

LEONHARD DEN HERTO^G*

The Rule of Law in the EU: Understandings, Development and Challenges

Abstract. This article examines the development and particular nature of the rule of law in the European Union against the background of the wider legal and political theoretical debate on the principle. It hence analyses the case law of the Court of Justice of the EU and the Treaty revisions on the rule of law. It argues that the principle has developed greatly since the first mention of it in the case law of the Court and contends that the principle has a particular focus in the EU on judicial protection in light of human rights. Nonetheless it is hard to apply the dichotomies running through the debates in legal and political theory to the development of the principle in the EU; an idiosyncratic mix of features seems to emerge. Moreover, this article also takes the case study of the external dimension of migration control to assess the current challenges to the rule of law in the EU. It thereby uncovers ways of working in the EU that are hard to reconcile with the rule of law requirements.

Keywords: rule of law, European Union, judicial protection, human rights, migration control

Introduction

The rule of law seems a self-evident value for academics and policy-makers and has been almost unanimously promoted in the post Cold War world. It is a constitutional cornerstone of the EU; the Treaties refer to it multiple times as a foundational value. It seems nonetheless that this cornerstone is becoming more porous: it suffers from a lack of conceptualisation and is under pressure in some EU policies.

This article puts the development of the rule of law in the EU in the wider scholarly perspective of the legal and political philosophy debates on the principle. What kind of rule of law is the EU actually adhering to or promoting? Firstly, this article argues that although indeed the EU seems to adhere to a “thick” or “substantive” notion of the principle, it seems nevertheless primarily focused on rather formal aspects, such as on judicial review, albeit in light of fundamental rights protection. Secondly, this article argues that, contrary to what may be conventional wisdom, compliance with the rule of law is at risk in some EU policy sectors due to the proliferation of new forms of governance.

The structure of this article is hence as follows. Section I briefly sets out the main conceptual dichotomies running through the debate on the rule of law in legal and political philosophy. This presents the different notions and discourses on the principle as background. It thereby informs the subsequent analysis of the principle in the EU. The development of the principle from it being first invoked by the CJEU in its landmark *Les Verts* case law (1986) to its current constitutional dominance is described in Section II. This analysis uncovers idiosyncratic features of the principle in EU law. The first two sections

* Ph.D. Fellow, Marie Curie ITN on EU external relations, Universities of Köln and Edinburgh; Jean Monnet Chair, Universität zu Köln, Gottfried-Keller-Str. 6, 50931, Köln, Deutschland. On research visit at the Institute for World Economics of the Hungarian Academy of Sciences. The author would like to thank Balázs Horváthy and Tamás Dezső Czigler from the Institute for Legal Sciences of HAS CSS for their help, comments and the opportunity of presenting a draft version of this paper in an open lecture at Széchenyi István University.
E-mail: den-hertog.a@uni-koeln.de

also aim to give a brief overview, or summary, of the main lines of thinking on the rule of law in the EU. Finally, Section III takes the case study of the external dimension of EU migration control to assess how the rule of law fares in contemporary EU policy making. The assessment reveals that despite uplifting rhetoric on the principle its full potential is not yet attained in this EU policy area.

1. Theoretical and Conceptual Discussions on the Rule of Law

The rule of law arguably suffers from a lack of clear conceptualisation. Many scholars have already suggested that *as a concept it is perhaps so elusive* that this made it in fact so universally and globally acceptable.¹ Craig even issues a “health warning” to those venturing into the rule of law debate;² there are so many diverging conceptions and academic discussions that the concept is held to become “elusive”³, “essentially contested”⁴ and perhaps even “less clear today than ever before”.⁵ This may be overstating it a bit. In the Union’s “Holy Trinity” of “democracy, human rights and the rule of law”, “human rights” have the Charter and international treaties to give them substance and “democracy” has its ultimate conceptual core in majority-rule through free and fair elections.⁶ Articulating what “the rule of law” means is however rare, also on the national level.⁷ In the EU there is no codified agreement on what the principle should mean, apparently not because it is so fiercely publicly contested but exactly *because it is not*.⁸ This evokes the slightly disconcerting question: if indeed there is no shared notion within the Union, then *what* is it actually claiming to “safeguard”, “consolidate” or “support”? And if it is indeed true that the principle is so elusive for those actors, can it credibly constrain policies? After all, *constraining*—and not “guiding”—State power is the classic objective of the rule of law as traditionally perceived in the liberal-democratic nation-state.⁹

The substance, requirements and characteristics of the rule of law are also the object of much contention within political and legal theory. This section offers neither an extensive nor a conclusive description of what the rule of law means and how it evolved over time. Instead, to illustrate that it is “an essentially contested concept”, this section aims to give some background to the main disputes that exist over its meaning. The rationale for delving

¹ Tamanaha, B. Z.: *On the rule of law—history, politics, theory*. Cambridge, 2004. 3.

² Craig, P.: *The Rule of Law*. Appendix 5 in House of Lords Select Committee on the Constitution, Relations between the executive, the judiciary and Parliament, HL Paper. 2006–2007. 97.

³ Tamanaha: *op. cit.* 3.

⁴ Waldron, J.: Is the rule of law an essentially contested concept (in Florida)? *Law and Philosophy*, 21 (2002) 2, 148.

⁵ Fallon Jr., R.: The “Rule of Law” as a Concept in Constitutional Discourse. *Columbia Law Review*, 97 (1997)1, 1.

