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The EU's conceptualisation of the rule of law in its external relations : case studies on development cooperation and enlargement

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The EU's Conceptualisation of the Rule of Law in its External Relations

*Case studies on development cooperation
and enlargement*

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List of abbreviations

ACP	African, Caribbean and Pacific states party to the Cotonou Agreement
AFSJ	Area of Freedom, Security and Justice
AP	Accession Partnership
BVerfGE	<i>Bundesverfassungsgericht</i> (German (Federal) Constitutional Court)
CARDS	Community Assistance for Reconstruction, Development and Stabilisation
CEECs	Central and Eastern European Countries
CEPEJ	Council of Europe Commission for the Efficiency of Justice
CFR	Charter of Fundamental Rights
CFSP	Common Foreign and Security Policy
CJEU	Court of Justice of the European Union
DAC	Development Assistance Committee of the OECD
DCI	Development Cooperation Instrument
EA	Europe Agreement
EC	European Community
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights and Fundamental Freedoms
ECR	European Court Reports
ECSC	European Coal and Steel Community
EDF	European Development Fund
EEC	European Economic Community
EIDHR	European Instrument for Democracy and Human Rights
ENCJ	European Network of Councils for the Judiciary
EP	European Partnership
EU	European Union
FCC	German (Federal) Constitutional Court (<i>Bundesverfassungsgericht</i>)
FYROM	Former Yugoslav Republic of Macedonia
GG	<i>Grundgesetz</i> (Basic Law, <i>i.e.</i> the German Constitution)
IPA	Instrument for Pre-accession Assistance
MDGs	Millennium Development Goals
OECD	Organisation for Economic Cooperation and Development
OJ	Official Journal
OSCE	Organization for Security and Cooperation in Europe
PHARE	Poland and Hungary Assistance for the restructuring of the Economy
SAA	Stabilisation and Association Agreement

SAP	Stabilisation and Association Process
SDGs	Sustainable Development Goals
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UK	The United Kingdom
UN	United Nations
VCLT	Vienna Convention on the Law of Treaties

The rule of law in EU external relations: An introduction

1. INTRODUCTION

For the European Union, the rule of law is a multifaceted notion of ‘primordial importance’.¹ It is a foundational value (Article 2 TEU) – to be upheld and promoted in its relations with the wider world (Article 3(5) TEU) – and a guiding principle for the Union’s external action in general (Article 21(1) TEU). The concept plays a central role *within* the EU. This was emphasised by then Commissioner Reding, in the context of the debate on the rule of law and its specific importance for the Union, when she stated that ‘[r]espect for the rule of law is in many ways a prerequisite for the protection of all other fundamental rights listed in Article 2 TEU and for upholding all rights and obligations deriving from the Treaties.’² In the context of the high-level meeting of the United Nations General Assembly on the rule of law at national and international level on 24 September 2012, the European Union issued a statement on its relation to the rule of law in which it called the latter one of the ‘pillars on which our European Union is built.’³ More importantly, the significance of the rule of law for the functioning of the EU legal order has come to the fore very prominently in the context of the ‘rule of law crises’ in a number of the Member States, Poland, Hungary, and Romania in particular. With the Commission⁴ and the European Parliament⁵ both triggering the Article 7 TEU procedure relating to grave rule of law concerns with regard to the first two Member States, the EU is more

1 Report from the Commission on Bulgaria’s progress on accompanying measures following Accession, COM(2007) 377 final, 27 June 2007, p. 23.

2 Viviane Reding ‘The EU and the Rule of Law – What next?’ SPEECH/13/677, 4 September 2013, available at: http://europa.eu/rapid/press-release_SPEECH-13-677_nl.htm.

3 Statement by Commission President Barroso at the high-level meeting on the rule of law, New York, 24 September 2012. Also see the Pledges of the EU and its Member States on the rule of law made on the occasion of that same meeting. See the EU ‘pledge registration form’ available at: <https://www.un.org/ruleoflaw/files/Pledges%20by%20the%20European%20Union.pdf>.

4 Commission Reasoned Proposal in accordance with Article 7(1) of the Treaty on European Union regarding the rule of law in Poland, COM(2017) 835 final, 20 December 2017.

