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Francis G. Jacobs. ***The Sovereignty of Law. The European Way.*** Cambridge: Cambridge University Press, 2007. Pp. 163. $28.99. ISBN: 9780521703857.

Erik O. Wennerström. ***The Rule of Law and the European Union.*** Uppsala: Iustus Förlag, 2007. Pp. 354. $147.50. ISBN: 9789176786581.

Arranging the newly arrived items, the bookseller is confronted with the conundrum of where to place the books under review here. At first glance, both dwell on similar subjects: rule of law here, rule of law there. Indeed, they deal with related questions: how can the rule of law be conceptualized and how is it put into meaningful practice within the conglomerate of European institutions? Furthermore, what is the specific role of this 'elusive' (Wennerström, at 41) concept? Both contribute to the emerging field of research on the rule of law.[1] They enrich the debate on cross-fertilization of legal regimes[2] as well as on how to balance commonality and difference in European

[1] See Peerenboom, 'The Future of Rule of Law: Challenges and Prospects for the Field', 1 *Hague J Rule of L* (2009) 5.

[2] See, e.g., the special issue of 38 *Texas Int'l LJ* (2003) at 397 ff. on judicial globalization.

cooperation.[3] Moreover, both books promise the reader an insider's insight, Francis G. Jacobs being a former Advocate General at the ECJ, and Erik O. Wennerström having worked at the European Commission.

Taking style, audience, and scope into account, though, there are differences between the two: one book is the printed version of a conversational lecture directed at the wider public in the UK; the other a doctoral thesis defended at Uppsala University. One deals with modern competencies of courts in and related to all of the transnational European institutions, while the other one discusses rule of law concepts advanced solely by branches of the EU system.

The central aim of Jacobs' book is to win the hearts and minds of the English audience in favour of a European legal order which is based on strong (both national and European) courts. His assertions are provocative – in spite of the important role of courts in developing the Common Law. Although this is not made explicit, the claims are directed against the notion of parliamentary sovereignty, a principle most highly cherished in English public law. The gist of this concept is that the legislative powers of the British Parliament are unbound. Hence, traditionally, anything – be it intolerably arbitrary, unjust, or absurd – can be put into law. The result could be an overtly unjust Act of Parliament to which no higher law or institution can object. The *lex posterior* rule is absolute. Reason, decency, and the next election are the only safeguards to prevent abuse. However, since the 1970s, this strict notion has been under attack by a constitutionalist strand of jurisprudence, Jacobs joining in.

Law's functions have changed. Neither governments nor parliaments have the last word. Instead, the courts are the ultimate arbiters of complex decisions on economic policy and human rights. Courts no longer merely apply the decision of a sovereign ruler; instead, value choices have to be made, and they have to be made by courts. Sovereignty, Jacobs claims, is 'no longer a viable concept' (at 4) in view of international obligations and the separation of powers, and chiefly because the concept is incompatible with the rule of law – the latter a notion of judicial review and of fundamental law capable of crushing ordinary laws. Hence, Jacobs calls the study 'sovereignty of law', in which the courts are its true trustees, ironically taking the term 'rule of law' very literally.

This modernity of law is advanced by the Europeanization of (domestic) law. Having outlined the basic principles and the remedial system of both EC/EU law and the human rights system of the Council of Europe, Jacobs identifies reasons why these innovations of the last century are reinforcing his notion of the rule of law. The first is the introduction of remedies in addition to the domestic system of legal protection; moreover, the domestic legal systems benefit from the fertilization by European principles such as proportionality – which is a 'two-way process' (at 17), since European principles are derived from domestic sources.

All of this obviously supports a court-centred model of a legal system. Accordingly, the methods of interpretation are converging; today, even English courts no longer confine their construction of statutes to literal meanings of certain provisions, but rather take their aim and purposes into account (at 14).