⁶ Of course, democracy is not merely majority-rule; an appropriate democracy needs to include minority rights and constitutional limitations on law-making and (constitutional) change.

⁷ Pech, L.: The Rule of Law as a constitutional principle of the European Union. *Jean Monnet Working Paper—NYU School of Law*, 4 (2009), 42–43.

⁸ Pech, L.: Rule of Law as a guiding principle of the European Union’s external action. *CLEER Working Papers*, 3 (2012) 22. See also Chesterman, S.: An International Rule of Law? *American Journal of Comparative Law*, 56 (2008), 332.

⁹ Tamanaha: *op. cit.* 114–119.

into this conceptual debate is that the development of the rule of law in the EU could be analysed and understood along some of these lines.

Since its origins in “the classics” and medieval times, the rule of law has expanded into a concept fundamental to the liberal-democratic nation-state.¹⁰ The main dichotomy running through the theoretical debate is that between “thin” or “formal” versus “thick” or “substantive” concepts of the rule of law. The thinnest version is the “rule *by* law” conception: merely meaning “the government acts through laws” thereby avoiding “rule *by* men”. To illustrate, some claim that the Chinese regime adheres to this notion.¹¹ To endorse that conception of the rule of law would however be a misinterpretation of the liberal thought in which the concept evolved; “rule *by* law” lacks the notion of effective limitations on government power.

Therefore, the dominant thin version of the rule of law in liberal thought understands it as “formal legality”.¹² According to central legal theorists such as Hayek and Raz, the rule of law’s fundamental function would be “guiding the behaviour” of citizens.¹³ Hence, it requires first of all general, prospective, clear and certain laws as the basis of government action. Secondly, a set of institutions were deemed necessary by Raz to effectuate the rule of law requirements, namely an independent judiciary with open and fair hearings and review of administrative and legislative action, and a limitation of security services’ discretion, such as the police’s.¹⁴ What is important to understand is that this formal legality is “substantively empty”; it essentially only imposes procedural requirements. According to some, this “value free nature” made it so widely acceptable.¹⁵ Possibly, to the shock of some, Raz pointed out that indeed slavery and the rule of law as formal legality could be perfectly well reconcilable.¹⁶

Thick (or substantive) theories bring—to different extents—individual rights into the rule of law concept. As Dworkin put it:

“I shall call the second conception of the rule of law the ‘rights’ conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. (...) It does not distinguish, as the rule book conception does, between the rule of law and substantive justice...”¹⁷

Some have voiced their concern over the anti-democratic implications of such a rights-based rule of law regime and its inherent judicialisation of politics, by taking the German *Rechtsstaat* as example.¹⁸ The thickest substantive version of the rule of law also takes socio-economic “welfare” rights into the “dynamic concept” of the rule of law.¹⁹

¹⁰ For example, Plato already discussed the rule of law: Aristotle, *Politics*, book 3, part XVI.

¹¹ Tamanaha: *op. cit.* 3, 92–93.

¹² Summers, R. S.: A Formal Theory of the Rule of Law. 6 *Ratio Juris*, 1993. 127.

¹³ Raz, J.: The Rule of Law and its Virtue. In: Raz, J.: *The Authority of Law*. Oxford, 1979. 214; Hayek, F. A.: *The Political Idea of the Rule of Law*. Cairo, 1955. See also Waldron, J.: The Rule of Law in Contemporary Liberal Theory. *Ratio Juris*, 2 (1989), 84–85.

¹⁴ Tamanaha: *op. cit.* 3, 92–93.

¹⁵ *Ibid.* 94.

¹⁶ Raz: *op. cit.* 221.

¹⁷ Dworkin, R.: Political Judges and the Rule of Law. *Proceedings of the British Academy*, 64 (1978) 259, 262.

¹⁸ Tamanaha: *op. cit.* 108.

¹⁹ See e.g. International Commission of Jurists: *The Rule of Law in A Free Society: A Report of the International Congress of Jurists*. Geneva, 1959.

The rule of law fell also prey to the left-right divide in politics. On the left, mostly in Marxist philosophy, the rule of law was seen as a concept of the ruling elite to enforce the order of property protection and privilege.²⁰ On the right, especially in the US, the rise of the welfare state was seen as a considerable threat to the rule of law understood as formal legality, with the generality of government action believed to be in jeopardy by the mounting unaccountable administrative machinery of the state interfering ever more individually, or even arbitrarily, in citizens' lives.²¹

Although it seems that today in (Western) liberal democracies when the rule of law is invoked, it comes in the same "package" with democracy and human rights, this need not conceptually be the case. In fact, that is problematic: making the rule of law the "mother" concept and thus the battleground for clashes over human rights, social values and substantive equality comes at the cost of losing clear conceptual boundaries of the principle.

Recently, theorists have attempted to reconceptualise the rule of law for our times of globalisation.²² For obvious reasons this debate is highly relevant when looking at the rule of law and the EU, itself being the world's most successful post-nationalist political structure. This reconceptualisation is not straight-forward exactly because the rule of law is so inextricably linked to the nation-state. In the global arena many of the essential state-like powers are not present. Nonetheless, the rule of law even in its thinnest version could add much to the ongoing construction of a rule-based global order with its own institutions, including those for review of state and individual action, thereby arguably reducing the much described "anarchy" in international relations. However, from the strand of critical legal theory others have pointed to the "perversity" of the global rule of law in legitimising and "organising irresponsibility" for human rights violations.²³

2. Development of the rule of law principle in the EU

This section gives a brief overview of how the rule of law principle came to the constitutional forefront in EU law. It traces mostly the case law of the CJEU and the subsequent treaty revisions. From this analysis two questions will be answered: 1) To what conceptual notion of the rule of law does the EU adhere? 2) What are the dominant elements of the rule of law in the EU?