5 Motion for a European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, (2017/2131(INL)), 4 July 2018.

forcefully attempting to tackle internal rule of law backsliding.⁶ The Union is very much aware of the fact that the internal and external dimension of its values are interlinked since it must be seen to uphold the rule of law internally if it wishes to uphold and promote it externally. As the 2016 Global Strategy provides: 'Consistently living up to our values will determine our external credibility and influence.'⁷

In relation to the Union's *external* dimension, in a 2011 Joint Communication with the High Representative for Foreign Affairs and Security Policy, the Commission firmly formulated the EU's mission regarding its values: 'The EU must be principled when it comes to the norms and values it seeks to uphold, creative in the ways it does so, and absolutely determined to achieve concrete results.'⁸ Stressing the 'critical importance' of the rule of law for the EU's external policy, the Union has stated that respect for the rule of law is not only 'an essential condition for peace and stability in the consolidation and support of democracy', but also for conflict prevention, conflict resolution and post-conflict reconstruction.⁹ Strengthening it lies at the heart of the enlargement process and the Stabilisation and Association Process,¹⁰ and its consolidation is vital for sustainable development.¹¹ In the words of Commissioner Timmermans, '[t]he rule of law is part of Europe's DNA, it is part of where we come from and where we need to go,' and, thus, it needs to be pursued both at the national and international level.¹²

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- 6 In relation to the current state of play in Romania, see Eszter Zalan 'Romania Faces Rule of Law Criticism in EU Parliament' 3 October 2018, available at: <https://euobserver.com/political/143006>.
 - 7 'Shared Vision, Common Action: A Stronger Europe: A Global Strategy for the European Union's Foreign and Security Policy', June 2016, p. 8.
 - 8 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy 'Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach' COM(2011) 866 final, 12 December 2011, p. 4.
 - 9 EU Statement on behalf of the European Union and its Member States by the head of the delegation of the European Union to the United Nations, at the UN Security Council Debate on 'The Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security', 19 January 2012.
 - 10 Council Conclusions 'Enlargement and Stabilisation and Association Process', Doc. 10555/18, 26 June 2018, pnt. 5.
 - 11 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ[2017] C210/1, pnt. 61.
 - 12 On 31 August 2015, in his keynote speech at a conference on the European Union and the rule of law at Tilburg University, the Netherlands, first vice-president of the European Commission Frans Timmermans stated that: 'For Europe, the rule of law is not just an *inspiration*, it is also an *aspiration*; a principle that guides both our *internal* and *external* actions'. Available at: https://ec.europa.eu/commission/commissioners/2014-2019/timmermans/announcements/european-union-and-rule-law-keynote-speech-conference-rule-law-tilburg-university-31-august-2015_en.

However, what is meant by the term 'rule of law'? Any state or organisation concerned with upholding the rule of law at home or promoting it in other countries is confronted with the challenge of conceptualising the notion. This necessarily involves the identification of the attributes that are constitutive of the concept. The term, however, is surrounded by a vast divergence of understandings, and thus, identifying the constitutive attributes, or elements, of the rule of law represents a daunting challenge. This challenge arises, not because of its supposedly 'essentially contested' nature,¹³ but by the fact that scholars from different disciplines as well as practitioners from the field of rule of law reform use a panoply of meanings within a variety of contexts when it comes to the term. More particularly, the term is employed in the field of legal philosophy, development economics, and democratic theory, and commonly brandished by politicians, academics, and practitioners to convey a wide array of different concepts.¹⁴ This has led Casper to observe that 'calls for the rule of law ... are quite undifferentiated and rarely specify what conditions have to be met in order to justify the conclusion that, in a given context, the rule of law is actually being furthered.'¹⁵ This holds true for general studies into the rule of law, but also for research into the rule of law in the EU context.

13 W.B. Gallie 'Essentially Contested Concepts' *Proceedings of the Aristotelian Society* 56 (1955-56), p. 167. For further elaboration on the meaning of essentially contested or contestable concepts see Richard Fallon 'The Rule of Law as a Concept in Constitutional Discourse' *Columbia Law Review* 97 (1997), p. 6 and Jeremy Waldron 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' *Law and Philosophy* 21 (2002), p. 12.

14 Rachel Kleinfeld *Advancing the Rule of Law Abroad. Next Generation Reform* Washington: Carnegie Endowment for International Peace (2012), pp. 1-36.