Jacobs affords some time to defend the introduction of the Human Rights Act in 1998 which allows English courts to apply the rights of the ECHR. This includes the power ultimately to issue declarations of incompatibility concerning Acts of Parliament. Fears of the yellow press and some politicians that the sovereignty of Parliament could be undermined have turned out to be exaggerated: few declarations of incompatibility have been made. Jacobs also puts forward that the Convention rights and Common Law rights may differ in shape and technique (at 33) but not in substance: the Convention actually is 'home-grown' (at 32), as English lawyers took part in its genesis. He presents cases where English interpretations of Convention rights

[3] See, e.g., P. Beaumont, C. Lyons, and N. Walker (eds), *Convergence and Divergence in European Public Law* (2002).

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have led the European Court of Human Rights (ECtHR) to revise its previous decisions. What does the rule of law have to do with this? The British rule of law, i.e., a specific relationship between judiciary and legislature (and executive), has undergone a 'constitutional shift' (at 30) in the process of incorporating the Convention. The UK legal system has not only been changed, but even strengthened by this incorporation as fundamental rights are now expressly guaranteed.

Jacobs' notion of the rule of law – towards which English law is headed – is epitomized by the EU system. The main point of reference here is Article 220 EC, which assigns to the ECJ the task of ensuring the observance of the *law*. Jacobs points to the broad understanding of the term 'law' in languages other than English, encompassing enacted laws as well as ideas of justice. Amending the English version of the Treaty so that it would state 'the rule of law is observed' would not be helpful since 'the rule of law is only part of what is right, or what is just; and its meaning should not be too far diluted' (at 37). Equipped with this broad reading, Article 220 EC warrants the clear departure of the ECJ from the literal wording of the Treaty. Hence, the ECJ is able to give the intentions of the Treaty full effect (at 44).

General principles of law, including legal certainty, fundamental rights, proportionality, and transparency, are values Jacobs associates with the rule of law and which are derived from the broad understanding of the concept of law, as well as from 'to a remarkable extent, shared values' (at 51) found in the Member States. In the context of the process of cross-fertilization and spill-over amongst the Member States' legal orders, Jacobs alludes to a future in which English courts may have jurisdiction to review legislation for compatibility with the British constitution (at 62).[4] He also mentions the positive and deferential attitude of the ECJ towards the ECtHR and the European Convention on Human Rights, which leads to cross-fertilization on a horizontal level.

[4] See Jenkins, 'Common Law Declarations of Unconstitutionality', 7 *Int'l J Constitutional L* (2009) 183.

Jacobs goes a long way to illustrate major European legal developments concerning fundamental rights such as religious freedom, and the conflict of fundamental economic freedoms with fundamental rights and environmental protection. This is a little off subject, but anyhow at the heart of his line of argument lies the specific impulse of the 'European way' of law. European law has been able to push domestic law and public opinion towards progressive attitudes to pluralism and fundamental rights. This impulse is enabled by Jacobs' dynamic and value-balancing approach towards interpretation and implementation of the law. How can these wide judicial powers be justified? Jacobs' answer is twofold – on the one hand, the probability of arbitrariness is minimized because judges increasingly take part in a dialogue with judges from other jurisdictions; on the other hand, there is more transparency in adjudication than there used to be as the case law is scrutinized intensively by experts and public opinion alike.

Jacobs finds evidence for the superiority of this European way in the EU system being a magnet and a model. The first term alludes to the accession rounds from 1973 to 2007. Especially the accessions of former Communist countries confirm his view that 'freedom under the law' (at 127) containing 'European' values has become universally attractive. The same applies to other projects such as, for example, the African Union with supranational courts modelled to some extent on the EU.

Jacobs manages to do three things at once: cover a wide span of issues, campaign in favour of European law, and convey interesting facts on European law and the relationship of domestic and European law, all put in a superb style. The reader gains valuable insight into the development of European law, especially when Jacobs explains the background of his pleadings as an Advocate General. Yet, one question remains. Does Jacobs' sovereignty of law not suffer from a European bias, meaning: can his court-centred, i.e., anti-parliamentary, notion of the rule of law really be transposed back to the domestic constitutional level, and should it? It can undoubtedly be defended at a transnational (EU) level, but

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it remains questionable whether the arguments laid out in this book will (yet?) suffice for the domestic.