2.1. Development of the rule of law in the Court's case law

It was not until 1986 that the rule of law principle became explicit in the EU legal order; the Court held in the landmark *Les Verts* case that the Community is "based on the rule of law".²⁴ However, already before that defining case, the rule of law was implicitly embedded in the constitutional structure of the Community. Especially former Art. 164 TEC (later Art. 220 TEC), akin to Art. 31 of the ECSC Treaty, *indicated* the rule of law by stipulating that "the Court of Justice shall ensure that in the interpretation and application of this Treaty *the*

²⁰ Tamanaha: *op. cit.* 73–77.

²¹ *Ibid.* 60–72.

²² Zifcak, S.: *Globalisation and the Rule of Law*. London, 2005.

²³ Veitch, S.: *Law and irresponsibility—on the legitimation of human suffering*. London, 2007.

²⁴ Case 294/83, *Les Verts v. Parliament*, ECR [1986] 1339, para. 23.

law is observed” (emphasis added).²⁵ And although the Court had already referred to these Articles in its case law before 1986, the “Community based on the rule of law” formula signalled a watershed in the Court’s role in the constitutionalisation of the principle. In this formula the Court thus aligned with the French notion of *Communauté de droit* (French was the language of the procedure), or German notion of *Rechtsgemeinschaft*.²⁶ This notion signals indeed the post-nationalist nature of the EU; in contrast to the *Rechtsstaat*.²⁷

In *Les Verts* the Court had to decide on whether acts of the European Parliament could also be annulled under Art. 173 TEC (now Art. 263 TFEU); something that was not stipulated by the Treaty as it limited this to acts of the Council and the Commission. However, the Court held that notwithstanding this limited list of institutions under Art. 173 TEC

“...the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty. (...) the Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions. Natural and legal persons are thus protected against the application to them of general measures which they cannot contest directly before the Court by reason of the special conditions of admissibility laid down in the second paragraph of Article 173 of the Treaty. (...) The general scheme of the Treaty is make a direct action available against ‘all measures adopted by the institutions ... which are intended to have legal effects’ (...) An interpretation of Article 173 of the Treaty which excluded measures adopted by the European Parliament from those which could be contested would lead to a result contrary both to the spirit of the Treaty as expressed in Article 164 and to its system.”²⁸

Hence, the Court introduced the rule of law principle to extend its own jurisdiction and the judicial protection offered. In subsequent cases the Court invoked the principle of the “Community based on the rule of law” to make similar strides to embolden judicial review in the EU.²⁹ For example, in the *Sogelma* case the Court of First Instance held that an EU

²⁵ Fernandez Esteban, M. L.: *The Rule of Law in the European Constitution*. The Hague, 1999. 104. She argues that “it results from the analysis of the case law of that the Court of Justice uses both Art. 164 of the European Community Treaty and the expression Rule of Law indistinctively”. Pech: *The Rule of Law as a constitutional...* *op. cit.* 15, fnt. 47, argues that this conclusion is not warranted; in fact according to him “it may be more accurate to contend that Art. 220 EC initially offered the only written basis from which the Court could convincingly derive the principle of a Community based on the rule of law.” I agree with the Pech on this point; the references in Art. 164/220 EC did not yet encompass the full breadth of the Rule of Law principle.

²⁶ See for these terms the French and German versions of the judgment.

²⁷ It is interesting that the Court did not use the term “Rechtsstaat”; Pech convincingly argues that this, obviously, was not deemed appropriate as the Community was not a State. See for a more extensive discussion: Pech: *The Rule of Law as a constitutional...* *op. cit.* 11.

²⁸ *Les Verts*, paras 23–24.

²⁹ See for example the *Zwartveld* case in which the Court linked the *Les Verts* “Community based on the rule of law” with the duty of sincere cooperation (then Art. 5 TEC). *In casu*, the Court held that the Commission was under an obligation to provide documents and witnesses to a Dutch judicial investigation. Order of the Court in Case C-2/88 Imm., *J. J. Zwartveld and Others*, ECR [1990] I-3365, especially paras 16–17.

agency act, *in casu* of the European Agency for Reconstruction (EAR), could fall under the action for annulment, something not foreseen in the Treaty. It argued that “it cannot be acceptable, in a Community based on the rule of law, that such acts escape judicial review”.³⁰ In the *Commission v. EIB* case the Court employed a similar argument to adjudicate an act of the Management Committee of the European Investment Bank (EIB) under the action for annulment.³¹ This was also not explicitly foreseen in the Treaty text.³²

The Court, with some judicial activism, thus produced dynamic interpretation to fix gaps in judicial review in the EU legal system. In the words of AG Mischio’s Opinion in the 1990 *Busseni* case:

“...the Court has on a number of occasions relied on Article 164 of the European Community Treaty and the principles deriving from it for the purpose of giving broad and coherent interpretation to those provisions of the Treaty which deal with the various means of redress, even going so far, when the need arises, as to remedy omissions and lacunae within it.”³³

