'A Union Founded on the Rule of Law': Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law

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Rule of law – Constitutional principle – Meaning – Scope of Application – Justiciability – Audit of the European Union's Constitutional Framework – Lisbon Treaty

Introduction

In a landmark judgment, the European Court of Justice famously referred to the European Community (EC) as 'a community based on the rule of law' to the extent that neither the member states nor the Community institutions could avoid review of the conformity of their acts with the Community's 'constitutional charter', the EC Treaty.[1] The Court has ever since continued to view the EC Treaty, albeit formally concluded in the form of a 'mere' international agreement in 1957, as the constitutional document of a supranational polity based on the rule of law.[2] Remarkably, whilst the Court's constitutional narrative has been subject to fierce criticism, the reference to the rule of law has been mostly welcomed even though this rather ancient notion has mostly flourished and been theorised in the context of the nation-state. This positive response, however, is not altogether surprising. Since the end of the Cold War, international organisations as well as national governments, regardless of the nature of their political regimes, have been particularly keen to articulate their – if only rhetorical – support for the rule of law. Indeed, the rule of law, which is regularly equated with the idea of a 'gov-

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

[2] *See*, e.g., Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 281.

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ernment of laws, not of men',[3] is generally assumed to be a 'good thing'. This undoubtedly explains why the Court of Justice, in stressing the importance of the rule of law as a defining element of the Community's 'constitutional framework'[4] did not encounter much criticism.

Widespread support for the rule of law, unfortunately, has not helped clarify the meaning of the Court of Justice's formula. Definitional concerns are not, however, a problem peculiar to the European Union.[5] Generally speaking, the undeniable high degree of consensus on the rule of law is 'possible only because of dissensus as to its meaning.'[6] In the Union, the emergence of such a consensus followed the end of the East-West ideological divide and what appeared, for a short time, to be the universal and permanent triumph of the Western democratic and liberal model. From then onwards, the rule of law, along with democracy and human rights, became a dominant concept in political and legal discourses.[7] In their capacity of 'Masters of the Treaty', the EU member states responded to the increasing and irresistible emphasis on the rule of law by subjecting the Union's founding Treaties to several important amendments and inserted not one, but multiple references to this principle when devising the 1992 Maastricht Treaty.[8] Yet in a good example of 'why make it simple when it can be complicated', the member states have persistently refused to constitutionalise the Court of Justice's innovative phrasing, i.e., 'community based on the rule of law'. Instead, the Treaty on European Union (TEU) was further amended in 1997 to include a provision – Article 6(1) TEU – referring to the principles of liberty, democracy, respect for human rights and the rule of law as principles common to the EU member states and ones on which the Union is said to be founded. In addition, the 1997 Treaty of Amsterdam inserted a new Article 7 TEU allowing for EU sanctions in the

[3] To recall Chief Justice Marshall's celebrated formula in *Marbury* v. *Madison*, 1 Cranch 137 (1803) p. 163: 'The government of the United States has been emphatically termed a government of laws, and not of men.'

[4] To paraphrase AG Poiares Maduro's Opinion in Case C-402/05 P *Kadi* [2008], para. 24.

[5] The Lisbon Treaty has finally put to bed the confusing distinction between the EC and the EU by establishing the EU as a single legal entity that replaces and succeeds the EC. As a result, the EC Treaty (TEC) bas been renamed the Treaty on the Functioning of the EU (TFEU).

[6] S. Chesterman, 'An International Rule of Law?', 56 *American Journal of Comparative Law* (2008) p. 331 at p. 332.

[7] *See*, e.g., J. Chevallier, 'La mondialisation de l'Etat de droit', in *Mélanges Philippe Ardant* (Paris, LGDJ 1999), p. 333.

[8] These references were largely symbolic at first. For instance, the Preamble of the TEU merely stipulated in 1992 that the member states confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law.' In addition, Article 11 TEU and Article 177(2) TEC respectively assigned to the EU's foreign and security policy and the EC's policy of development cooperation the same objective of developing and consolidating democracy and the rule of law as well as respect for human rights.

case of serious and persistent breach of the principles mentioned in Article 6(1) TEU by any member state. Logically, a new Article 49 TEU moreover provided that any European state that respects these principles may apply to become a member of the Union.

In the light of these multiple references there can be little argument that the rule of law has become an overarching and primary principle of Union constitutional law. And whilst the Court of Justice is yet to unambiguously refer to the rule of law in such terms, one may wish it does not refrain from doing so as it clearly constitutes a legal principle of a fundamental and compelling nature, stemming from the common European legal heritage, and which aims to regulate the exercise of public power.[9] In order to tackle the argument that claims the EU Treaties' heavy emphasis on to the rule of law is no more than a mere rhetorical device, this article will examine the substance and scope of this constitutional principle before subjecting the EU's constitutional framework to 'a rule of law audit'. It will first be shown that the EU constitutional principle of the rule of law is, to paraphrase Lord Bingham,[10] no meaningless verbiage. Not only has the rule of law unsurprisingly become one of the defining principles undergirding the Union's constitutional system, but the EU courts have correctly understood it as a multifaceted legal principle, with formal and substantive elements, and whose normative impact should not be underestimated. The fact that the EU rule of law is no hollow slogan, however, does not necessarily imply that there is no gap between rhetoric and practice. The nature and extent of what has been sometimes referred to as the Union's 'rule of law deficit' will be analysed. Adopting the Court of Justice's understanding of the rule of law as a benchmark, this article will propose that the post-Maastricht Union's constitutional framework illustrated a serious 'rule of law deficit' that has been considerably remedied by a set of long-awaited reforms contained in the Lisbon Treaty.

Content and scope of the rule of law in the Union's constitutional framework

Before attempting a rule of law audit of the Union's constitutional framework, the content and scope of application of this principle must first be clarified. As will be shown below, the multiple references to the rule of law in the Union Trea-

[9] For a recent description of the key legal principles of the EU's legal order as constitutional in nature, *see* Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 285. On the notion of compelling or constitutional legal principle, *see* H. Schermers and D. Waelbroeck, *Judicial Protection in the European Union*, 6th edn. (The Hague, Kluwer Law International 2001) p. 28, para. 54.

[10] Lord Bingham, 'The Rule of Law', 66 *Cambridge Law Journal* (2007) p. 67 at p. 69.

ties should not be viewed as mere political statements. Whilst the rule of law is certainly a shared political ideal in Europe, it also has progressively become a posited principle of constitutional value in most European legal systems before becoming one of the cardinal principles on which the Union is founded. Remarkably, but perhaps unsurprisingly, the Union's understanding and judicial reliance on the rule of law, as well as the functions assigned to this principle, largely reflect national constitutional experiences in Europe. With the arguable exception of an unfortunate rephrasing of Article 6(1) TEU (now Article 2 TEU), the Treaty of Lisbon brought no significant change in this respect.

The rule of law as a foundational principle

The enshrinement of the rule of law in the Union's founding treaties reflects a widespread reliance on the rule of law as one of the defining principles on which all modern and liberal constitutional regimes are formally based. The Union's 'borrowing' of this traditional constitutional principle has nonetheless raised a series of conceptual and definitional issues.

Common and original features

By stipulating that the Union is 'founded' on – and must not merely respect – the principles of liberty, democracy, respect for fundamental rights and the rule of law, Article 2 TEU (introduced by Lisbon) makes clear that these are foundational principles. In other words, this provision states the overarching principles of political morality that 'underlie and inform the purpose and character'[11] of the Union's politico-legal system as a whole. In doing so, the Treaty is clearly reminiscent of national constitutional regimes, and incidentally confirms or rather assumes, for legitimating purposes, that the Union and national constitutional regimes are based on a broadly identical set of foundational principles and values.[12] As regards the rule of law, one may indeed make a reasonable case that this principle has progressively become a dominant organisational paradigm of modern constitutional law and is commonly recognised as one of the foundational principles undergirding and legitimating all European constitutional systems.[13] This is not to say that the rule of law is always explicitly guaranteed in each national constitution. Yet even in countries where the rule of law is not explicitly mentioned, it is often said to constitute a principle that is inherent to the national constitution. For instance,

[11] T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford, Oxford University Press 2003), p. 4.

[12] *See* Opinion of AG Poiares Maduro in Case C-127/07 *Arcelor* [2008] *ECR* I-9895, para. 16.

[13] *See*, e.g., J. Kokott, 'From Reception and Transplantation to Convergence of Constitutional Models in the Age of Globalization', in C. Starck (ed.), *Constitutionalism, Universalism and Democracy. A Comparative Analysis* (Baden-Baden, Nomos 1999), p. 97-102.

until the Constitutional Reform Act of 2005 and its section 1 providing that 'This Act does not adversely affect (a) the existing constitutional principle of the rule of law', the United Kingdom was lacking 'grand statutory exhortations',[14] yet no British lawyer has ever doubted that it constitutes a cardinal principle of the British constitution that courts must take into account.

In a more original fashion, and as previously mentioned, the TEU was amended in 1997 to include a new provision enabling the Council to take measures against any EU country guilty of 'a serious and persistent breach' of the Union's foundational principles. The second innovation brought about by the Amsterdam Treaty is the formal reliance on these principles as requirements to comply with for any country wishing to join the Union. Finally, the rule of law, along with democracy and respect for fundamental rights, has been formally referred to as a key objective of the Union's foreign policy since 1992. Viewed in the light of national constitutional traditions, these features may seem quite innovative yet one may contend they logically flow from the fact the foundational principles mentioned above formally make up the Union's essence as an organisation. This is why, for instance, compliance with the rule of law is understandably a prior and formal condition for Union membership. This largely also explains why the rule of law is one of the key objectives of the Union's 'foreign policy'. In this particular context, however, the rule of law, arguably, ceases to fulfil a constitutional function. As a foreign policy objective, it does not impose legally binding obligations on Union institutions but rather operates as a 'soft' and undefined 'value to be 'exported' beyond the borders of the Union by means of persuasion, incentives and negotiation.'[15]

Pre- and post-Lisbon Treaty problematic issues

Ever since the member states have decided to include a provision referring to the rule of law as a principle which is common to the member states and on which the Union is founded, it has been recurrently argued, on the one hand, that national understandings radically differ, and, on the other hand, that the Union cannot rely on this constitutional principle as it does not constitute a state.[16] The first point will be briefly dealt with. Regardless of whether no common denominator can be found in Europe, it is difficult to see why the Union should not be able to redefine the meaning and scope of the rule of law to fit the distinct features of its autonomous legal order. In any event, it is important to stress that the EU experience largely emulates most national constitutional practices: the rule of law, in the Union's

[14] Lord Falconer, HL Deb. 7 Dec. 2004, vol. 667, col. 739.

[15] Opinion of AG Mengozzi in Case C-354/04 P *Gestoras Pro Amnistía* [2007] *ECR* I-1579, para. 79.

[16] For further references and discussion, *see* L. Pech, 'The Rule of Law as a Constitutional Principle of the EU', *Jean Monnet Working Papers* No. 04/09, p. 22.

constitutional framework, also constitutes an explicit yet undefined legal principle with a foundational nature which is amenable, as we shall see, to judicial interpretation and application.