Jacobs pursues an integrative approach which presents arguments in favour of a universal change towards decision-making powers ultimately vested in courts, partly fuelled by legal cross-fertilization, whereas Wennerström in his thesis deconstructs the unity of European law by criticizing the lack of a uniform employment of the concept of the rule of law in EU institutions and policies. In terms of commonality and difference, on the one hand, old domestic differences are turned into new European-wide commonalities (Jacobs), on the other, old domestic differences are replaced by new internal European differences (Wennerström). The fragmented use of the rule of law concept by the EU, Wennerström fervently and frequently points out, leads to double standards. Here, Jacobs and Wennerström differ again; the former is convinced of the rationalizing force of Europeanization, the latter suspects that arbitrariness follows from European law's *rules* of law.

In the course of his study, Wennerström examines how EU institutions apply the concept of the rule of law. Wennerström picks out three main areas of application: the founding treaties are his starting point, yet a distinction is made whether EU institutions develop EC or EU conceptions of the rule of law. He then looks at specific policies, namely enlargement policy and external relations. The latter is divided into trade and aid policy on the one, and foreign and security policy on the other hand. Wennerström thus distinguishes internal and external rule of law conceptions of the EU.

The study is based on the assumption of a culture- and context-dependent multiplicity of rule of law versions, which Wennerström terms 'conceptions'. 'Conceptions' are interpretations of a 'concept' the original meaning of which is unattainable and perennially contested. The concept's content is made up of certain components (at 52 ff.). Conceptions differ in the arrangements of the components, the *Vorverständnis* of the agents which refer to them (*ibid.*), and their purpose (at 50). For the sake of comparison of rule of law conceptions within EU activity, Wennerström 'will reason as of [*sic!*] there *is* a common concept at the bottom of it all, whereas the conceptions of it vary' (at 52). His own understanding of the 'concept' is also revealed: a common feature of the rule of law is the control of public authority (at 54); more interestingly, '[p]rocess or procedure' (at 55) are supposed to be central for the rule of law. Wennerström's intention is to deliver mere descriptions of conceptions (at 41 ff.); his method in doing so consists of making 'predictions, based upon past behaviour' (42), thus not being restricted to the self-description of the rule of law agents concerned.

The comparison of the different rule of law conceptions is carried out along two dimensions. Thus, one has to consider the 'strength' of the conception ranging from declaratory and persuasive to obligatory (first dimension). The will and means of the advocating institution as well as the degree of vagueness and thickness of the definition in use are parameters which determine the 'operationability' of the particular conception. For example, a demanding rule of law definition is less 'operationable' because it may encounter resistance in the addressed legal order. The other dimension is based on the distinction between formal and substantive conceptions of the rule of law. Wennerström thus identifies the scope of the different rule of law conceptions. Although the author is aware of the pitfalls of the formal/substantive dichotomy, he nevertheless holds the distinction useful for his purposes.

Remarkably, while examining the *internal* rule of law conception of the EU, Wennerström gives Article 220 EC an interpretation entirely contrary to that of Jacobs. According to Wennerström, the term 'law' in Article 220 EC is not capable of embracing all the components of the EC rule of law like fundamental rights (at 131). Overall, in the *EC* a 'fairly well defined and strong conception' (at 134) is pursued, encompassing supremacy of law, separation of powers, judicial review (formally), fair application of the law, fundamental rights of legal protection and effective enjoyment of Community rights (substantially). The EC definition mainly outlined by the ECJ is contrasted with that of the *EU*, which is held to be rather

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unspecific – a conclusion which is exclusively supported by referring to Article 6(1) EU and the procedure laid down in Article 7(1) EU.