It is interesting to see that the Court thus understood the rule of law mostly in procedural terms of judicial remedies: the complete system of remedies needs to be effectively in place so that decisions of public authorities can be reviewed independently.³⁴ This serves of course the effective judicial protection of individuals and other entities (the “subjective” function), but also serves to check the legality of measures taken, the latter mostly referring to the availability and appropriate choice of legal basis and the hierarchy of norms to safeguard the institutional balance in the Union (the “objective” function).³⁵

However, it seems that the Court has increasingly moved towards linking this “procedural” or “formal” rule of law concept (dominated by judicial protection) with fundamental rights protection. Of course, some of the elements of the formal rule of law concept are human rights themselves (e.g. right to an effective remedy)³⁶ but it seems that the rule of law is increasingly seen as connected to general fundamental rights protection at large. Some recent case law is illustrative in this respect. The controversial *Kadi* case is perhaps the best example. It concerned a so-called “blacklisted” individual (i.e. under anti-terrorist policies) whose assets had been frozen; he sought to annul that measure. The Court of First Instance had held that no judicial remedy could be offered within the EU legal order as the origin of the contested Regulation was a UN Security Council resolution.³⁷ As

³⁰ Case T-411/06, *Sogelma v. EAR*, ECR [2008] II-2771, para. 37. However, the Court had before also declared an application under former Art. 230 TEC inadmissible because it involved an agency: Case C-160/03, *Spain v. Eurojust*, ECR [2005] I-2077, paras 36–44.

³¹ Case C-15/00, *Commission v. EIB*, ECR [2003] I-7281, para. 75.

³² See former Art. 237(b) TEC.

³³ Opinion of AG Mischio in Case 221/88, *ECSC v. Acciaierie e Ferriere Busseni spa in liquidation*, ECR [1990] I-495, pt. 20.

³⁴ Pech: *The Rule of Law as a constitutional... op. cit.* 15. See also Jacobs, F.: *The sovereignty of law: the European way*. Cambridge, 2007. 35.

³⁵ See for the objective v. subjective functions: Esteban: *op. cit.* 122.

³⁶ See e.g. Art. 47 Charter.

³⁷ Council Regulation (EC) No 467/2001 of 6 March 2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, and repealing Regulation (EC) No

this thus concerned international law, the Court of First Instance held that it did not have jurisdiction to adjudicate the matter.³⁸ The Court of Justice however decided otherwise and held that

“...the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty. (...) Review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a Community based on the rule of law, of a constitutional guarantee [our emphasis] stemming from the EC Treaty as an autonomous legal system (...).”³⁹

The clear link between the “formal” rule of law requirements and the “substantive” protection of fundamental rights is thus clear. Also in the *PKK* case the Court has held that in a “Community based on the rule of law” restrictive measures cannot go unchecked by the judiciary.⁴⁰ In the *UPA* case, although the eventual outcome was not beneficial for the applicants, the Court linked these elements perhaps most explicitly when it held:

“The European Community is, however, a community based on the rule of law in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights. Individuals are therefore entitled to effective judicial protection of the rights they derive from the Community legal order (...).”⁴¹

2.2. The rule of law in EU Treaty making

Quite surprisingly, it was not until the Maastricht Treaty (entry into force in 1993) that the rule of law was explicitly mentioned in EU’s constitutional text. However, this was still “mostly symbolic”⁴² and was in no way as strongly worded as the Court had done in *Les Verts*. Instead the preamble to the Treaty indicated that the Member States “confirmed their attachment” to *inter alia* the rule of law. The Amsterdam Treaty (entry into force in 1999) finally repeated the Court’s formula and stated thus that the “Union is founded on the

337/2000 [2001] OJ L67/1; Council Regulation (EC) No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 [2002] OJ L139/9.

³⁸ The Court of First Instance did however hold that it would have jurisdiction if *jus cogens* norms would be in question. See: Case T-315/01, *Yassin Abdullah Kadi v. Council of the European Union and Commission of the European Communities*, ECR [2005] II-03649, para. 226.

³⁹ Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*, ECR [2008] I-03651, paras 285 and 316. Strictly speaking the Court only adjudicated the EU implementing measure of the UN resolution.

⁴⁰ Case C-229/05 P, *PKK and KNK v. Council*, ECR [2007] I-439, paras 109–110.

⁴¹ Case C-50/00 P, *UPA*, ECR [2002] I-6677, paras 38–39.

⁴² Pech: *The Rule of Law as a constitutional... op. cit.* 17.

principles of liberty, democracy, respect for human rights and fundamental freedoms, *and the rule of law*, principles which are common to the Member States” (emphasis added).⁴³ The Treaty of Lisbon changed the wording from “principles” to “values”, something generally seen as insignificant in academic analysis.⁴⁴ Also, over the course of the Treaty revisions, the rule of law has been worded in the Treaty as an objective for EU’s foreign policy (Arts 21(1) and (2b) TEU), as condition for the accession of new Member States (Art. 49 TEU), and as ground for punitive measures against Member States in (or risking) “serious and persistent” breach of the rule of law (Art. 7 TEU).⁴⁵ The Charter also refers to the rule of law in its Preamble, but here still as “principle”. From this brief overview, three conclusions are appropriate. Firstly, the Treaty text also clearly presents the rule of law principle separately but in package with human rights and fundamental freedoms, something that, as argued above, increasingly emerges from the Court’s case law as well. Secondly, the rule of law is also used as a, what Pech calls, “politico-legal benchmark”: current and potential Member States need to act in accordance with the rule of law to enjoy full EU membership.⁴⁶ And thirdly, perhaps more than other constitutions, the Treaties clearly present the rule of law as a value to be exported in the Union’s external relations.⁴⁷

2.3. *What Notion and Understanding of the Rule of Law in the EU?*

Taking the legal and political theory debate as presented in section 2 and the analysis of case law and Treaty revisions in sections 3.1. and 3.2. as background, this section attempts to establish what kind of rule of law the EU is adhering to.