Another recurrent source of controversy derives from the fact that in languages other than English, the TEU refers to the principle of a *State* founded on the rule of law (e.g., *Rechtsstaatlichkeit* in German, *Etat de droit* in French, etc.). Yet it is quite evident that the Union is not a State. Could it mean that the principle of the rule of law is only binding on the member states or that the Union is itself a sovereign state-like entity or that it pursues this ambition? It may be worth recalling that the Court of Justice initially described the EC as a 'community based on the rule of law' or *Rechtsgemeinschaft* in German and *communauté de droit* in French. The most likely explanation for the Court of Justice's reluctance to rely on the more classic national concepts of *Rechtsstaat* or *Etat de droit* – a reluctance which is difficult for English speakers to note as the English phrase does not refer to a state or government – is that the Court of Justice judges may have been reluctant to use terms which could give ammunition to those who have constantly feared and denounced the emergence of a European 'Superstate'.[17] The use of the term *Rechtsgemeinschaft/communauté de droit* indeed leaves open the statehood question and the member states themselves might not have welcomed a judicial description of the Community as one which was governed by the principle of a 'State' governed by law. Viewed in this light, it may seem surprising that the member states agreed in 1997 to amend the TEU to make clear that the Union is founded on the principle of *Rechtsstaatlichkeit/Etat de droit*, i.e., on the principle of a *State* founded on the rule of law. It may be that one should not read too much into this departure from the Court's formula. Indeed, in the English language, the notions of a community based on the rule of law and of a Union founded on the principle of the rule of law do not appear radically different from a conceptual point of view and this may actually be for the best as the principles of *Rechtsgemeinschaft/communauté de droit* and of *Rechtsstaat/Etat de droit* give the wrong impression of an important dichotomy whereas they all illustrate the same basic idea: the exercise of public power must be subject to the law.[18] In other words, Article 2 TEU merely refers to

[17] The Court may also have wished to acknowledge the existence of a genealogical link between all the national and EC concepts without undermining its power to construct an 'autonomous' understanding. *See* D. Simon, *Le système juridique communautaire*, 3rd edn. (Paris, Presses Universitaires de France 2001), p. 96, para. 61.

[18] From a theoretical point of view, the reference to the 'State' in the German *Rechtsstaat* is traditionally viewed as the most important difference with the English rule of law. The modern understanding of the *Rechtsstaat* principle nonetheless seems to indicate that, similarly to the English rule of law, it is now predominantly understood and applied as a generic constitutional principle of governance, a concept whose most important purpose is to regulate public power and which can be applied to any legal order and not necessarily to the sole internal legal order of a state. Accordingly,

the notions of rule of law/*Rechtsstaat*/*Etat de droit* to confirm that the Union constitutes a polity that is governed by a general and fundamental principle, which is common to the member states, and according to which the exercise of public power is subject or regulated by a set of legal limitations.

Another fascinating issue debated in the context of the momentous *Kadi* case[19] is whether the rule of law, along with other foundational principles of Union law, can claim supra-constitutional status. The answer must be no. The fact that the Union Treaties, as amended by the Amsterdam Treaty, have given 'primary importance'[20] to the rule of law does not mean that this principle cannot be derogated from and is beyond the reach of the amending power of the *pouvoir constituant*. To argue otherwise, on the basis of the *Kadi* case, represents, in this author's view, a misinterpretation of the Court of Justice's ruling. Faced with the argument that ex Article 307 EC (the rights and obligations arising from pre-Community or pre-accession agreements of the member states shall not be affected by the provisions of the EC Treaty) and ex Article 297 EC (which does not prohibit obstacles to the operation of the common market when they are caused by measures taken by a member state to carry out the international obligations it has accepted for the purpose of maintaining international peace and security) allow the member states to eventually derogate from ex Article 6(1) TEU, the Court held that these provisions cannot 'be understood to authorise any derogation from the principles of liberty, democracy and respect for human rights and fundamental freedoms' enshrined in this provision as a foundation of the Union.[21] With respect to ex Article 307 EC, the Court felt compelled to add that it 'may in no circumstances permit any challenge to the principles that form part of the very foundations of the Community legal order.'[22] Curiously, the Court makes no explicit reference to the rule of law. Whilst this omission is certainly unfortunate, and hopefully involuntary, the principles mentioned by the Court cannot, in any event, be understood as constituting, formally speaking, supra-constitutional norms. Rather, they form part of the 'very foundations' of the Union legal order and what the Court did in

for the present author, the EU can be properly described as a non-state polity based on the principle of 'a State governed by law'.

[19] In a widely awaited grand chamber judgment, the Court of Justice ruled that the EC judicature has jurisdiction to review measures adopted by the EC giving effect to resolutions of the UN Security Council and held that EC regulation 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with terrorist movements, infringed the applicants' fundamental rights under EC law. *See* Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351.

[20] Opinion of AG Mengozzi in Case C-354/04 P *Gestoras Pro Amnistía* [2007] *ECR* I-1579, para. 75.

[21] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 303.

[22] Ibid., para. 304.

Kadi was to emphasise – and rightfully so – the fundamental nature of these principles from a *material* point of view. In practice, this implies that all Union norms must always be interpreted with a view of strengthening compliance with these principles.

The entry into force of the Lisbon Treaty has added a new problematic dimension to the Union use of the rule of law as a constitutional principle. Indeed, the new Article 2 TEU departs from the phrasing of most national constitutional provisions in the sense that the principles previously mentioned in ex Article 6(1) TEU are now referred to as values. Furthermore, Article 2 TEU offers a fairly inflated list of those 'values':

> The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.[23]

By increasing the number of values on which the Union is founded, the Lisbon Treaty, for instance, theoretically reinforces the conditions of eligibility for accession to the Union under Article 49 TEU (as amended by Lisbon). Solely focusing here on the unprecedented use of the term value, it must be said that this constitutes a rather peculiar change. Not only is the rule of law still identified as a principle in the Preamble of the EU Charter of Fundamental Rights,[24] no convincing explanation for this vocabulary change has been offered. While one may theoretically distinguish between values and principles on the basis that '*values* have a more indeterminate configuration, whereas legal *principles* possess a more defined structure which, combined with their clear nature as "ought to be" propositions, make them more suitable for the creation of legal rules through judicial adjudication',[25] it is doubtful that those responsible for this terminological variation intended to introduce these type of theoretical distinctions. The replacement of the term 'principle' by the term 'value' is nonetheless regrettable.[26] A distinction between the

[23] This provision reproduces Art. I-2 of the defunct Constitutional Treaty.

[24] 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity; it is based on the principles of democracy and the rule of law.' *See also* new Art. 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law …'

[25] M.L. Fernandez Esteban, *The Rule of Law in the European Constitution* (The Hague, Kluwer Law International 1999), p. 40-41.

[26] *See* however S. Millns, 'Unraveling the ties that bind: National Constitutions in the Light of the Values, Principles and Objectives of the Constitution for Europe', in J. Ziller (ed.), *L'européanisation des droits constitutionnels à la lumière de la constitution pour l'Europe* (Paris, L'Harmattan 2003), p. 100:

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Union's fundamental *moral* values (human dignity, freedom, etc.) on which the Union is founded, and the *structural* constitutional principles (democracy, the rule of law, etc.) on the basis of which the Union must function, would have been more appropriate. It may well be that the drafters of the Constitutional Treaty and the Lisbon Treaty did not view the use of the term 'value' as a meaningful change but if 'principle' and 'value' should be understood as interchangeable terms, the need for a terminological change hardly appears pressing and in this article, the rule of law will continue to be understood and referred to as a (constitutional) principle.[27]

Regardless of the doubtful merits of the Lisbon Treaty's rephrasing of ex Article 6(1) TEU, the codification of the rule of law as a fundamental principle on which the Union is founded has undeniably further consolidated its dominant character as an organisational paradigm of modern constitutional law at the national and international levels. The Union's strong and explicit emphasis on the rule of law might explain, for instance, the late statutory recognition of the rule of law as an *existing* constitutional principle in the United Kingdom under the Constitutional Reform Act 2005. In giving emphasis to these abstract ideals without defining them – another feature that has sometimes been criticised and that will be explored below – the Union is not particularly innovative. A more remarkable aspect of the enshrinement of the rule of law into the Union's founding treaties is that it is hardly ever mentioned as a stand-alone principle. In most cases, the principles of liberty, democracy and respect for fundamental rights immediately accompany the rule of law.[28] This is the right approach. Whilst the rule of law is traditionally considered 'one of the most important political ideals of our time',[29] it is obviously not the only one. Indeed, it 'is one of a cluster of ideals constitutive of modern political morality; the others are human rights, democracy, and perhaps also the principles of free market economy.'[30] Those faithful to a 'formal' conception of the rule of law have nevertheless controversially argued that it should not be confused with other principles such as democracy and justice

'[T]he invocation of values in place of the previous language of foundational principles should help to clarify somewhat the distinction between these core values and the various other non-foundational principles of EU law.'

[27] For a similar view, *see* A. von Bogdandy, 'Constitutional Principles', in A. von Bogdandy and J. Bast (eds.), *Principles of European Constitutional Law* (Oxford, Hart 2006), p. 9: '[P]rinciples are to be distinguished from values, the latter being fundamental ethical convictions whereas the former are legal norms. Since the 'values' of [Art. 2 TEU] have legal consequences … they are legal norms and can be considered as principles.'

[28] This reflects an old tradition. *See*, e.g., *Declaration on the European Identity* by the Nine Foreign Ministers on 14 December 1973 in Copenhagen, Bull. EC, Dec. 1973, No. 12, p. 118.

[29] J. Waldron, 'The Concept and the Rule of Law', 43 *Georgia Law Review* (2008) p. 1 at p. 3.

[30] Ibid.

and that it can even be 'compatible with gross violations of human rights'.[31] The Union offers a striking counter-model to this doctrinal approach as the TEU illustrates an approach that views these principles as being interdependent,[32] and in doing so, more accurately reflects the dominant approach in most if not all of its member states. To put it differently, the Union rule of law is correctly understood as sharing a consubstantial, one may say organic, link with the other foundational principles. This makes it difficult to assess the rule of law, as a constitutional principle of the Union, in light of the traditional – yet largely artificial – theoretical divide between formal and substantive approaches, especially if one wrongly believes that formal and substantive features of the rule of law are mutually exclusive.[33] Indeed, the Union offers a mixed model. By distinguishing the rule of law from other foundational principles, Article 2 TEU may seem to suggest the adoption of a narrow and predominantly formal understanding of the rule of law (i.e., judicial review, principle of legality, hierarchy of norms, etc.).[34] Such an interpretation, however, would not do full justice to the fact that the Union's 'Constitution', viewed as whole, strongly suggests that all the Union's foundational principles are interdependent and must be construed in light of each other. This reading has actually progressively gained ground in the Court of Justice's case-law. As will be pointed out below, whilst the Court's initial understanding was predominantly for-

[31] J. Raz, 'The Rule of Law and its Virtue', in J. Raz, *The Authority of Law. Essays on Law and Morality* (New York, Oxford University Press 1979), p. 221.

[32] For instance, as amended by the Lisbon Treaty, Art. 7 TEU now clearly indicates that these 'values' are to be taken together as it provides, for instance, that the Council may determine the existence of a serious and persistent breach by a member state of '*the*' EU's values (and not 'of principles' as previously drafted).

[33] To put it concisely, it is customary to oppose formal conceptions to substantive ones. According to the 'formal school', the rule of law is properly understood as a set of ideal attributes that any given legal system must strive towards. According to the 'substantive school', not only does the rule of law require compliance with certain formal requirements, it *also* encompasses elements of political morality such as democracy and substantive rights for individuals. Conceptions emphasising the formal/procedural aspects of the rule of law are also often referred to as 'thin' theories as opposed to 'thick' theories. *See* R. Peerenboom, 'Varieties of Rule of Law. An Introduction and Provisional Conclusion', in R. Peerenboom (ed.), *Asian Discourses of Rule of Law* (London, Routledge 2004), p. 2-10. Additional classifications have been suggested in order to overcome the fact that 'the formal versions have substantive implications and the substantive versions incorporate formal requirements', B. Tamanaha, *On the Rule of Law* (Cambridge, Cambridge University Press 2004), p. 92.

