality by limiting contradictions within the law, but substantive rationality is designed to evaluate the defensibility of legal doctrine. Establishing that a rule or procedure through precedent is employed at a particular time cannot be the reason for justifying that legal doctrine - that is, doctrine cannot validate itself as legitimate. Furthermore the development of strict precedent,

⁸³ Op. Cit. n.79 at 30 where Dworkin appears to be suggesting such a situation with a conservative judge having to apply a principle of political morality if it is included in a legislative act

⁸⁴ Op. Cit. n.56. Cf A v Secretary of State for the Home Department [2005] 2 AC 68 at 129 per Lord Hoffman

⁸⁵ B Dickson, 'Safe in their Hands? Britain's Law Lords and Human Rights' (2006) 26 LS 329 at 335

⁸⁶ Op. Cit. n.46 at 224

⁸⁷ Op. Cit. n.76 Laws J. For a critical analysis of Laws' position see JAG Griffiths, 'The Brave New World of Sir John Laws' (2000) 63 MLR 159. See also T Poole, 'Questioning Common Law Constitutionalism' (2005) 25 LS 142

combined with the apparent conservative nature of the judiciary, leads to a diminution in the standards of fairness in recognised legal doctrine as the use of existing doctrine as the standard of legitimacy would curtail any proposal for reform or revision. If this were to be modified to allow some small improvements to existing doctrine then this suggests that there is a form of legitimacy outside the existing doctrine that can recognise such improvements and the need for them.

The third option is to invoke the standards of fairness recognised by the community⁸⁸. This option raises two questions. What are the 'standards of fairness' and within which community are they to be recognised? Standards of fairness require some form of definitional elucidation. It is submitted that as the community is an arena for human social action then this is achieved through philosophical analysis using practical reason. As fairness is value-laden then the standards envisaged must be moral values⁸⁹ that are universal in nature, developed from a transcendental deduction, that can themselves be rationally justified and be grounded in practical reason. A modern neo-Kantian moral theory that answers these requirements is that advanced by Gewirth⁹⁰. It is outside the scope of this thesis to consider his theory in depth⁹¹ but he argues from human action to a supreme principle of morality that he calls the Principle of Generic Consistency (PGC). In essence this states that on pain of contradiction of being a human being, every human being must act in accordance

⁸⁸ Op. Cit. n.46 at 225

⁸⁹ See Op. Cit. n.47 where Toddington establishes that practical reason must be viewed from the moral point of view when used to analyse human social action

⁹⁰ See Op. Cit. n.35

⁹¹ See E Regis Jr, (Ed.), *Gewirth's Ethical Rationalism: Critical Essays with a Reply by Alan Gewirth* (University of Chicago Press, Chicago 1984); D Beyleveld, *The Dialectical Necessity of Morality: An Analysis and Defence of Alan Gewirth's Argument to the Principle of Generic Consistency* (University of Chicago Press, Chicago 1991)

with the generic rights of other human beings as well as themselves, where the generic rights are freedom and well-being. As these generic rights are held equally by all human beings then they are human rights⁹². It is submitted that, even if Gewirth's argument to the PGC is disputed, the moral concept that underpins the principle of fairness is one that is embodied by the concept of human rights. Furthermore if Gewirth's argument⁹³ of a supreme principle of morality derived from human action by practical reason is employed then legal doctrine may be rationally justified using the PGC as the basis of human rights. The second question involving the determination of the community is as difficult as the first. Human rights are considered to be universal and so one could posit the notion that the community encompasses the whole of human kind. However, where legal doctrine is territorially delineated then it is logical to presume that the community will be likewise. Thus European Union law will be confined to the territory of the current twenty-seven Member States. External agreements may extend this community reach in certain defined areas such as trade and immigration.

