Summary

This thesis explores the question of what the EU's conceptualisation of the rule of law is in its external relations. How does the EU understand and portray the rule of law in its external relations, with a particular focus on development cooperation and enlargement? While there is a growing amount of research on the rule of law in the context of the EU, what is missing from the literature is a comparative analysis of the rule of law concept the EU promotes in its external relations in different foreign policy fields. The increasing focus on the external aspects of the rule of law in the EU's external action coupled with the Union's post-Lisbon global ambitions as an international actor highlight the need for more clarity in relation to the EU's approach to the rule of law.

To this end, the main research question is divided into two sub-questions: a. Are there discernible differences between the legal concept of the rule of law as defined in legal theory and as applied in the practice of the European Union? b. Subsequently, is the legal concept of the rule of law the same or different in the practice of the EU in its policy areas of development cooperation and enlargement as two specific subfields of EU external relations? In order to tackle these questions, the thesis is divided into two parts.

Part I provides the rule of law analytical framework. Since there is no definition of the rule of law in the EU Treaties, the only relevant reference is that the rule of law is a value 'common to the Member States' (Article 2 TEU). Therefore, the traditions of the Member States form the point of departure for exploring the theoretical definition of the rule of law. For this purpose, chapter 1 examines the legal theories of the three major national legal systems (the German *Rechtsstaat*, the French *état de droit*, and the Anglo-Saxon rule of law). The analysis proves that although there is no common definition of the concept, a number of common elements can be identified. First, it shows that the three legal systems have adopted the rule of law as a solution to the common problem of the need to restrain governmental power with the aim of the protection of the individual. Secondly, in order to address the control of power and to ensure that the government not only rules on the basis of law, but is also bound by it, the thesis argues that all three traditions require a form of the functional separation of powers, whereby, at a minimum, the judiciary is accorded a large amount of independence in relation to the legislative and executive branches of government. Thirdly, the analysis highlights that in Germany, France, and the United Kingdom, legality forms the rule of law's common substance. More particularly, it demonstrates that legality provides requirements both for the

legislature in relation to the law it produces, as well as for the validity of law itself. Fourthly, the rule of law, in order to achieve its aims, requires safeguarding mechanisms in the form of judicial review.

In chapter 2, the thesis proceeds to examine whether, and if so, to what extent, legal doctrine considers the same features crucial for the existence of the rule of law concept. It concludes that, indeed, the elements found in the legal systems of the three Member States analysed, can also be located in the literature. However, it makes the observation that there are discrepancies regarding the weight attached to these elements; the main focus of legal scholarship has been on the notion's core element of legality and its requirements. Part I ends with the introduction of the analytical framework. It asserts that the elements can be categorised as follows: *formal*, *procedural*, and *institutional*. Formal elements are concerned with the predictability and determinacy of laws, procedural elements cover those related to the impartial administration of the law, and institutional elements are concerned with the institutional requirements for upholding the rule of law.

Against this backdrop, Part II, examines whether, and to what extent, the elements identified in the analytical framework can be found in the field of EU external relations. For this purpose, it tests the analytical framework against the background of the two case studies, namely the EU's development cooperation policy (chapter 3) and its enlargement policy (chapter 4). It does so with detailed reference to the relevant EU legal framework, instruments, and policy in the respective policy areas. Regarding development cooperation, chapter 3 shows that the element of legality – around which much of the rule of law discussion of legal doctrine is centred – and judicial review – the core element safeguarding the rule of law in national legal systems – have remained largely underdeveloped. In contrast, it asserts that the EU puts great emphasis on both the procedural element of access to justice, and the institutional element of judicial independence. However, the analysis also demonstrates that the EU's articulation of both elements leaves much to be desired.

Furthermore, chapter 3 highlights two general findings. First, in the almost total absence of formal elements, the Union's understanding of the rule of law in development cooperation mainly revolves around the institutional element of judicial reform. Exploring the reasons underpinning the EU's emphasis on a fundamentally institutional understanding of the rule of law in its development policy, it is argued that the international framework, which the EU has committed itself to implement, steers the policy of development cooperation towards the improvement of institutional capacity in aid receiving countries in general. Moreover, the chapter argues that the EU's institutional conceptualisation of the rule of law can, in particular, be explained on the basis of the impact of the notions of good governance and security sector reform on this external policy field. Both notions focus on the effective functioning of institutions, which, in the case of the rule of law, has resulted in a concomitant understanding of the rule of law in terms of the reform and strengthening of judicial institutions. Secondly, it

is shown that the EU's methodology in the area of development cooperation has led to conceptual confusion in a number of the rule of law element identified. Even though the use of indicator lists is common practice in a result-based cooperation policy, the Union's indiscriminate application of these lists, without a comprehensive rule of law definition, has led to vagueness and ambiguity.