[34] A. Arnull favours a formal conception for the EU on the grounds that such a conception 'enables the rule of law to be given a meaning which is distinct from, though complementary to, that of the other principles on which the Union is said to be founded' but also acknowledges that the 'dividing-line between the formal and the substantive conception of the rule of law can be difficult to draw, not least because some of the technical elements of the rule of law are regarded as fundamental rights', 'The Rule of Law in the European Union', in A. Arnull and D. Wincott (eds.), *Accountability and Legitimacy in the European Union* (Oxford, Oxford University Press 2002), p. 254.

mal and procedural in nature, an evolution towards a more expansive and substantive understanding can be detected.

The rule of law in the EU courts' case-law

A striking but not necessarily problematic feature of the enshrinement of the rule of law in the Union Treaties is the absence of any definition. Indeed, national constitutions also frequently fail to define this principle and it is left to national courts to define more precisely its substance. More importantly, one may further contend that similarly to most national courts, the Court of Justice now views the rule of law as an 'umbrella principle'[35] which can be relied on as an interpretative guide and as a source from which more specific legal standards may be derived.

The rule of law as an umbrella principle with formal and substantive components

Whilst one may regret the lack of a formal Treaty definition, it seems excessive to criticise on this sole basis the Union's heavy reliance on the rule of law. As a matter of fact, in Europe, the rule of law is never precisely defined by national constitutions.[36] For instance, in the United Kingdom, despite a recent and unprecedented statutory reference to the principle, the British legislator has remained silent on what the rule of law precisely entails. In other words, it seems that regardless of the national legal system, it is always left to scholars and more decisively, to judges, to flesh the principle out. Unsurprisingly, there continues to be debate about its precise meaning and scope in most national legal systems. The lack of a formal definition does not mean, however, that the Union rule of law is necessarily or unjustifiably vague. This general reluctance to give a precise meaning to the rule of law may actually be wise considering the protean and contested nature of this concept. It is worth noting that troubled by its open-ended nature, the House of Lords Select Committee on the Constitution commissioned a paper from Professor Craig to assist the Committee's understanding of the term.[37] After noting that his paper 'shed much light on the matter', the Committee nevertheless concluded

[35] G. Marshall, 'The Rule of Law. Its Meaning, Scope and Problems', 24 *Cahiers de philosophie politique et juridique* (1993) p. 43 at p. 43.

[36] With the arguable exception of the Spanish Constitution: its Art. 9(3) offers a clear account of at least the formal elements at the heart of the *Estado de Derecho*: 'The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, legal security, the accountability of public authorities and the prohibition of arbitrary action of public authorities.'

[37] From this author, *see* in particular, 'Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework', *Public Law* (1997) p. 467.

that 'despite its inclusion in the statute book, the rule of law remains a complex and in some respects uncertain concept.'[38]

Regardless of whether one agrees to view the rule of law as a useful legal concept,[39] the absence of any definition in the Union Treaties has had the consequence of allowing or rather obliging the EU courts to flesh the principle out. The Court of Justice first definitional attempt can be traced back to the 1986 case of *Les Verts*. In this case, Advocate-General Mancini essentially suggested equating the rule of law with judicial protection, i.e., the 'right to a judge', which itself is often understood as entailing not only the right to an effective remedy but also the rights of access to an impartial tribunal, to legal aid, to a fair hearing and finally, the right to be judged within a reasonable time. But the Advocate-General went further and argued that 'whenever required in the interest of judicial protection', the Court should be 'prepared to correct or complete rules which limit its power.'[40] In the name of the rule of law, and by reference to the 'general scheme' of the EEC Treaty as well as its 'spirit', the Court did exactly that in *Les Verts* as it reinterpreted – some may say rewrote – the EEC Treaty provision dealing with annulment actions so as not to excluding actions brought against measures adopted by the European Parliament intended to have legal effects *vis-à-vis* third parties.[41] It is in this context of blatant judicial activism that the phrase 'Community based on the rule of law' first emerged:

> It must first be emphasized in this regard that 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

[38] House of Lords Select Committee on the Constitution, *Relations between the executive, the judiciary and Parliament*, HL Paper 151(2006-2007) p. 12, para. 24.

[39] It may seem at first that the English rule of law, by not referring to the term state, cannot be subject to the traditional Kelsenian criticism according to which the concept of *Rechsstaat* is nothing more than a pleonasm. Indeed, if one agrees to identify the State with law, the concept of *Rechtsstaat* is redundant because every State is then, by definition, a 'State of law.' It may be worth noting, however, that Locke spoke of 'Lawful Government' in his *Two Treatises of Government* before the term rule of law became more influential with the work of Dicey. Furthermore, Raz, not unlike Kelsen before him, also questioned the tautological nature of the rule of law if it is understood to mean 'that all government action must have foundation in law' as '[a]ctions not authorized by law cannot be the actions of the government as a government.' Raz, *supra* n. 31, at p. 212.

[40] Opinion of AG Mancini in Case 294/83 [1986] *ECR* 1339, p. 1350.

[41] In *Les Verts*, the Court of Justice had to rule on the delicate question of whether the European Parliament could act as a respondent in annulment proceedings initiated by a private party. According to what was then Art. 173 EEC, the Court's jurisdiction to hear and determine an action for annulment was expressly limited to actions brought against measures adopted by the Council and the Commission. In the words of the applicant, this limitation amounted to a 'denial of justice', an ancient and fundamental legal notion which has traditionally justified a large exercise of judicial interpretation when the right to obtain a ruling is at stake.

> Treaty. In particular, in Articles 173 [now 263 TFEU] and 184 [now 277 TFEU], on the one hand, and in Article 177 [now 267 TFEU], on the other, 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 ...[42]

Whilst the Court's judgment does not explain the origin of the rule of law at Community level – the notion was not yet explicitly mentioned as such in the EC Treaty – it is clear that the Court implicitly views it both as a positive good in itself and as one of the fundamental principles underlying the Community's entire constitutional framework. This, in turn, explains why, in the eyes of the Court, a 'generous and dynamic interpretation'[43] of the Community's constitution is not only a legitimate method of interpretation but may be, at times, preferable to a literal reading when the need arises to protect the effectiveness of the individual right to effective judicial protection,[44] a general principle of Union law and one also laid down in Articles 6 and 13 of the ECHR.[45] The Court, however, adopted a more encompassing understanding, but no less procedural, of what the rule of law entails in the Union's constitutional framework. Indeed, to paraphrase the Court's ruling, the Community was said to comply with the rule of law because it allegedly offered a complete set of legal remedies and procedures in order to ensure (i) that its institutions (as well as its member states where relevant) adopt measures in conformity with the primary sources of Community law and (ii) that natural and legal persons are able to challenge, directly or indirectly, the legality of any act which affects their Community rights and obligations.[46]

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

[43] AG Jacobs Opinion in Case C-50/00 P *UPA* v. *Council* [2002] *ECR* I-6677, para. 71. Referring to *Les Verts* and other cases dealing with the rights of 'privileged applicants' in annulments proceedings, Jacobs describes the Court's interpretation in these cases as 'generous and dynamic' or even 'contrary to the text' and explains it by the need 'to ensure that the evolution in the powers of the Community institutions does not undermine the rule of law and the institutional balance.'

[44] *See*, e.g., C-15/00 *Commission* v. *BEI* [2003] *ECR* I-7281: Measures adopted by the European Investment Bank (EIB), when it acts as a Community body, must be subject to judicial review to ensure observance of the rule of law (para. 75). This is so even if Art. 237 EC makes no explicit reference to the Management Committee of the EIB, the organ that adopted the litigious measure in this case.

[45] *See* Case 222/84 *Johnston* [1986] *ECR* 1651. *See also* Art. 47(1) of the EU Charter of Fundamental Rights: 'Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.'

[46] The Court of Justice's emphasis on remedies is remarkably reminiscent of what the US Supreme Court stated in *Marbury* v. *Madison*: The government of the United States 'will certainly cease

For the Court of Justice, therefore, the principle of the rule of law entails more than the individual fundamental right to judicial protection. It first provides the foundation for judicial review and implies the existence of comprehensive and complementary judicial review processes. These processes, in turn, enable the judiciary to ensure compliance with two key tenets of any genuine legal system: the principle of legality, that is essentially the requirement that public authorities enact measures in conformity with the legal system's hierarchy of norms and the principle of judicial protection, which in particular implies the right to obtain an effective remedy before a competent court for any person whose rights or interests guaranteed by law are violated by public authorities. The Court of Justice's initial understanding of the notion of 'community based on the rule of law' can be described as legalistic and procedural as it is closely related to the traditional and *interrelated* principles of legality, judicial protection and judicial review, principles which are inherent to all modern and democratic legal systems.

EU lawyers and judges, for the most part, have welcomed the Court of Justice's rather narrow and formal approach and would likely agree with Sir Jacobs' contention that 'the key to the notion of the rule of law is … the reviewability of decisions of public authorities by independent courts.'[47] Yet, a remarkable aspect of the Court's more recent case-law lies in the broader interpretation of this notion and appears to demonstrate the progressive realisation that the rule of law also requires that the Union institutions respect more substantive requirements. This is to be welcomed. The rule of law is indeed best understood as a multifaceted principle with formal and substantive components. Viewed in this light, the direct and explicit linkage to the general principle of fundamental rights protection, which has been made by the Court of Justice since the *UPA* judgment, is neither surprising nor objectionable:

> The European Community is … 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…[48]

This ruling, at last, makes clear that the Union rule of law does not merely encompass compliance with formal and procedural requirements, the most important of which are the principle of judicial review and the right to an effective remedy, the

to deserve this high appellation [a government of laws, and not of men], if the laws furnish no remedy for the violation of a vested legal right', 1 Cranch 137 (1803) p. 163.

[47] F. Jacobs, *The sovereignty of law: The European way* (Cambridge, Cambridge University Press 2007), p. 35.

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

principle of legal certainty, the principle of legitimate expectations and the principle of proportionality. The rule of law has also a substantive dimension in the sense that it also demands judicial remedies to protect procedural *as well as* substantive rights.

The Court of Justice's recent series of judgments on the Union's 'terror lists' are worthy of note in this respect as they appear to construct more explicitly the Union's constitutional charter as an 'objective order of values'[49] where the principle of the rule of law and its components must always be interpreted through 'fundamental rights lenses', i.e., they must be interpreted and applied with a view to guaranteeing the most effective protection of these rights:

> [T]he 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* [emphasis added] stemming from the EC Treaty as an autonomous legal system …[50]

It follows that one important, if not the most important, purpose of judicial review, according to the Court, lies in the protection of natural and legal persons' fundamental rights. This means, for instance, that the interpretation and application of the formal components of the rule of law must permanently be guided by this purpose.

In reflecting a broad understanding of the rule of law and suggesting that this constitutional principle, and the legally enforceable 'sub-principles' it encompasses, must serve the primacy and dignity of the individual, the Court of Justice's case-law is not particularly innovative but rather reflects to a great extent national experiences and in particular, the German one.[51] In other words, the Union rule of law is also construed by the Court of Justice as a 'meta-principle' which provides the foundation for an independent and effective judiciary and essentially describes and justifies the subjection of public power to formal and substantive legal constraints with a view to guaranteeing the primacy of the individual and its protection against the arbitrary or unlawful exercise of public power. Although the precise list of principles, standards and values the rule of law entails may naturally vary in

[49] For the German Constitutional Court, the Basic Law does not merely protect substantive rights it also frames an objective order of values, which imposes 'a positive obligation on the state to ensure that [they] become an integral part of the general legal order', D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2nd edn. (Durham, Duke University Press 1997), p. 47.