A *prima facie* analysis of the development of the rule of law in the EU may seem to indicate a development from a “thin” or “formal” to a “thick” or “substantive” notion of the concept. It seems that when the principle was developed by the Court it focused on providing the remedy as such; it served therefore to expand the “complete system of remedies” and to assert the independence of the EU legal order. Also, the rule of law principle provided the Court with an opening to assert and extend its own jurisdiction. The focus then gradually shifted to the rule of law as necessary principle to ensure human rights protection.⁴⁸ However, contrary to what some academics argue, this does not necessarily imply that the Union now adheres to a full “substantive” notion of the rule of law as discussed in the theoretical debate. That notion implies that the rule of law *includes* human rights and perhaps even democracy; essentially that *there is no rule of law* if that law is unjust or immoral.

Although it is true that the Union legal order, mostly through the Charter and accession to the ECHR, has increasingly acknowledged rule of law principles (e.g. right to effective

⁴³ Art. 2 TEU. Laurent Pech shows convincingly in his long article that the rule of law is indeed a principle “common to the Member States”: Pech: *The Rule of Law as a constitutional...* *op. cit.*

⁴⁴ See Pech: *The Rule of Law as a constitutional...* *op. cit.* 21.

⁴⁵ Art. 7 TEU has never actually been used against a Member State.

⁴⁶ Pech: *The Rule of Law as a constitutional...* *op. cit.* para. 4.2.1.

⁴⁷ Larik argues that the EU Treaties are not an odd outlier when it comes to wording such explicit principles to guide external relations. Although it is one of the “most explicit” such constitutional provisions, he considers them “the vanguard of a global trend”. See Larik, J.: *Shaping the international order as a Union objective and the dynamic internationalisation of constitutional law. CLEER Working Papers*, 5 (2011), 36–37.

⁴⁸ See for such a conclusion Pech: *The Rule of Law as a constitutional...* *op. cit.* 53.

remedy) as fundamental rights, and it is also true on a conceptual level that the rule of law always includes some moral ideals and minimum rights,⁴⁹ this does not necessarily entail that the rule of law concept is now fully “substantive”. Indeed, the rule of law and human rights go now hand in hand in the Union legal order, as also shows from the Treaty, but the Court invokes the rule of law mostly to justify decisions related to legal remedies. That this rule of law often serves fundamental rights protection would not necessarily alter that conclusion: it does not mean that human rights are an *inherent part of* the rule of law. It means however clearly that the rule of law and fundamental rights are principles *inextricably linked*. Supporting and obvious evidence for an *intertwined but separate* legal and conceptual understanding of the rule of law and fundamental rights would also be the separate wording of the principles in the Treaty in Art. 6 TEU. I would thus agree with Arnall when he argues that such a rule of law notion for the Union enables conceptualising “a meaning which is distinct from, though complementary to, that of the other principles on which the Union is said to be founded”.⁵⁰

However, applying the political and legal theory debate to the Union legal order also shows that this debate wields only limited relevance. Rather a more mixed and nuanced picture emerges in the EU where, as said before, the rule of law is increasingly *connected* to fundamental rights protection. The rule of law, although itself lacking clear justiciability,⁵¹ is thus the “umbrella” principle from which different specific principles are derived that are connected with the assertion of the independent Union legal order as founded as a *Rechtsgemeinschaft* in which fundamental rights are protected.⁵² Additionally, as explained in the previous section, from the Treaty it becomes evident that the rule of law also evolved into a “politico-legal” benchmark for current and future Member States and that it increasingly became an overarching value in EU’s external relations. All these aspects are peculiar features of the rule of law in the EU.

3. Challenges for the rule of law in the EU: the external dimension of migration control

One may assume that after such solid case law by the Court and the explicit constitutional enshrinement of the principle, the rule of law is now in safe hands in the EU. That assumption may be further emboldened by the increased jurisdiction for the Court after the Lisbon Treaty; the court now has formal jurisdiction over a wider range of EU entities and policy fields.⁵³ There is, however, reason to be cautious on this optimistic conclusion.

The policy field of the external dimension of migration control provides an excellent case to put EU’s rhetorical commitment to the rule of law to the test. It is an area in which

⁴⁹ *Ibid.* 28.

⁵⁰ Arnall, A.: *The Rule of Law in the European Union*. In: Arnall, A.–Wincott, D. (eds): *Accountability and Legitimacy in the European Union*. Oxford, 2002. 254.

⁵¹ Pech: *The Rule of Law as a constitutional...* *op. cit.* 9, 30, 46.

⁵² Esteban: *op. cit.* 175.