In chapter 4, the second case study focusses on the EU's conceptualisation of the rule of law in its enlargement policy. The analysis demonstrates that, similar to the previous case study, in this policy area the EU has paid little attention to the element of legality. More particularly, chapter 4 shows that the methodology of enlargement in relation to the process of legislative approximation is based on a mostly quantitative demonstration of progress. As a consequence of this, the qualitative requirements of legality (such as legal stability and coherence) have actually been undermined. In relation to the procedural elements, impartiality and judicial efficiency are shown to form the core elements in this category. However, the examination of the relevant documents highlights that there is a frequent lack of clear articulation of EU standards in these areas. Turning to the category of institutional rule of law elements, chapter 4 argues that the formulation of the Copenhagen criteria and the relevant legal framework have been very influential in the EU's adoption of a mainly institutional focus in its activities to strengthen the rule of law in the applicant states. It claims that the rule of law is conceptualised in terms of judicial reform with an emphasis on the structure and functioning of the courts, resulting in a particular emphasis on the institutional element of judicial independence.

From the analysis, three general conclusions are drawn. First, the EU's conceptualisation of the rule of law in enlargement is strongly geared towards both procedural and institutional element, with an almost total absence of the formal element of legality. Moreover, the extensive institutional focus of the policy has led to an emphasis on judicial reform, which has also led to an institutional approach towards a number of the procedural elements, such as judicial review. Secondly, even though the EU professes to domestic rule of law reform, its conceptualisation of the rule of law is heavily influenced by the fact that the applicant states are future Member States; for upholding EU law within the Member States, domestic courts fulfil a crucial role. It is further asserted that this has resulted in neglecting certain rule of law elements (legality) and disproportionately emphasising others (judicial independence). Thirdly, the Commission has refrained from clearly differentiating between the rule of law elements under the Copenhagen political criteria and as part of the *acquis*, and, moreover, has actually converged its analysis of the functioning of the judiciary as part of the rule of law under both sections, thereby codifying the political criterion of the rule of law.

Lastly, the final concluding chapter summarises the key findings of this thesis and provides a comparative analysis of the case studies. It shows that the findings resulting from the examination of the rule of law in develop-

ment cooperation and enlargement can, to a large extent, be explained on the basis of the characteristics and influences of the policy areas. The strong institutional emphasis on judicial reform, the lack of formal legality, the prominence of certain procedural and institutional elements and not others, as well as the limited articulation of a number of rule of law elements, developments in the external areas as well the EU's policy emphasis therein provide the reasons behind these findings. The chapter also argues that the discrepancy between the rule of law elements, as they are found in the Member States (chapter 1), and those that have been identified in the case studies, is problematic. Even though the rule of law allows for flexibility in how its various elements relate to each other and in how they are implemented, this flexibility does not stretch so far as to exclude core components altogether; a definition of the rule of law that does not include legality and clarity on judicial review is missing its core components. Furthermore, it claims that the financial instruments underpinning the EU's rule of law reform efforts also require a level of clarity, which, for reasons of legal certainty, the EU should at least attempt to provide. Finally, the last section provides three insights for improvement regarding the EU's conceptualisation of the rule of law. First, it argues that the Union should make a concrete effort to first define the rule of law elements and the way these elements interrelate, before entering into a more 'comprehensive' approach. Secondly, it is put forward that the EU would do well to acknowledge that developments within a policy area also influence the weight attributed to different elements within that particular area in order to keep a clear focus on the rule of law despite the fluctuating developments in different policy areas. Thirdly, it asserts that the Union should be more aware of its own cognitive bias vis-à-vis the rule of law's instrumental use-value, *i.e.* its use as a means to other ends, which has led to a strong emphasis on the end goals and a lack of attention to precisely what elements of the rule of law are needed to achieve those very ends.