[50] Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] *ECR* I-6351, para. 316.

[51] *See* generally the thorough and excellent study offered by E. Carpano, *Etat de droit et droits européens* (Paris, L'Harmattan 2005).

each legal system, it is important to emphasise that most if not all European legal systems share in common the use of formal and substantive legal standards and have all known an 'intensification of judicial review',[52] in particular as far as fundamental rights are concerned. Furthermore, most national courts view the formal and substantive components of the rule of law as interdependent. This is the right approach as these formal and procedural components (non-retroactivity, access to courts, etc.), in liberal and democratic European polities, are logically supposed to serve the substantive values (human dignity, social justice, etc.) upon which these societies are founded. Another remarkable shared trait between most national legal systems in Europe is that the strong emphasis on the rule of law as a defining constitutional principle has progressively led to the 'instrumentalisation' of the State, i.e., public authorities are supposed to serve the individual and protect his rights, and the 'subjectivisation' of the law, i.e., individuals must be able to challenge acts that may violate their rights.[53]

In the light of this general evolution, the Court of Justice's 'deepening' of the rule of law is hardly surprising and should be praised. Its traditional formula since *Les Verts* (the EC is a community based on the rule of law) would nevertheless benefit from some adjustment to make the substantive dimension of the principle more explicit. The entry into force of the Lisbon Treaty should also convince the Court to revise its formula along the following lines:

> Founded on the values of human dignity, freedom, equality and solidarity,[54] the European Union is a union[55] governed *inter alia* by the constitutional principle[56] of the rule of law [*Rechtsstaat*, *Etat de droit*, etc.[57]], which primarily means that its

[52] To paraphrase G. Nolte, 'General Principles of German and European Administrative Law: A Comparison in Historical Perspective', 57 *The Modern Law Review* (1994) p. 191 at p. 205.

[53] *See* J. Chevallier, 'L'Etat de droit', *Revue du droit public* (1988) p. 365 at p. 367.

[54] Rather than emulating the 'ugly' phrasing and excessive length of Art. 2 TEU, the Court may wish to follow the Preamble to the EU Charter of Fundamental Rights, which concisely and more accurately states that 'the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity' and 'is based on the principles of democracy and the rule of law.'

[55] New Art. 1 TEU provides that 'The Union shall replace and succeed the European Community.' Any reference to a 'community' would therefore be awkward unless it is made clear it is meant as a substitute for polity.

[56] As amended by the Lisbon Treaty, the EU Treaties simultaneously and confusingly describe the rule of law both as a value (*see*, e.g., Art. 2 TEU) and as a principle (*see*, e.g., Art. 21 TEU). Alternatively, the Court could solely refer to the rule of law as a value governing the Union and for the sake of simplicity, make no mention of the EU Charter's Preamble distinction between values and principles.

[57] While the Court's decision to rely on unprecedented terms in languages other than English (*Rechtsgemeinschaft*, *communauté de droit*, etc.) might have made sense in 1986, it is time to take into account the formidable Treaty changes since *Les Verts* and avoid unnecessary and confusing terminological inflation.

> institutions must be subject to judicial review of the compatibility of the measures adopted by them, save some limited exceptions, in order to guarantee their compatibility with the EU's basic constitutional charter and in particular, the whole range of fundamental rights it protects.

Notwithstanding the merits of this proposal, the most important point at this juncture is that the Court of Justice has progressively refined its understanding of the rule of law and its constitutive components since *Les Verts*. In other words, a positive move towards a more 'material' and 'demanding' conception can be detected.[58] This refined understanding more accurately reflects the subsequent enshrinement of the rule of law as one of the Union's foundational principles. Yet, and somewhat intriguingly, the Court of Justice has continued to parsimoniously refer to the rule of law. This reluctance to apply the rule of law as *a* rule of law is not, however, uncommon.

The rule of law as a rule of law

The normative added value of the rule of law is regularly challenged. As a constitutional principle, its usefulness has been in particular questioned on the ground that its unique function would be to synthesise a series of sub-principles in an attractive and valorising formula.[59] This criticism is not entirely warranted. Whilst it is true that scholars and the Court of Justice, the latter not always explicitly, have invoked the notion of a community based on the rule of law to justify the 'discovery' of a set of fully justiciable general principles of law, it would be wrong to conclude that the rule of law lacks legal effect. Indeed, the rule of law is clearly a legally binding principle[60] that naturally guides judicial interpretation. Before ex-

[58] It might be that the Court has been influenced by the stronger emphasis on the rule of law's substantive components one may detect in the multiple policy initiatives, technical instruments, etc. adopted by the EU in the late 1990s with the aim of promoting, in its external relations, compliance with the EU's foundational principles. *See*, e.g., Council Common Position 98/350/CFSP on human rights, democratic principles, the rule of law and good governance in Africa, *OJ* [1998] L 158/1, Art. 2(c): The rule of law is a principle 'which permits citizens to defend their rights and which implies a legislative and judicial power giving full effect to human rights and fundamental freedoms and a fair, accessible and independent judicial system.' For a critique of these 'legislative' definitions on the ground that they often lack consistency, *see* E. Wennerström, *The Rule of Law and the European Union* (Uppsala, Iustus Förlag 2007), chap. 5. Whilst EU external policies do indeed sometimes reflect questionable understandings of what the rule of law covers (e.g., anti-corruption), the core demands of the rule of law (principle of legality and existence of effective legal remedies to guarantee the protection of fundamental rights) nonetheless appear to be always taken into account.

[59] *See*, e.g., L. Heuschling, *Etat de droit, Rechtsstaat, Rule of Law* (Paris, Dalloz 2002), p. 304, para. 312.

[60] Pre-Lisbon Treaty Art. 46 TEU, in a rather awkward fashion, provided that the powers of the Court of Justice shall not apply to Art. 6(1) TEU with the exception of the principle of respect for human rights. This did not mean that the rule of law was not a legally binding principle but implied

amining this latter point, the extent of the rule of law's justiciable nature should be briefly addressed.

It would be difficult to deny that the Court of Justice does not view the rule of law as *a* rule of law actionable before a court. This means, for instance, that parties in legal proceedings cannot *directly* rely on the principle of the rule of law to seek annulment of the acts of Union institutions. The reason is that the rule of law is not one of the grounds of judicial review but rather provides the constitutional foundation for judicial review at Union level. This explains the relatively minor number of instances where the rule of law has played a *direct* role with respect to the outcome of the cases before the EU courts, even where the Court of Justice or the Court of First Instance have been invited to do so by the parties' counsels or by the Advocates-General, mostly in the context of annulment proceedings.[61] This finding is not entirely surprising as the rule of law is, above all, a foundational principle with a multifaceted nature. It is not, therefore, an ideal standard for day-to-day judicial work. Indeed, were the rule of law treated as *a* rule of law, it would potentially run afoul of its own requirements for the simple reason that the rule of law itself is not entirely clear or certain in meaning. This must surely explain why EU judges have been inclined to rely on more concrete and less open-ended principles to scrutinise, and eventually strike down, public authorities' measures. Known as general principles of law, these principles constitute, similarly to Treaty provisions, a primary source of Union law, and their main purpose is to operate as grounds of review. Historically, most of these general principles were drawn by the Court of Justice from the laws of the member states and were not, therefore, explicitly linked to the principle of the rule of law. The case-law post *Les Verts* is, regrettably, not much more explicit. This is unfortunate, conceptually speaking, as these general principles share an obvious connection with the rule of law.[62] Indeed, they are 'concrete' emanations of the rule of law as their primary purpose is to regulate public power according to material and substantive standards. The rule of law can accordingly be used to legitimise and bring

that its *judicial* enforcement *on the basis* of this provision was excluded. This rather complex situation might explain why the Court of Justice continued to describe the EC as a community based on the rule of law rather than rely on the formula of Art. 6(1) TEU. One may only hope that following the repeal of Art. 46 TEU and the granting of exclusive legal personality to the EU, the Court will now directly rely on new Art. 2 TEU to give more textual grounding to, and eventually revise, its traditional description of the EC as a community based on the rule of law.

[61] For further analysis, *see* Pech, *supra* n. 16, p. 58-60.

[62] *See*, e.g., D. Simon, 'Y a-t-il des principes généraux du droit communautaire', 14 *Droits* (1991) p. 73 at p. 82 (the general principles of law are not some occasional rules guaranteed by the Court of Justice for circumstantial reasons but rather express the requirements of the *Rechtsstaatlichkeit*); von Bogdandy, *supra* n. 27, at p. 18 (the rule of law contains numerous sub-principles which are known in the EU legal order as general principles of law).

coherence to the judicial 'discovery' of these plainly justiciable general principles. The Court of First Instance, on one occasion at least, made explicit the existence of such a relationship by referring to the right to sound administration and the principle of judicial review as 'general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the member states.'[63] This innovative wording conveniently relays two important ideas previously discussed: (i) the rule of law, at the national and Union levels, must primarily be viewed as a foundational principle of constitutional value from which justiciable sub-principles may be derived from; (ii) the general principles of law protected under Union law are inherent to any polity governed by the rule of law.

Last but not least, the rule of law may also fulfil a decisive interpretative function. As one of the few constitutional principles having a defining character and on which all modern and liberal political systems are expected to be based, the rule of law is generally thought to be in a 'preferred position' when courts must interpret constitutional provisions. This is not to suggest that the rule of law is, formally speaking, a superior constitutional norm or that it should be treated as one. It rather means that the rule of law, as a 'primary constitutional principle',[64] must always inform the interpretation of other constitutional and infra-constitutional norms. To put it differently, the rule of law, alongside the principles of democracy, liberty and fundamental rights protection, represents a foundational value of the Union legal order that EU courts must always take into account in their day-to-day adjudicative role with a view of strengthening concrete compliance with it. In practice, the EU courts have rightly referred to the notion of community based on the rule of law to justify a dynamic and, at times, *contra legem* reading of 'restrictive' Treaty provisions, i.e., provisions which limit the scope of the EU courts' power of judicial review, or the exercise of a strict degree of judicial scrutiny over Union measures.

It would therefore be wrong to argue that the rule of law lacks normative effect and merely fulfils a descriptive function. By relying, not always explicitly, on the rule of law as a source from which more narrowly defined and judicially cognisable principles can be derived in order to help the judiciary in their day-to-day mission to interpret and scrutinise the validity of public authorities' measures, and as a primary and transversal constitutional principle to assist their interpretation of other norms, EU judges have emulated, to a large extent, national judicial prac-

[63] Case T-54/99 *Max.mobil Telekommunikation* [2002] *ECR* II-313, paras. 48 and 57.

[64] With respect to the European Convention on Human Rights (ECHR), Greer includes among his constitutional primary principles, the principles of effective protection of Convention rights, of democracy, and of legality/rule of law, and suggests that the 'remaining principles of interpretation' should be subordinate to these principles. *See* S. Greer, *The European Convention on Human Rights. Achievements, Problems and Prospects* (Cambridge, Cambridge University Press 2006), p. 195.

tices. One may therefore contend that the rule of law, as a constitutional principle of the Union, is no empty slogan or pointless legal concept. It fulfils different useful functions and in particular, it has had a positive impact on the development of a sophisticated and – from the point of view of the individuals subject to it – protecting legal order. This does not obviously mean that all is for the best in the best of all possible worlds. With respect to the Union's constitutional framework, one can indeed question whether the reference to a Union founded on the rule of law has always been taken seriously.