⁵³ The Lisbon Treaty added to the institutions of the Union also the agencies and other bodies of the EU, see e.g. Art. 263 TFEU. Former third pillar dealing with Police and Judicial Cooperation in Criminal Matters (PJCC) is now also firm in the jurisdiction of the Court, albeit with a five-year transitional period, see Art. 10, Protocol on transitional provisions. The Common Foreign and Security Policy (CFSP) still falls outside its jurisdiction.

internal and external aspects of the rule of law meet: it presents both an area where far-reaching administrative actions are taken to limit irregular migration, thus calling for judicial review, and where the Union “goes abroad” to persuade third States to cooperate with its migration policy, thus calling for rule of law promotion.

3.1. *The External Dimension of EU’s Migration Control Policy*

For those not familiar with the external dimension of migration control it may be good to outline in this section the main features of this policy field. At the outset it should be noted that in the EU there exists no clearly circumscribed policy field bearing the name “external dimension of EU migration control”. Also, there is no single EU entity dealing with this area.

However, roughly speaking, this “external dimension” refers to all those policies to be implemented outside the EU (although often by or with the support of the EU) that aim to contribute to EU migration control. Cooperation with third State governments or international organisations is usually indispensable for this. Hence, it means that migration concerns have become part of EU’s wider external relations.

With the 1992 Maastricht Treaty the foundations were laid for EU migration and asylum policy. It was not until 1999 that the European Council in Tampere called for greater coherence between internal and external policies of the Justice and Home Affairs (JHA) field.⁵⁴ In the subsequent years ever more attention was given to this important political aim of the EU. Cooperation of third States with EU’s migration control agenda is now regarded as crucial by EU policy makers.⁵⁵

Nowadays, the main EU strategic document on the “external dimension” is the “Global Approach for Migration and Mobility” (GAMM, as recently the Commission proposed a renewed version) which is intended to address the external dimension of migration in a coherent way.⁵⁶ Different approaches to the external dimension come together in this document: the “migration-development nexus”, the preventive “root causes” approach and restrictive migration control.⁵⁷ The emerging core instrument for the “external dimension” seems to be the “Mobility Partnership” which includes components such as a readmission agreement, cooperation with Frontex (EU Border Agency), enhanced mobility for certain groups of third-country nationals and capacity-building programmes for foreign security services (such as border guards).⁵⁸ However, also the implementation of EU visa policy by airlines on foreign airports can be considered part of the “external dimension”.⁵⁹ The same

⁵⁴ European Council (1999), *Conclusions of the Presidency*, Tampere.

⁵⁵ See e.g. European Council: *The Stockholm Programme—An open and secure Europe serving and protecting citizens*. OJ 2010, C 155/01, at 28.

⁵⁶ See for the recently proposed changes: European Commission Communication: *The global approach to migration and mobility*, COM(2011) 743 final. The original Global Approach was adopted in 2005.

⁵⁷ *Ibid.* 5–7.

⁵⁸ See European Commission Staff Working Document: *Mobility partnerships as a tool of the global approach to migration*, SEC(2009) 1240. Mobility Partnerships have also been at the centre of EU’s response to the migration flows resulting from the Arab Spring: European Commission Communication: *A dialogue for migration, mobility and security with the southern Mediterranean countries*, COM(2011) 292 final.

⁵⁹ Gil-Bazo, M. T.: The Practice of Mediterranean States in the context of the European Union’s Justice and Home Affairs External Dimension. The Safe Third Country Concept Revisited. *International Journal of Refugee Law*, 18 (2006) 3–4, 573.

goes for extraterritorial Frontex joint operations, also because they are often dependent on arrangements with third State governments or international organisations.

Along with this greater attention for the “external dimension” came a body of academic literature addressing it from different disciplinary directions, most notably from political and legal scholarship. Concepts such as “externalisation”, “extra-territorialisation” or “remote border control” were developed to understand this new push in JHA policy-making.⁶⁰ Although the meanings of these concepts diverge, the red line running through them is the conclusion that the EU is pursuing ever more policies that aim to “shift the border outside”.⁶¹ This is done 1) by making external entities (e.g. third States, international organisations, private entities) responsible for elements of migration control or 2) by operating those controls outside EU territory. Some have understood this as an “effective” way to limit unwanted irregular migration while maintaining mobility for EU citizens and pre-authorised travellers.⁶² From legal scholarship several contributions have also identified challenges resulting from these “externalisation” approaches to safeguarding human rights and the rule of law.⁶³

3.2. *Challenges for the Rule of Law*

The scope of this article does not allow for an extensive overview of all the external dimension practices and all the possible challenges for the rule of law. However, a few elements of the external dimension are identified to highlight the extent to which the rule of law is under pressure in these practices; most notably Frontex joint operations. Three such elements are presented: secret and unclear ways of working, lack of legal basis, lack of judicial remedies and the risk to external rule of law promotion.

Firstly, much of the external relations initiatives in this field are shrouded in secrecy and fuzziness. Many of the working arrangements between EU governments or agencies (e.g. Frontex) and third State authorities are not publicly accessible. They are also not subject to the regular constitutional procedures for international treaty-making as foreseen in the Treaty, thus also excluding involvement of the European Parliament.⁶⁴ Moreover, effective monitoring is lacking. For example, when joint operations of EU Agency Frontex

⁶⁰ See respectively Boswell, C.: The external dimension of EU migration and asylum policy. *International Affairs*, 79 (2003) 3, 622; Cremona, M.–Rijpma, J. J.: The extra-territorialisation of EU migration policies and the rule of law. *EUI Working Paper, Law*, (2007)1, 12; Guiraudon, V.: Before the EU border: remote control of the “huddled masses”. In: Groenendijk, K.–Guild, E.–Minderhoud, P. (eds): *In Search of Europe’s Borders*. The Hague, 2003, 194–195.