Wennerström concedes that the ECJ does not really apply an integrative conception of the rule of law – asserting a main principle which generates a group of sub-principles – but instead deals with rule of law components case by case (at 132).[5] Nevertheless, Wennerström still defends his EC definition, which comprises a coherent scope of the rule of law. Yet, one may ask why he 'creates' an arbitrary definition of the EC rule of law although his original aim was to evaluate the degree of precision of *pre-existing* definitions, definitions found in the behaviour of European institutions. The definition Wennerström gives is – as he himself shows – clearly not the ECJ's. Thereby, he departs from his proposed inductive method; in fact, he proceeds deductively.

The big difference between the enlargement policy's rule of law and the *EC* definition, institution-wise, is seen in the influential role of the Commission contrasted with that of the ECJ in determining the *EC* definition. The Commission specifically focuses on the independence of the judiciary as well as on corruption, the latter completely missing in the general *EC* definition. Although effectiveness of the administration is mentioned as a criterion for accession (at 214), Wennerström unfortunately does not consider effectiveness to be a rule of law component. Again, his methodological promise to proceed inductively is not kept; 'past behaviour' of EU institutions, which is supposed to be the main reference, is neglected. Concerning the second analytical dimension, Wennerström holds the enlargement conception to be at least stronger than the general *EU* one: the promise of accession makes the criteria demanded by the Commission more enforceable than the values of Article 6 EU *vis-à-vis* the existing Member States (at 220).

In the context of external politics, the EU trade policy's rule of law conception is considered to demand high standards, but to be insufficiently enforced. The requirements include compliance with labour and penal law standards as well as mere ratification of international treaties. Similarly, the police missions of the Common Foreign and Security Policy reveal only fragments of a conception, as the term 'rule of law' is mainly used to designate the 'category of staff' (277) – i.e., lawyers – and as it is deemed to encompass only penal law. Wennerström criticizes the omission from scrutiny of legal fields like administrative law and that the higher ranks of government are also excluded from the conception, thus paying undue respect to political conditions.

Wennerström expresses his discontent with the resulting lack of a uniform definition of the rule of law in external relations. The political nature and double standards of accession (at 222) and external politics, which diminishes the value of the rule of law, is another one his *Leitmotifs.* Moreover, fragmented definitions and the lack of will to really enforce European values may contribute to arbitrariness, a result contrary to the idea of the rule of law (at 307).

Apart from (not always reliable) systematization of the concept of the rule of law, the achievement of this book lies in showing how agents and policies of the EU place varying emphasis on rule of law elements. Hence, anyone referring to *a* European rule of law has to reveal the specific context of this reference. However, the study suffers from a lack of adherence to initially proposed methodological premises: inductive method turns into deductive. Wennerström also seems to ignore reasonable grounds for differing rule of law versions and, subsequently, his own premise that *purpose* is a factor in rule of law difference. For example, in international relations, even the global player EU has to consider impact constraints. Thus, the EU may legitimately choose methods other than hard law to pursue its goals in external relations. This may not lead to immediate results as in the developed legal system of the EU, but is definitely suitable for the conditions of *Realpolitik*.

[5] See also Classen, 'Rechtsstaatlichkeit als Primärrechtsgebot in der Europäischen Union' [2008] *Europarecht* Suppl. 3, 7.

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Both studies offer state-of-the-art rule of law methodology and stress the cross-fertilization of legal regimes. A curious extension they have in common is that they expand the discussion of the *rule* of law to questions of the *role* of law, Jacobs emphasizing the role of courts and the law in influencing society, Wennerström reviewing the role of the rule of law to disseminate 'European' values. Given that both are advocates of the European project, they nevertheless reach diverging conclusions: while Jacobs overtly praises the systems of European law, Wennerström is bashing the European reality of external relations in a way comparable to a rebuffed lover. Coming back to the bookseller's dilemma, he might be wise to place the volumes on the same shelf but on either end of it.

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