Rule of law audit of the Union's constitutional framework

The fact that the rule of law is no meaningless legal verbiage does not obviously imply that there is no gap between Union rhetoric and the reality of its constitutional framework. As we shall see, some concerns have long been raised in relation to the compatibility of certain institutional features of the Union's 'Constitution' with the principle of the rule of law notwithstanding the Court of Justice's regular depiction of the Community as a community based on the rule of law. But before assessing the Union's constitutional framework in the light of this principle it is important to stress that one cannot conduct any meaningful 'rule of law audit' without the prior adoption of a working definition of what the principle entails.

The rule of law as a legal benchmark

The rule of law is regularly relied on either to praise or, more often than not, to critically evaluate the fundamental structures of a legal system or more narrowly, governmental actions or particular statutes or specific judgments. In this context, alleged violations of the rule of law are normally deplored and calls for restoring or improving compliance with the rule of law often made. Rather than multiplying examples, it is more decisive to question here whether the rule of law can be relied on as an objective *legal* standard. In other words, can the rule of law be objectively used as a benchmark, that is, a standard or point of reference against which things may be compared or assessed?

In agreement with Raz, this article assumes that the rule of law is not only 'a political ideal which a legal system may lack or possess to a greater or lesser degree', but also 'one of the virtues by which a legal system may be judged and by which it is to be judged.'[65] It is imperative, however, to adopt an explicit definition of what the rule of law entails in order to avoid the pitfalls of the Union's democratic deficit debate. Indeed, in this particular context, critics of the Union do not always share their understanding of democracy with their audience. This is highly

[65] Raz, *supra* n. 31, at p. 211.

unfortunate as it makes little sense to condemn the Union for its alleged deficient democratic credentials without first explaining what they are. As explained in a valuable study offering a democratic audit of the Union, any systematic assessment of democracy in the Union needs to be conducted against clearly defined criteria.[66] This rule of law audit must therefore also make clear the criteria on the basis of which judgments of consistency or inconsistency with the rule of law, as a legal benchmark, can be formulated.

To give a single example demonstrating the decisive character of this definitional exercise, one may refer to the Union's official website's understanding of the rule of law. If we are to believe *Europa*, the Union is based on the rule of law because 'everything that it does is derived from treaties, which are agreed on voluntarily and democratically by all member states.'[67] The rather clear and succinct nature of this explanation does not obviously reflect the subtle and multifaceted nature of the rule of law. As previously shown when exploring the substance and scope of this principle in the Union constitutional framework, if anything, it is evident that the Union rule of law cannot simply be equated with the basic principle of conferred competences.

Like the concept of democracy, the rule of law can be said to constitute a 'complex evaluative concept',[68] which is often understood as comprising multiple criteria or as set of ideal attributes that a given legal system must strive towards. To follow, for instance, Raz's influential 'formal' account, in a legal system based on the rule of law, legal norms should have the following attributes:[69] they must be prospective, adequately publicised, clear, relatively stable and lawmaking should also be guided by open, stable, clear and general rules. But the rule of law is not merely about the 'quality' of legal norms as standards capable of providing effective guidance, it further requires, according to Raz, the protection of the right to a fair trial as well as unimpeded access to courts while an independent judiciary should be granted the power to review that laws comply with the 'qualities' mentioned above. Finally, the discretionary powers of 'crime-preventing agencies' should be limited.

Legal theorists are not the only ones to view the rule of law as a set of attributes, institutional requirements, legal principles or fundamental rights. A recent and ambitious research project is worth mentioning in this regard. In order to measure extent to which countries adhere to the rule of law in practice, a new quantitative assessment tool has been designed by the World Justice Project (WJP).[70]

[66] C. Lord, *A Democratic Audit of the European Union* (Basingstoke, Palgrave Macmillan 2004).

[67] <europa.eu/abc/treaties/index_en.htm>, visited 1 July 2010.

[68] Waldron, *supra* n. 29, at p. 47.

[69] Raz, *supra* n. 31, at p. 214-218.

[70] WJP Rule of Law Index, <www.worldjusticeproject.org/rule-of-law-index>, visited 1 July 2010.

The 'WJP Rule of Law Index' consists of 16 factors and 68 sub-factors organised under the following four principles or bands: (i) an accountable government under the law; (ii) clear, publicised, stable and fair laws that protect fundamental rights; (iii) accessible, fair and efficient legislative and administrative processes; (iv) access to justice.

As this article's objective is to review the compatibility of the Union's constitutional framework with the rule of law rather than assess the entire Union legal system's adherence to this principle, the WJP index, regardless of its merits, only offers a partially suitable analytical framework. Similarly, this article is not concerned with the manner in which Union laws are made, their formal qualities or substantive content, or how they are enforced or reviewed by courts. Raz's 'wish list' therefore cannot either be used to measure compliance of the Union's institutional system.[71] Rather it would appear more fitting and less subjective to rely on the Court of Justice's understanding of the rule of law as an elementary and minimum benchmark that the Union's 'Constitution' is naturally supposed to comply with. This is not to say, of course, that one should be precluded from adopting alternative conceptions of the rule of law but any fruitful assessment requires, as a starting point, the explicit adoption of a working definition.

As previously shown, the Court of Justice's understanding predominantly illustrates a legalistic and procedural conception of the rule of law, one which is preoccupied with judicial review and the existence of an adequate system of legal remedies and procedures in order to guarantee that Union measures (and national measures where relevant) are in conformity with the Union's 'Constitution' and that individuals can challenge the legality of any act affecting their Union rights and obligations. The Union rule of law has also progressively gained a clearer substantive dimension. The Court of Justice indeed appears to view the rule of law as a principle encompassing not only a 'right to challenge' litigious measures before the courts, but also a 'right to rights'. The Union legal system must therefore afford adequate protection of fundamental rights. To sum up, the Court essentially equates the rule of law, as a constitutional principle, not with a particular set of requirements about the form of legal rules, but with judicial review (as it gives effect to the rule of law) and judicial protection of individual rights and in particular, the individual's fundamental rights (a key component as well as objective of the rule of law).

Viewed in this light, it is quite common for jurists to contend that the rule of law, in the sole Community, 'has been effectively guaranteed by the wide jurisdic-

[71] For a study questioning the extent to which the EU, and in particular its Court of Justice, respect the rule of law, which the author essentially understands similarly to Hayek (in a system governed by the rule of law, the laws must be general, equal and predictable), *see* Arnull, *supra* n. 34, at p. 241.

tion conferred'[72] on independent courts which do not refrain from ensuring the full review of all EC acts in light of the individual's constitutional fundamental rights. This diagnosis however, needs to be nuanced. Generally speaking, it does not mean that better or more effective compliance with the rule of law is neither possible nor desirable. Furthermore, and more problematically, one may challenge the view that the EC Treaty has established, as the Court alleged in *Les Verts*, a *complete* system of legal remedies and procedures designed to enable the Court of Justice and the Court of First Instance to review the legality of all EC acts. The lack of 'mechanisms that make it possible to ensure respect for rules and rights'[73] under the (pre-Lisbon) TEU was also particularly difficult to reconcile with the provision providing that the Union is based, *inter alia*, on the principle of the rule of law (ex Article 6(1) TEU). It is therefore time to confront the Court's rhetoric to the reality of the Union's constitutional framework pre- and post-Lisbon Treaty and to assess in particular whether Union measures affecting individual rights were/are easily amenable to judicial review.

Note that it would not be sensible to seek to conclude either that the Union's constitutional framework perfectly complies with the rule of law or that it absolutely does not. Adherence to the rule of law, in liberal democracies, is normally a matter of degree because, to paraphrase Waldron, a system of governance may satisfy this principle in some areas and not others, or because some of the requirements associated with the rule of law may be satisfied but not others.[74] Accordingly, this article rather aims to 'audit' the Union's constitutional framework to identify departures from the rule of law and assess whether they can be justified and/or have been remedied following the entry into force of the Lisbon Treaty.

Taking the rule of law seriously: A pre- and post-Lisbon Treaty assessment

As we shall *see* below, some features of the Union's constitutional framework have long been denounced on the ground that they would undermine 'the effectiveness of the Union's legal order in providing access to the remedy of judicial review of the Union's institutions'[75] to control compliance with fundamental rights stan-

[72] Jacobs, *supra* n. 47, at p. 37.

[73] AG Mengozzi Opinion in Case C-354/04 *P Gestoras Pro Amnistía* [2007] *ECR* I-1579, para. 101.

[74] Waldron, *supra* n. 29, at p. 44. It goes without saying that 'complete noncompliance with any one principle of the rule of law would signify that the system is not properly called a legal system', R. Summers, 'The Principles of the Rule of Law', 74 *Notre Dame Law Review* (1998-1999) p. 1691 at p. 1696.

[75] S. Carruthers, 'The Treaty of Lisbon and the Reformed Jurisdictional Powers of the European Court of Justice in the Field of Justice and Home Affaires', 6 *European Human Rights Law Review* (2009) p. 784.

dards. The nature and extent of the changes brought about by the Lisbon Treaty as regards these problematic features will consequently be addressed.

Pre-Lisbon rule of law gaps

– Jurisdictional gaps

The most fundamental criticism relates to the infamous three-pillar structure established by the TEU in 1992 and the ensuing patchwork of confusing restrictions imposed on the EU courts' jurisdiction as regards foreign policy and justice and home affairs measures.[76] The persistence of policy areas not subject, or only partially subject, to the jurisdiction of the EU courts has been repeatedly denounced by scholars as well as judges writing in their extra-judicial capacity.[77]

It goes without saying that the fact that the EU courts were denied jurisdiction to review acts adopted as part of the Common Foreign and Security Policy (CFSP) is hard to reconcile with the principle of the rule of law as understood by the Court of Justice in *Les Verts*. In an emblematic case dealing with asset freezing measures adopted by the Union against an organisation suspected of terrorism, the Court of First Instance, faced with the argument that the principles of a State governed by the rule of law apply to all of the Union's acts, had no choice but to recall that Title V of the TEU relating to the CFSP makes no provision for actions for annulment of CFSP acts before the EU courts. It further concluded that the TEU has, in relation to CFSP acts as well as JHA acts adopted on the basis of Title IV (as we shall *see* below), established a limited system of judicial review, certain areas being outside the scope of that review and certain legal remedies not being available.[78]

Although one may accept the Court's contention that in a legal system founded on the principle of conferred powers, the absence of an effective legal remedy, as claimed by the applicant in this case, cannot in itself confer independent jurisdiction on EU courts in relation to a CFSP act, this situation makes one wonder

[76] As is relatively well-known, the EU was originally established by the TEU as an encompassing framework aimed at including the pre-existing Communities and two newly born intergovernmental pillars: the Common Foreign and Security Policy (CFSP) and Justice and Home Affairs (JHA) pillars. The justification behind what became known as the three-pillar structure was to make clear that the CFSP and JHA are areas of intergovernmental cooperation with their own decision-making procedures. This meant, as far as the Court of Justice is concerned, that its jurisdiction radically differed in each pillar. To complicate matters further, following the decision to transfer some third pillar issues into the first pillar (Title IV of the EC Treaty entitled 'Visas, asylum, immigration and other policies related to free movement of persons' was inserted into the TEC by the Treaty of Amsterdam), the third pillar (Title VI of the EU Treaty) was renamed Police and Judicial Co-operation in Criminal Matters (PJCCM) in 1997.

[77] For further references, *see* A. Hinarejos, *Judicial control in the European Union. Reforming jurisdiction in the Intergovernmental Pillars* (Oxford, Oxford University Press 2009).