⁶¹ See Lavenex, S.: Shifting up and out: The foreign policy of European immigration control. *West European Politics*, 29 (2006) 2, 330.

⁶² Guiraudon; *op. cit.* 194–195.

⁶³ See e.g. Fischer-Lescano, A.–Löhr, T.–Tohidipur, T.: Border controls at sea: requirements under international human rights and refugee law. *International Journal of Refugee Law*, 21 (2009) 2, 256–296; Den Heijer, M.: Europe beyond its borders: refugee and human rights protection in extraterritorial immigration control. In: Ryan, B.–Mitsilegas, V.: *Extraterritorial immigration control*. Leiden, 2010. 169–198; Weinzierl, R.–Lisson, U.: *Border management and human rights, a study of EU Law and the Law of the Sea*. Berlin, 2007.

⁶⁴ They are so-called “soft law” often under the name of “working arrangements” therefore not scrutinised by the European Parliament under Art. 218 TFEU.

“go abroad” no independent monitors are entitled to join.⁶⁵ It is therefore not always clear what is happening in these operations on the high seas or in the territories of third States. Within such joint operations it is often difficult to establish liability for actions. As many actors are usually involved (Frontex, Member States, international organisations and third State authorities) it is difficult to disentangle the web of actions.⁶⁶ All these factors make it difficult for individuals to challenge decisions taken in the course of such operations. Because several human and refugee law rights are at stake, these decisions (for example, to return a boat with migrants without examination of individuals) may have serious repercussions for the lives of those targeted individuals. There are clear risks that individuals are returned to a country where his or her life is in danger, in contravention of the *non-refoulement* principle. The secret and unclear ways of working make it however extremely difficult to establish liability and to build a case worth bringing to a European court.⁶⁷

Secondly, for many of the practices in Frontex joint operations, such as interception at sea, there is no clear legal basis available in EU law or international law of the sea. Recently some efforts have been undertaken to provide such a legal basis in EU law.⁶⁸ For activities on the high seas, the law of the sea applies, with its principles of freedom of the high seas and right of navigation for the flag State.⁶⁹ This is not the place to discuss in detail the different justifications under maritime law to stop, search and divert boats in international waters, but those options are limited. “Search and rescue” or “absence of nationality”, sometimes invoked by Frontex,⁷⁰ are indeed relevant grounds but cannot serve, in my opinion, *a priori* to justify a general and proactive policy of intercepting vessels even if

⁶⁵ During the negotiation of Frontex’ new mandate in 2011, some MEPs attempted to include a standard independent monitor system of its operations, this is however not included in the new text. This is why the Greens voted against the new Regulation in the EP, see The Greens/European Free Alliance in the European Parliament: Révision Frontex: des garanties insuffisantes pour le nouveau mandat de l’agence. *Press Release*, 12 July 2011.

⁶⁶ Baldaccini, A.: Extraterritorial border controls in the EU: the role of Frontex in operations at sea. In: Ryan, B.–Mitsilegas, V. (eds): *Extraterritorial immigration control: legal challenges*. Leiden, 2010. 230.

⁶⁷ See also Mitsilegas, V.: Extraterritorial immigration control in the 21st century: the individual and the State transformed. In: Ryan, B.–Mitsilegas, V. (eds): *Extraterritorial immigration control: legal challenges*. Leiden, 2010. 39–68.

⁶⁸ European Commission: *Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement*, COM(2011) 118 final, Annex IV. This proposal to allow for border checks in third countries is currently under review by the EP.

⁶⁹ See Arts 87 and 90, UNCLOS (United Nations Convention on the Law of the Sea).

⁷⁰ Frontex Press Kit: *Background on operations*. 2010, 1: “*Joint operations coordinated by Frontex represent Europe’s biggest search and rescue operation.*” Search and rescue is an obligation under international law; see mostly the SAR (Search and Rescue), UNCLOS (United Nations Convention on the Law of the Sea) and the SOLAS (Safety of Life at Sea) Conventions. See also Council (2010). This Decision is however challenged before the CJEU by the EP on grounds of exceeding the implementing powers under Art. 12(5) SBC, see: Action brought on 14 July–European Parliament v Council of the European Union, Case C-355/10, OJ 2010, C246/58. The case is pending.

they themselves do not indicate a state of distress.⁷¹ Neither they can serve to justify push-back practices.⁷² Hence, the extra-territorial policy of Frontex JOs should be seriously scrutinised on grounds of a lacking adequate legal basis under EU and international law. This is not only hard to reconcile under “thick” but also under “thin” notions of the rule of law, such as the dominant formal legality notion.