4. Reflexive Rationality

It must be queried, following the analysis of formal, instrumental and substantive rationality, whether any other type of legal rationality exists. Gunther Teubner⁹⁴ has argued that as there is scepticism over substantive rationality and a lack of desire for formal rationality then reflexive rationality may prevail. Reflexive rationality is used interchangeably by Teubner with procedural rationality⁹⁵ (or justice) and according to

⁹² A Gewirth, *The Community of Rights* (University of Chicago Press, Chicago 1986) chapter 1

⁹³ Op. Cit. n.35

⁹⁴ Op. Cit. n.51

⁹⁵ Op. Cit. n.50 TRLC at 242

John Rawls⁹⁶ there are three types of procedural justice: pure; perfect; and, imperfect. Pure procedural justice goes further than the ideas of formal rationality that rules are the same for all, so that the rules are not obviously for or against anyone. This is achieved by the ideas of equality of opportunity, chance or risk. However, pure procedural justice is not driven by any independent conception of a just outcome. Perfect and imperfect procedural justice, on the other hand, are driven by the issue of outcomes. Perfect procedural justice deals with procedure guaranteed to generate a substantive, just outcome, and imperfect procedural justice with procedures that are blameworthy. A weak version of reflexive rationality can be equated with pure procedural justice and as there are no conceptions of substantively just outcomes as to the design of procedural conditions, then this topples into formal rationality. A strong version will be equated with the twin concepts of perfect and imperfect procedural justice. An independent theory of just outcomes will drive procedural conditions in a certain way, thus collapsing strong reflexive rationality into substantive rationality. As reflexive rationality attempts to chart a middle way between formal and substantive rationality it soon becomes apparent that it fails the very test of rationality that it attempts to resolve.

Legal Rationality within the Context of Policy

To ensure that the legal rationality tool can then be utilised to provide useful critical analysis, the findings of the critique must be set within the context of policy associated with the legal instruments examined. The aim is principally to determine whether the purposes of the policy⁹⁷ can “objectively justify” any findings of legal irrationality so that there is political legitimacy but as Tridimas states the concept of

⁹⁶ J Rawls, *A Theory of Justice* (2nd edn OUP, London 1999) chapter 14

⁹⁷ T Tridimas, *The General Principles of EU Law* (2nd edn OUP, London 2006) at 83

objective justification is “not easy to define in the abstract”⁹⁸. The principle as it has developed in the case law of the ECJ but partially modified by the legal rationality criteria provides the means for providing the practical dimension to an ideal analysis. This then is the reality check with safeguards.

To formulate the background for the objective justification evaluation the factors affecting policy formation must be established. When the findings for formal and instrumental rationality are considered then the fact that they are value-neutral enables most good policy factors to be claimed as justification with different factors being arranged in order of importance as the polity determines. However, substantive rationality is value-laden with an underlying moral claim to the protection of human rights. As such any justification for findings of substantive irrationality would need to be based on human rights standards.

When using objective justification in the free movement provisions any policy factor would now need to comply with the requirements of proportionality such that the measures are suitable for attaining the objective and do not go beyond what is necessary to achieving it⁹⁹. However, both of these elements are included in the analysis of specific instrumental legal rationality.

Conclusions

⁹⁸ Ibid.

⁹⁹ C Barnard, *The Substantive Law of the EU: The Four Freedoms* (3rd edn OUP, London 2010) at 516

The argument presented provides for a new method of analysing the rationality of the European Union. Starting from Scharpf's seminal theory of input and output legitimacy it was found that input legitimacy, or democratic accountability as traditionally viewed through the lens of the nation-State model, was difficult to establish. Much of the academic commentary was viciously circular arguing for nation-State solutions from the starting point of a nation-State model, and failing to address the supranational, and at times intergovernmental, nature of the EU. However, output legitimacy when considering the legal outputs of political action through the lens of legal rationality could be utilised to evaluate the political legitimacy of the EU polity. The process though was idealistic and sterile until set within the policy context of the polity. This was the reality check that brought the ideal into the real political world.