[78] Case T-228/02 *OMPI* [2006] *ECR* II-4665, para. 54.

about the reality of the EU Treaty's description of the Union as one founded on the rule of law, notwithstanding the fact that CFSP measures such as the ones ordering the freezing of assets of persons or organisations suspected of involvement in terrorism activities, normally require the adoption of implementing Community and/or national acts and which can themselves be the subject-matter of an action for annulment either before the EU or the national courts. The existence of a judge-made law exception to the EU courts' lack of jurisdiction over CFSP acts – the EU courts recognised their jurisdiction to hear an action for annulment directed against CFSP as well as third pillar JHA acts where the applicant alleges an infringement of the Community's competences – is similarly insufficient to invalidate this conclusion.

Unsurprisingly, the pre-Lisbon Treaty provisions restricting the jurisdiction of EU courts over first pillar JHA measures (visas, asylum, immigration, etc.) and third pillar measures (police and judicial cooperation in criminal matters) have suffered from similar criticism as they also established, especially in relation to the last type of measures, an inadequate system of judicial review.[79] Space constraints preclude an exhaustive exposition of those jurisdictional restrictions. It is worth emphasising, however, that the European Commission itself found it difficult to accept the curtailment of the broad preliminary reference jurisdiction afforded to the Court of Justice under ex Article 234 TEC as regards first pillar JHA measures. Indeed, before the Lisbon Treaty, only national courts of last resort could refer questions to the Court of Justice on the validity or interpretation of first pillar JHA acts. The Court was furthermore explicitly denied the jurisdiction under ex Article 68(2) TEC to rule on Council measures connected with the removal of controls on the movement of persons across internal borders 'relating to the maintenance of law and order and the safeguarding of internal security.' As the Commission put it, 'the proper way of safeguarding public policy in a Community governed by the rule of law is to adopt substantive measures, both legislative and executive, and not to exclude the right to take action in the court.'[80] As for ex Article 35 TEU, which governed the EU courts' jurisdiction over third pillar JHA measures, it further subjected the EU courts' jurisdiction to a series of awkward limitations[81] that made any exercise of any judicial review largely illusory from

[79] *See*, e.g., S. Douglas-Scott, 'The Rule of Law in the European Union. Putting the Security into the Area of Freedom, Security and Justice', 29(2) *European Law Review* (2004) p. 219.

[80] European Commission Communication, *Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection*, COM(2006) 346 final at p. 7.

[81] To give a single example, the ECJ was given jurisdiction to give preliminary ruling in relation to the validity and interpretation of framework decisions and decisions, and in relation to the interpretation of conventions, but it was left to each member state to decide whether to make a prior declaration accepting the jurisdiction of the Court. Furthermore, the member state had the option

the point of view of the individual applicant despite the best efforts of the Court of Justice to 'normalise' this exceptional regime.[82]

One may finally briefly refer to the Court's limited role regarding two essential Treaty provisions and whose main aim is to guarantee compliance with the Union's foundational principles. The first one concerns the current member states while the second is applicable to the countries wishing to accede to the Union.

Since the entry into force of the Amsterdam Treaty, any member state can theoretically be subject to Union sanctions if it is found to breach, or about to breach, the Union's foundational principles. The Court of Justice, however, lacks the jurisdiction to review the legality of any decision determining that there is a clear risk of a breach of the Union's foundational principles or a serious and persistent breach of these principles. The member states, in their capacity of Masters of the Treaty, deliberately limited the Court's jurisdiction to the sole review of the 'purely procedural stipulations in Article 7',[83] with the aim of merely guaranteeing that the 'guilty' member state's defence rights are respected. In other words, pre-Lisbon Article 7 TEU mechanisms, whose main purpose is to guarantee permanent compliance with the rule of law, amongst other principles, may paradoxically be criticised for not fully satisfying rule of law's requirements. In practice, such a formal limitation may appear in any case rather superfluous as the Court of Justice, like any court of law, is simply not equipped to review the material merits of a Council decision concluding that there is a systemic risk of a breach or that an actual breach has occurred. By contrast, pre-Lisbon Article 49 TEU did not bar the Court from reviewing the application of this provision. The lack of any formal limitation on the Court's jurisdiction was nonetheless of little practical significance as fulfilment of the condition according to which all countries seeking to accede to the Union must respect its foundational principles, simply grants the candidate country the option to apply, not a right to accede to the Union. Were the European Parliament to reject a membership application on the ground that a candidate country does not adhere, for instance, to the rule of law, one cannot

to limit the preliminary ruling jurisdiction to national courts of last resort. For further analysis of ECJ jurisdiction under pre-Lisbon article 35 TEU, *see* Carruthers, *supra* n. 75, p. 789-795.

[82] *See*, e.g., Case C-354/04 *P Gestoras Pro Amnistía* [2007] *ECR* I-1579. P. Craig and G. de Búrca interestingly observe that this judgment offers 'classic ECJ reasoning to circumvent limits to its review power. It relies on the general principle that the EU is founded on the rule of law to provide the foundation for judicial review of a common position', *EU Law*, 4th edn. (Oxford, Oxford University Press 2008), p. 254.

[83] *See* Art. 46(e) TEU and Case T-337/03, *Bertelli Gálvez* v. *Commission* [2004] *ECR* II-1041, para. 15: The TEU 'gives no jurisdiction to the Community judicature to determine whether the Community institutions have acted lawfully to ensure the respect by the member states of the principles laid down under Article 6(1) EU or to adjudicate on the lawfulness of acts adopted on the basis of Article 7 EU, save in relation to questions concerning the procedural stipulations contained in that article, which the Court may address only at the request of the member state concerned.'

realistically expect the Court to review the material merits of such an eminently political determination.

The fact that the Court of Justice was given no direct role to play as regards pre-Lisbon Articles 7 and 49 TEU does not necessarily have to be severely criticised. Indeed, establishing whether a current member or a candidate country is in breach of the Union's foundational principles essentially calls for a political judgment rather than a legal one. More problematic has always been the potential for jurisdictional 'black holes'[84] in respect of CFSP as well as JHA measures. Accordingly, it has been reasonably argued that the pre-Lisbon TEU illustrated a 'rule-of-law deficit'.[85] A similar diagnosis is in order as regards the pre-Lisbon system of legal remedies and procedures established by the EC Treaty.

– A complete system of remedies and procedures?

As it would have been certainly 'incompatible with the legal traditions of the founding member states and with the rule of law for the exercise by the Community institutions of their law-making powers to have escaped judicial review',[86] ex Article 230 TEC gave jurisdiction to the Court of Justice to review the legality of EC acts. This provision has nonetheless given rise to a great deal of criticism essentially on two grounds: it does not make sufficiently clear that annulment proceedings may be brought against measures taken by *all* institutions and bodies of the EC and, more problematically, it severely limits private parties' ability to challenge the legality of EC acts.

To briefly address the first point, suffice it to say that this provision, before the entry into force of the Lisbon Treaty, only referred to a limited number of European institutions (European Parliament, Council, Commission and European Central Bank) and that the absence of any reference to the European Council had been criticised on the ground that it is inconsistent with the rule of law as its actions are not subject to any judicial control. The EU courts' case-law, however, largely remedied this shortcoming. As neatly summarised by the Court of First Instance in a recent judgment, the general principle to be elicited from the Court of Justice's *Les Verts* judgment 'is that any act of a Community body intended to produce legal effects *vis-à-vis* third parties must be open to judicial review' as 'it cannot be acceptable, in a community based on the rule of law, that such acts escape judicial review.'[87] Notwithstanding this welcome jurisprudence, the word-

[84] To borrow from Carruthers, *supra* n. 75, at p. 799.

[85] *See*, e.g., B de Witte, 'The Nice Declaration: Time for a Constitutional Treaty of the European Union?', 36 *International Spectator* (2001) p. 21 at p. 22-23.

[86] A. Arnull et al., *Wyatt & Dashwood's European Union Law*, 5th edn. (London, Sweet & Maxwell 2006), p. 442, para. 13-023.

[87] Case T-411/06 *Sogelma* v. *EAR* [2008] *ECR* II-2771, para. 37.

ing of ex Article 230 TEC could still be found wanting as it did not explicitly provide that annulment actions could be brought against measures producing legal effects adopted by *all* EC institutions, bodies or agencies. This is nonetheless a minor failing when compared to the situation of measures adopted under the TEU or those adopted by Union agencies established outside the 'normal' EC institutional framework.[88] In a Union founded on the rule of law, it would indeed appear indispensable for the Union Treaties to make clear that any measure adopted by a Union institution, body or agency intended to produce legal effects *vis-à-vis* third parties is amenable to judicial review.

Another prevalent source of criticism concerned the more significant issue of standing requirements for private applicants in annulment actions. As is well-known, ex Article 230(4) TEC provided that an individual (a natural or legal person) may only challenge 'a decision addressed to that person' or 'a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.' The stringent interpretation of these last two criteria by the Court of Justice, and in particular the Court's narrow construal of the concept of individual concern, have long been denounced as 'unacceptable',[89] essentially on the ground that the individual's right to effective judicial protection is not adequately guaranteed. Accordingly, numerous scholars have relied on the principle of the rule of law to advocate a relaxation of the standing rules in order to allow more private challenges.[90] It has been argued, for instance, that an 'expansion of the rules on standing would offer the Union courts the opportunity to contribute … to uphold the institutional balance, transparency, accountability and democracy, as well as to protect fundamental rights through judicial review of all acts of the institutions. A Union based on the rule of law cannot afford anything less.'[91]

Yet the Court of Justice has resisted change. Despite multiple instances where applicants have argued that the Court's case-law is incompatible with the principle of the rule of law, the Court has persistently maintained the view that there is no need to adopt a 'dynamic' and liberal reading of the Treaty criteria restricting the capacity of natural and legal persons to bring annulment proceedings as the EC Treaty offers alternatives to individuals seeking to challenge the legality of *general* measures adopted by the EC institutions but which they cannot *directly* contest in

[88] *See*, e.g., Case C-160/03, *Spain* v. *Eurojust* [2005] *ECR* I-2077.

[89] J.-V. Louis, 'The Rule of Law', in M. Westlake (ed.), *The European Union beyond Amsterdam* (London, Routledge 1998), p. 112.

[90] *See*, e.g., Arnull, *supra* n. 34, at p. 249.

[91] *See*, e.g., K. Lenaerts and T. Corthaut, 'Judicial Review as a Contribution to the Development of European Constitutionalism', in T. Tridimas and P. Nebbia (eds.), *European Union Law for the Twenty-First Century*, vol. I (Oxford, Hart Publishing 2004), p. 64.

the EU courts. In other words, the existence of additional legal avenues – individuals may bring a direct action against EC implementing measures addressed to them or plead the invalidity of the national implementing measure before a national court and cause the latter to request a preliminary ruling of the Court of Justice on the validity of EC measure – appears to have convinced the Court that the principle of the rule of law is therefore perfectly complied with and does not in fact require any relaxation of its traditional interpretation of the standing rule for the so-called 'non-privileged parties'. The Court's reasoning, however, failed to take into account, as convincingly shown by Advocate-General Jacobs, that the allegedly 'complete system' of remedies established by the EC Treaty may not always provide an effective remedy.[92] For instance, an individual, in some limited circumstances, may be required to breach the law in order to be able to argue the invalidity of an EC measure before the relevant national court.

Notwithstanding the merits of the Court of Justice's reasoning, and to focus only on the rule of law, an interesting question is whether this principle may be relied on to justify an unconditional right of access to a court when individuals seek to challenge the legality of infra-constitutional norms of general application. To put it concisely, a negative answer is in order. Although access to justice is universally seen as a basic right and one of the rule of law's core components, it is rare to see scholars deducing from the rule of law, an individual right to initiate proceedings in any court, or a right to *actio popularis* in any situation, against any type of legal measure, merely on the basis of a general interest in the observance of the law. Furthermore, in most national legal systems, restrictive conditions usually govern the legal standing of natural and legal persons when they seek to directly challenge the constitutionality of statutes even though it is true that standing rules are generally more liberally interpreted when one seeks to judicially review a non-legislative measure.