Thirdly, in many situations there is no remedy available for individuals targeted in the wider external dimension. “Extra-territorialising” migration control entails the *inherent* consequence that individuals have increasingly limited access to a European court, as they are simply not in Europe, to challenge decisions nevertheless taken, prepared or supported by European administrative authorities. It thus results in extending the “executive” reach of Europe beyond its territory, without accompanying it with a sound judicial framework. And even if migrants are under the control of European authorities, such as in Frontex joint operations on the high seas, there is often no remedy available to challenge the decisions taken by the border guards before they are being implemented. This is thus irrespective of that fact, as highlighted above, that these decisions may have serious human rights repercussions. In the recent *Hirsi* case the European Court of Human Rights (ECtHR) also clearly held that the right to an effective remedy under Art. 13 ECHR was violated by returning a boat of African migrants from the high seas to Libya.⁷³ Hence, this core right flowing from the rule of law is deemed to be under pressure in these operations. However, it should be seen in a wider context; by aiming to keep migrants as closely to their country of origin as possible the EU is also making it complicated for refugees to reach European territory and subsequently get their refugee status recognised in a fair and impartial case.

Lastly, these “externalisation” pushes by the EU increasingly jeopardise its self-proclaimed image as a power that exports its core values, such as the rule of law. The academic “Normative Power Europe” thesis would arguably have a hard time explaining these external policies of the EU.⁷⁴ The dominant restrictive pushes in the external dimension field, such as the readmission agreements and Frontex joint operations, thus delegitimise the rhetoric from Brussels about human rights and the rule of law. Apart from the expected long-term international relations repercussions resulting from this, it is also hard to reconcile with the Treaties that so vehemently proclaim that the rule of law should guide external policies.

This uncovers the diverging nature of the internal and external “functions” of the rule of law in the EU; respectively to *constrain* administrative action and to *promote* the principle externally. It is especially the constraint function of the rule of law that is easily

⁷¹ Article 110 (1.d), UNCLOS authorizes the visiting of a ship on the basis of suspicion that the ship is without nationality. Art. 98 UNCLOS, and the above-mentioned additional conventions, lay down a “search and rescue” obligation. These articles can indeed be legal bases for intercepting a vessel. However, these legal bases must not become a justification to stop any boat for which there is a “suspicion” that migrants are on board. Boarding without any of these legal bases available is thus problematic, although apparently vessels have been boarded without any clear distress situation, see Papastavridis, E.: “Fortress Europe” and Frontex: within or without international law? *Nordic Journal of International Law*, 79 (2010), 86, fnt. 56.

⁷² In the UNCLOS there is no legal basis for the coercive push-back of vessels to third States.

⁷³ ECtHR, *Hirsi and others v. Italy*, Application No. 27765/09, judgment of 23 February 2012. See especially paras 205–207.

⁷⁴ See Manners, I.: Normative Power Europe: a contradiction in terms? *Journal of Common Market Studies*, 40 (2002) 2, 235–258.

disregarded in EU external relations, as it is assumed that third parties, and not the EU itself, should improve on its rule of law record. However, the extraterritorial migration control evidences how this assumption may sometimes be unfounded.

Conclusion

This section offers a brief overview of the main conclusions of this article and adds a few critical notes. As we have seen in this article, the rule of law has made a remarkable development in the EU. From the first mention in *Les Verts* in 1986 it has now become a prominent constitutional cornerstone. Through the sometimes daring and dynamic case law of the Court it developed a strong emphasis on judicial protection to safeguard human rights in the EU. The Treaty has followed, albeit with delay, and now prominently features the rule of law as a foundational value of the EU, alongside other values such as fundamental rights and democracy. It is thus clear that in the EU the rule of law cannot be easily captured in the “all-or-nothing” theoretical dichotomy on “thin” versus “thick” notions of the principle. Instead, the principle is accorded idiosyncratic “procedural” features of judicial review but is nevertheless strongly connected with fundamental rights protection. Moreover, the constitutional text of the EU also holds the rule of law to be a “politico-legal benchmark” for current and future members and stresses the guiding role of the principle in external relations.

No matter how far the rule of law has indeed developed in the EU, the analysis in this article also uncovered persisting weaknesses. In the external dimension of migration control there are secret and unclear ways of working emerging that present serious threats to effectively upholding the rule of law. Moreover, the lack of judicial remedies accessible to individuals on the move who encounter “externalised” EU administrative actions and of inadequate legal basis for the carried out activities are at odds with basic rule of law requirements. In fact, problems in the EU with regard to legality, especially related to lack of adequate legal basis, may not be limited to the case study assessed in this article. It would hence be interesting for future academic contributions to examine whether peculiar features of EU governance prompt such problems. There may be a general trend in the EU, due to its specific *sui generis* nature, under which cooperation and initiatives are first “experimented” and, if they are deemed successful, given a proper legal basis only later on.

The analysis in this article has also highlighted the different functions of the rule of law internally and externally, respectively dealing with the constraint of administrative action and with the promotion of the principle abroad. These two functions are in an uneasy relationship in fields such as the external dimension of migration control where restrictive administrative action of EU authorities and promotion of the rule of law are sometimes difficult to reconcile.

So, with these identified challenges, the development of the rule of law in the EU cannot be expected to have reached its final stage. In fact it is well possible that the Court will further extend its jurisdiction to offer increasingly extensive judicial protection as new administrative strategies and ways of working feature in the European “executive” branch. Therefore, both from an academic and policy perspective the rule of law will expectedly remain an area of high interest. Although the substance of the principle, and especially its relation with fundamental rights, will remain an area of contestation for theorists, it seems that the development of the principle in any given polity will follow its idiosyncratic path resulting in different mixtures of and connections between “formal” and “substantive” elements.