It may be that, in the absence of any formal distinction between EC acts of a legislative nature and EC acts of an administrative nature, the Court of Justice may have had no choice but to adopt a restrictive reading of the *locus standi* requirements laid down in ex Article 230(4) TEC. The fact that this provision did not confer any *general* entitlement upon individuals to bring a *direct* action for annulment against generally applicable EC measures cannot be taken, in itself, as evidence of an unacceptable violation of the rule of law given the existence of alternative legal avenues allowing individuals to challenge the validity of these EC measures. This is not to say, however, that there is no room for improvement. One may certainly allude to the rule of law to argue for a more liberal and clearer interpretation of the standing rules 'in respect of individuals seeking to challenge

[92] Opinion of AG Jacobs in Case C-50/00 P *UPA* [2002] *ECR* I-6677.

generally applicable Community measures in order to ensure that full judicial protection is in all circumstances guaranteed.'[93]

– The absence of a special remedy for the protection of fundamental rights

Respect for fundamental rights, to the extent that it helps prevent an arbitrary use of public power, is normally viewed as a core element of the principle of the rule of law.[94] Unsurprisingly, the lack of a specific appeal for violation of Union fundamental rights has thus been regularly regretted and multiple proposals to confer on individuals the right to appeal directly to the Court of Justice have been put forward following the publication of the 1976 Tindemans Report.[95] More recently, this idea was once again debated when the European Convention began working on the draft text of the Union Constitutional Treaty. Numerous scholars were in favour of improving the rights of the individual to challenge Union measures before the Court of Justice by means of an Union *Verfassungbeschwerde*[96] or *recurso de amparo*.[97] Because a majority of its members had reservations, the idea of establishing a special remedy was not recommended by the relevant working group of the European Convention.[98] Indeed, powerful and rather pragmatic counter-arguments exist. As 'issues of fundamental rights already arise in connection with the application of the ordinary remedies, often in combination with other issues (e.g., equal treatment, proportionality, etc.)', it has been sensibly argued that such issues 'can and should continue to be dealt with in principle within the habitual procedural framework.'[99] In any event, the absence of a special remedy may not

[93] Opinion of AG Jacobs in Case C-263/02 P *Jégo-Quéré* [2004] *ECR* I-3425, para. 46.

[94] *See*, e.g., J.P. Jacqué, *Cours général de droit communautaire,* vol. I-1 (Martinus Nijhoff 1990), p. 276; W. van Gerven, *The European Union: A Polity of States and People* (Stanford, Stanford University Press 2005), p. 104.

[95] In his report, the Prime Minister of Belgium noted that 'the gradual increase in the powers of the European institutions … make it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognized and protected' and proposed that individuals should gain 'the right of direct appeal to the Court of Justice against an act of an institution in violation of these fundamental rights.' Report by Mr. Tindemans to the European Council, *Bulletin of the European Communities*, Supplement 1/76, p. 26-27.

[96] In Germany, subject to some procedural conditions, individuals can lodge a complaint with the Federal Constitutional Court when they are of the view that their fundamental rights have been infringed by the decision or action of a public authority. The complaint may be directed against a measure of an administrative body, a statute, or against a court's judgment of a court.

[97] Under Spanish constitutional law, citizens may lodge a special appeal with the Constitutional Court on fundamental rights ground but this remedy may only be used to challenge administrative decisions or actions.

[98] The European Convention, Final Report of Working Group II 'Incorporation of the Charter/ accession to the ECHR', CONV 354/02, 22 Oct. 2002, p. 15.

[99] F.G. Jacobs, 'Necessary changes to the judicial system of judicial remedies', Note for the working group on the Charter/ECHR, the European Convention, Working group II, Working document 20, 27 Sept. 2002, p. 3.

be taken as evidence of a gap between rhetoric and practice as regards the Union's compliance with the rule of law. Whilst constitutional review of legislation on fundamental rights grounds is a *sine qua non* feature of any polity based on the rule of law, legal systems may naturally differ when it comes to defining the mechanism allowing for the testing of the constitutionality of statutes on the basis of individual complaints. As far as the Union is concerned, it may well be true that the idea of introducing a distinct form of action for fundamental rights cases is neither necessary nor desirable, but in a Union founded on the rule of law, the lack of a special remedy of this nature would nevertheless seem to render more imperative that standing rules for individuals are not drawn too narrowly or interpreted too strictly and that the Union seeks accession to the ECHR. We shall now see if and to what extent the Treaty of Lisbon has answered these multiple concerns.

Lisbon Treaty answers to the Union's rule of law deficit

By putting an end to the three-pillar structure and making fundamental changes to the jurisdiction of the CJEU,[100] principally as regards JHA measures, the Lisbon Treaty has largely remedied the 'structural' deficiencies identified above and undoubtedly strengthened 'the coherence of the judicial system of the Union, thereby bolstering the protection of the 'rule of law'.'[101] Additional yet less radical improvements made to the 'complete' system of remedies and procedures established by the EC Treaty – which is renamed the Treaty on the Functioning of the Union (TFEU) – will also be briefly considered before highlighting some remaining unsatisfactory features of the Union's constitutional framework.

– The formal abolition of the pillar structure and the extension of the EU court's jurisdiction over all JHA acts

Following the laborious yet ultimately successful ratification of the Lisbon Treaty, the byzantine three-pillar structure established by the Maastricht Treaty has formally come to an end. This change is particularly significant as regards JHA, a policy area whose confusing if not awkward institutional arrangements have long been denounced on legitimacy, democratic accountability and rule of law grounds.[102] Any maintenance of the previous patchwork of restrictions on the

[100] New Art. 19(1) TEU provides that the Court of Justice of the European Union includes the Court of Justice, the General Court (formerly known as the Court of First Instance) and specialised courts (formerly known as judicial panels). *See* generally R. Barents, 'The Court of Justice After the Treaty of Lisbon', 47 *Common Market Law Review* (2010) p. 709.

[101] K. Lenaerts, 'The Rule of Law and the Coherence of the Judicial System of the European Union', 44 *Common Market Law Review* (2007) p. 1625 at p. 1650.

[102] As will be shown *infra*, the CFSP remains subject to 'specific rules and procedures' (Art. 24 TEU), which make clear that the CFSP continues to constitute an area of intergovernmental cooperation.

EU courts' jurisdiction would have certainly been difficult to reconcile with the TEU solemn affirmation that the Union shall constitute an area of freedom, security and justice (AFSJ) with respect for fundamental rights (Article 61(1) TFEU) and which 'shall facilitate access to justice' (Article 61(4) TFEU).

Reform had become inescapable as most found difficult to accept the limited jurisdiction of the CJEU concerning acts that are generally liable to directly affect the fundamental rights of the individuals. The President of the Court of Justice himself publicly regretted the development of 'a situation in which the mechanisms for judicial protection vary by reference to the different pillars of the Union' and 'the development of such inconsistencies in judicial review within the Union' since the transition from the Community to the Union in 1993.[103] Convinced that 'the best way of ensuring observance of the law in all spheres of the European Union' is to render 'the system of judicial protection uniform on the basis of the Community model',[104] the European Convention's working group dealing with AFSJ matters recommended the abolition of the specific mechanisms laid down in ex Articles 35 TEU and 68 TEC and further suggested that the general system of jurisdiction of the Court of Justice be extended to the whole of the AFSJ, including action by Union bodies in this field.[105]

By finally bringing together pre-Lisbon first and third pillar JHA matters into a new Treaty Title dedicated to the AFSJ and extending the Court of Justice's 'normal' jurisdiction to all aspects of the AFSJ (external borders, asylum and immigration, judicial cooperation in civil matters, judicial cooperation in criminal matters and police cooperation), the Lisbon Treaty significantly remedies the shortcomings previously denounced. In a nutshell, the repeal of ex Articles 35 TEU and 68 TEC means that 'standard' annulment actions, actions for failure to act and enforcement actions are finally possible in relation to any AFSJ measure. Any court or tribunal (in place of courts of last resort only) may now request a preliminary ruling from the Court of Justice on the interpretation and/or validity of AFSJ measures and no prior declaration by each member state is required as was previously the case in the area of PJCCM. The extended remit of the CJEU undeniably constitutes a particularly significant change in the light of the previous and numerous convoluted restrictive mechanisms contained in the pre-Lisbon Union Treaties, and one may therefore convincingly contend that 'the reforms in the Treaty of Lisbon provide a structure for effective judicial control of JHA acts that

[103] The European Convention, Oral presentation by M. Gil Carlos Rodríguez Iglesias, President of the Court of Justice of the EC, to the 'discussion circle' on the Court of Justice on 17 Feb. 2003, CONV 572/03, 10 March 2003, p. 1-2.

[104] Ibid.

[105] The European Convention, Final report of Working Group X 'Freedom, Security and Justice', CONV 426/02, 2 Dec. 2002, p. 25.

respects the rule of law and provides a coherent framework for the protection of human rights in the Union's legal order.'[106] The newly acquired general jurisdiction of the CJEU over FSJ measures nevertheless remains subject to a series of traditional and novel restrictions which unnecessarily undermine the progress made in terms of the rights to access to a court and to an effective remedy.[107]

– Other changes in the jurisdiction of the CJEU and additional improvements made to the Union's system of legal remedies and procedures

As regards the most important reforms unconnected to the abolition of the pillar structure and the AFSJ but which similarly extend the jurisdictional powers of the CJEU and improve individual access to the Union courts, the most significant one 'relates to the standing of natural and legal persons to bring actions for annulment.'[108] Yet also worth noting is the fact the CJEU, for the first time, can now review the legality of acts of the European Council intended to produce legal effects *vis-à-vis* third parties,[109] a lacuna previously denounced as inconsistent with the rule of law. An explicit and welcome reference is also finally made to bodies, offices or agencies of the Union.[110] Where their acts are intended to produce legal effects *vis-à-vis* third parties, annulment actions will be permitted. Less significant is the 'new' provision regarding the Court of Justice's jurisdiction to review the legality of measure adopted by the European Council or by the Council in the situation where an individual member state is found to be in serious breach of the Union's foundational principles such as the rule of law.[111]

To return to the more fundamental issue of the widening of the right of individuals to challenge the legality of Union acts, it must be said that the Lisbon Treaty positively yet only marginally eases the conditions for the admissibility of annulment actions brought by natural or legal persons. Any natural or legal person may now 'institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.'[112] Jurists have generally welcomed this change although most have deplored both the am-

[106] Carruthers, *supra* n. 75, at p. 804.

[107] To be discussed further below.

[108] M. Dougan, 'The Lisbon Treaty 2007', 45 *Common Market Law Review* (2008) p. 617 at p. 676.

[109] Art. 263(1) TFEU.

[110] Ibid.

[111] According to Art. 269 TFEU, the ECJ shall have jurisdiction to decide on the legality of an act adopted by the European Council (new addition) or by the Council pursuant to Art. 7 TEU at the request of the concerned member state 'in respect solely of the procedural stipulations [instead of "*purely* procedural stipulations"] contained in that Article.'

[112] Art. 263(4) TFEU. This provision merely replicates Art. III-270(4) of the abandoned Constitutional Treaty.

biguous nature of the new and undefined notion of regulatory act and the modest nature of the improvement made to the pre-Lisbon admissibility conditions under ex Article 230(4) TEC.[113] Indeed, the fact that a regulatory act need not be of individual concern to the applicant is unlikely to dramatically ease access to judicial review of Union measures by natural and legal persons as the requirement of proving 'direct concern' is likely to remain a significant obstacle in practice. Furthermore, what is now referred to as 'legislative acts' still cannot be challenged by individuals unless they show that the relevant legislative act is of direct and individual concern to them. This reform cannot consequently totally satisfy those who previously argued, in the name of the rule of law, for a relaxation of the standing rules in order to provide individuals with more latitude to challenge Union measures directly in the EU courts.

Furthermore, there still is no special remedy for violation of Union fundamental rights. This is not wholly surprising considering the lack of unanimity on the desirability of such a change. The idea of creating a special remedy for alleged infringements of Union fundamental rights was rejected, for instance, by the working group of the European Convention which worked on the question of access to the EU courts.[114] The President of the Court of Justice also made clear in 2003 that 'the Court considers that there is no need to create such a remedy in order to improve the protection of fundamental rights in the European Union', and that it seems preferable 'to protect fundamental rights in the framework of existing remedies. If those remedies were found to be inadequate, it would then be appropriate to improve them in relation to the protection of all individual rights, not merely fundamental rights.'[115] In the absence of a drastic relaxation of the standing requirements for individuals, it may have made sense, however, to grant the Union Ombudsman or the Union Fundamental Rights Agency the right to bring annulment actions for the purposes of fundamental rights protection. Future accession of the Union to the ECHR – new Article 6(2) TEU provides that the Union 'shall accede' to the ECHR – will in any case lead to new remedies and will make more tolerable the absence of a right of direct and special appeal to the CJEU against any Union act in violation of Union fundamental rights.[116]

Two further reforms concerning the CJEU must finally be mentioned. The enhancement of the Court of Justice's general jurisdiction to deliver preliminary

[113] For more liberal proposals, *see*, e.g., Jacobs, *supra* n. 99, at p. 8 ('The only satisfactory solution is … to recognise that an applicant is individually concerned by a Community measure where the measure has, or is liable to have, a substantial adverse effect on his interests').

[114] *Supra* n. 98, at p. 15.

[115] *Supra* n. 103, at p. 4-5.

[116] For a general overview, *see* X. Groussot and L. Pech, 'Fundamental Rights Protection in the EU post Lisbon Treaty', *Foundation Robert Schuman Policy Paper*, European Issue no. 173, 14 June 2010.

rulings is another positive change brought about by the Lisbon Treaty. As previously indicated, the Lisbon Treaty explicitly extends the jurisdiction of the CJEU in respect of the acts and failures to act of Union bodies, offices and agencies. Logically, the CJEU has also been given jurisdiction to give preliminary rulings concerning the validity and interpretation of acts of bodies, offices or agencies of the Union.[117] Article 267 TFEU also provides for a new form of procedure: the urgent preliminary ruling procedure. This new procedure obliges the Court of Justice to act with the minimum of delay promptly when requested to deliver preliminary rulings in cases concerning persons in custody.

An additional change, which aims to further strengthen the independence of the judiciary – a critical component of the rule of law albeit not explicitly referred to by the Court of Justice in *Les Verts* – deserves to be alluded to. In order to answer the criticism made in relation to the secrecy surrounding the appointment process and the possibility of political nominations to the Court,[118] the Lisbon Treaty provides for the setting up of an advisory panel responsible for giving 'an opinion on candidates' suitability to perform the duties of Judge and Advocate-General of the Court of Justice and the General Court before the governments of the member states make the appointments.' This is a positive reform, which might help preventing 'crude forms of nepotism and 'court packing' attempts.'[119]

– Remaining unsatisfactory features

Regrettably, most national governments have agreed to maintain a provision (now Art. 275 TFEU) that expressly excludes CFSP provisions as well as acts adopted on the basis of those provisions from the jurisdiction of the CJEU. This may appear to the reasonable observer 'as wholly unjustified in the light of the developing content of the Union's foreign policy', and further constitutes 'a substantial breach in the rule of law'[120] as the CFSP area continues to remain a 'judicial review-free islet'[121] notwithstanding two modest reforms laid down in Article 275(2) TFEU: The CJUE may now monitor compliance with the Union Treaties' allocation of powers between the Union and the member states and, more importantly, rule on proceedings reviewing the legality of decisions providing for restrictive measures against natural or legal persons adopted by the Council under the CFSP. This first change merely codifies the Court's case-law but the last one is significant

[117] Art. 267 TFEU.

[118] Barents, *supra* n. 100, at p. 712.

[119] Ibid., p. 714.

[120] P. Eeckhout, *Does Europe's Constitution Stop at the Water's Edge? Law and Policy in the EU's External Relations* (Walter van Gerven Lectures, Europa Law Publishing 2005), p. 27.

[121] J. Rideau, 'Nature, fondements et caractères généraux', in *Juris-Classeur Europe Traité*, Fasc. 110, Nov. 2006, para. 231.

as it largely remedies the gap in fundamental rights protection highlighted by the *Kadi* line of cases. Also welcome is the inclusion of a provision providing that CFSP Council restrictive measures adopted against natural or legal persons must include 'necessary provisions on legal safeguards.'[122] Overall, these changes nevertheless remain 'patently insufficient from the perspective of the rule of law.'[123] Whom should we blame for this regrettable situation? Blame must be assigned to the national governments. Wishing to preserve the intergovernmental character of the CFSP at all cost, and therefore their individual sovereign prerogatives over foreign affairs, most governments strongly objected to the 'communitarisation' of this sensitive area. This situation is not merely incompatible with the rule of law, it also undermines the credibility of the Union since new Article 21(2) TEU provides that a core objective of the CFSP is to 'consolidate and support' the rule of law and human rights. Furthermore, and pragmatically speaking, the CJEU's lack of jurisdiction makes little sense considering that the European Court of Human Rights will be in a position to review the compatibility of CFSP acts with ECHR standards as soon as the Union becomes party to the ECHR. As Advocate-General Jacobs once observed, 'no matter should be automatically *a priori* excluded from judicial review.'[124] Were the CJEU to gain jurisdiction over Union foreign policy acts, the CJEU would certainly emulate the Strasbourg Court's practice and allow a wide margin of appreciation to the Union in this sensitive area. The options of exercising low intensity judicial review and developing, for instance, a US-inspired 'political question' doctrine[125] should be sufficient to overcome the member states' fear of extending the jurisdiction of the Court of Justice in this area.

Another 'traditional' restriction that survived the Lisbon Treaty concerns national measures dealing with law and order or internal security matters. Article 276 TFEU (ex Article 35(5) TEU) continues to preclude the Court of Justice from reviewing 'the validity or proportionality of operations carried out by the police or other law-enforcement services of a member state or the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security.' Some feared, inaccurately,

[122] Art. 215(3) TFEU (*see also* Art. 75 TFEU dealing with financial sanctions that the EU may adopt against natural or legal persons, groups or non-State entities in order to prevent and combat terrorism).

[123] Eeckhout, *supra* n. 120, at p. 28.

[124] Cited in House of Lords, Select Committee on the EU, *The Future Status of the EU Charter of Fundamental Rights*, Session 2002-03, 6th Report, HL Paper 48, p. 36, para. 144.

[125] For a remarkable discussion on how to subject the conduct of foreign policy to the rule of law and an interesting review of the German model of 'judicial abdication', *see* T. Franck, *Political questions/judicial answers: does the rule of law apply to foreign affairs?* (Princeton, Princeton University Press 1992).

that conferring jurisdiction on the CJCEU over this type of national measures or actions may enable the Union to legislate in these domains.[126] However, the provision that prohibited the Court from reviewing first pillar JHA measures adopted by the Council, when relating to the maintenance of law and order and the safeguarding of internal security, has not been retained. The repeal of ex Article 68(2) TEC ought to be welcomed as it meant, in practice, that some EC rules such as the rules for the abolition of controls on persons at the Union's internal borders, could completely escape judicial review, a situation that the European Commission itself found 'difficult to justify' in a Community governed by the rule of law.[127]

Last but not least, the transitional restrictions on the jurisdiction of the CJEU over pre-Lisbon third pillar acts must be briefly considered. The enhanced jurisdiction of the CJEU over FSJ measures analysed above will not in fact fully apply until 1 December 2014. According to a rather byzantine Protocol on Transitional Provisions, which was devised to comfort some national governments, third pillar FSJ measures will not fall under the 'normal' jurisdiction of the CJEU until five years after the date of entry into force of the Treaty of Lisbon. Space constraints fortunately – if I dare say – preclude a thorough review of the transitional Protocol's nuts and bolts. Suffice it to say that 'a system that will prolong the deficiencies of the pre-Lisbon JHA jurisdictional regime'[128] can hardly be justified. Amongst other things, this Protocol means indeed that the Court of Justice's preliminary reference jurisdiction continues to be limited to those States which having made a voluntary declaration accepting the jurisdiction of the Court. The insensible character of this transitional regime is further reinforced by the inclusion of a series of provisions peculiar to the UK,[129] which may arguably be ones of the most opaque and convoluted legal provisions ever contained in the Union Treaties, which are themselves often decried for being incomprehensible. And it may be further submitted that these transitional provisions seem hardly compatible with the rule of law as one agrees to understand this principle as requiring the protection of individual rights by means of intelligible, accessible and general rules applicable to

[126] This concern is difficult to understand in the light of Art. 72 TFEU, which provides that the Treaty Title on the AFSJ 'shall not affect the exercise of the responsibilities incumbent upon member states with regard to the maintenance of law and order and the safeguarding of internal security.' Furthermore, new Art. 4(2) TEU, for the first time, also provides that national security is a matter solely for the member states.

[127] *See* European Commission, *supra* n. 80, at p. 6.

[128] Carruthers, *supra* n. 75, at p. 802.

[129] *See* Art. 10(4) and (5) Protocol no. 36. As Dougan points out, 'this is the first time a reform treaty has offered a particular member state not just the right to opt-out from the adoption of future measures in a given field [AFSJ], but also the right to repudiate its obligations under an entire corpus of pre-existing measures', *supra* n. 108, at p. 683.

all. Similar criticism could also certainly be levelled at the other and permanent opt-out/opt-in arrangements laid down in the Union Treaties[130] as they undermine the coherence of Union law and create gaps in judicial protection, not mentioning the fact that they are virtually impossible to make sense of for the citizens of the countries concerned.

Conclusion

The creation of the European Union and the existence of areas of intergovernmental cooperation entirely or partially beyond the scope of judicial control exercised by the EU courts, marked an unmistakable retreat as regards compliance with the constitutional principle of the rule of law as understood by the Court of Justice in *Les Verts*. As a result, it has been rightly argued that the 'proper solution to the patchwork created by successive ill-thought-out Treaty amendments' could only be found 'by a full-scale recasting of the Treaty, removing the unfortunate three-pillar structure',[131] and a substantially expanded role for the EU courts. By and large, the changes contained in the Lisbon Treaty have answered this call as they largely remedy the Union's 'rule of law deficit' as identified in this article. By providing greater judicial protection against a broader set of Union measures, and notwithstanding some remaining unsatisfactory features, one may conclude that the Lisbon Treaty substantially strengthens compliance with the principle of the rule of law as far as the Union's constitutional framework is concerned. This is not to say, naturally, that there is no room for improvement and that further improvements are not actually required if one takes the Union Treaty's reference to a Union founded on the rule of law seriously.

[130] *See* generally M. Fletcher, 'Schengen, the European Court of Justice and Flexibility under the Lisbon Treaty: Balancing the United Kingdom's 'Ins' and 'Outs', 5 *European Constitutional Law Review* (2009) p. 71.

[131] Jacobs, *supra* n. 47, at p. 146.

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