15 Gerhard Casper 'The Rule of Law - Whose Law?' *Stanford CDDRL Working Paper* no. 10 (2004), p. 5.

2. PROBLEMATIQUE AND RESEARCH QUESTION

While there is a growing amount of research on the rule of law in the context of the EU,¹⁶ missing from the existing literature is a detailed compara-

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- 16 Dimitry Kochenov & Petra Bárd 'Rule of Law Crisis in the New Member States of the EU – The Pitfalls of Overemphasising Enforcement' *Reconnect Working Paper* No.1 (2018); Amichai Magen & Laurent Pech 'The Rule of Law and the European Union' in Christopher May & Adam Winchester *Handbook on the Rule of Law* Cheltenham: Edward Elgar (2018), pp. 235-256; Theodore Konstadinides *The Rule of Law in the European Union* Oxford: Hart Publishing (2017); Dimitry Kochenov 'The EU and the Rule of Law – Naïveté or a Grand Design' in Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin (eds) *Constitutionalism and the Rule of Law. Bridging Idealism and Realism* Cambridge: Cambridge University Press (2017), pp. 419-445; Werner Schroeder (ed) *Strengthening the Rule of Law in Europe* Oxford: Hart Publishing (2016); Christophe Hillion 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in C. Closa & D. Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* Cambridge: Cambridge University Press (2016), pp. 59-81; Carlos Closa & Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* Cambridge: Cambridge University Press (2016); Ségolène Barbou des Places 'Enforcing the Rule of Law in the EU. In the Name of Whom?' 1 *European Papers* (2016), pp. 771-776; Dimitry Kochenov & Laurent Pech 'Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality' 11 *European Constitutional Law Review* 3 (2015), pp. 512-540; Sionaigh Douglas-Scott 'Justice, Injustice and the Rule of Law in the EU' in Dimitry Kochenov, Gráinne de Búrca & Andrew (eds) *Williams Europe's Justice Deficit?* Oxford: Hart Publishing (2015), pp. 51-66; Armin von Bogdandy & Michael Ioannidis 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done?' 51 *Common Market Law Review* (2014), pp. 59-96; Geert De Baere 'European Integration and the Rule of Law in Foreign Policy' in: Julie Dickson & Pavlos Eleftheriadis (eds) *Philosophical Foundations of European Union Law* Oxford: Oxford University Press (2012), pp. 354-383; Laurent Pech '"A Union Founded on the Rule of Law": Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' 6 *European Constitutional Law Review* (2010), pp. 359-396; Dimitry Kochenov 'The EU Rule of Law: Cutting Paths through Confusion' 2 *Erasmus Law Review* (2009); Laurent Pech 'The Rule of Law as a Constitutional Principle of the European Union' *Jean Monnet Working Paper* no. 4 (2009); Dimitry Kochenov *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* The Hague: Kluwer Law International (2008); Francis G. Jacobs *The Sovereignty of Law. The European Way* Cambridge: Cambridge University Press (2007); Koen Lenaerts 'The Rule of Law and the Coherence of the Judicial System of the European Union' *Common Market Law Review* (2007); Eric Carpano *État de Droit et Droits Européens* Paris: L'Harmattan (2005); Dimitry Kochenov 'Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law' 8 *European Integration Online Papers* (2004); Karen J. Alter *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* Oxford: Oxford University Press (2003); Amaryllis Verhoeven *The European Union in Search of a Democratic and Constitutional Theory* The Hague: Kluwer Law International (2002); Anthony Arnall 'The Rule of Law in the European Union' in Anthony Arnall and Daniel Wincott (eds) *Accountability and Legitimacy in the European Union* Oxford: Oxford University Press (2002); Maria Louisa Fernandez Esteban *The Rule of Law in the European Constitution* The Hague: Kluwer Law International (1999); Lord Mackenzie Stuart *The European Communities and the Rule of Law* London: Stevens & Sons (1977); Gerhard Beber *Rule of Law within the European Communities* Brussels: Institut d'Etudes Européennes de l'Université Libre de Bruxelles (1965). For contributions on the EU rule of law in the context of the literature on the general principles of EU law, see for example Ola Zetterquist 'The Judicial Deficit in the EC: Knocking on Heaven's Door?' in Ulf Bernitz, Joakim Nergelius & Cecilia Cartner (eds) *General Principles of EC Law in a process of Development* The Hague: Kluwer Law International (2008); Armin von Bogdandy 'Constitutional Principles' in Armin von Bogdandy & Jürgen Bast *Principles of European Constitutional Law* Oxford: Hart Publishing (2006).

tive contextual analysis of the concept of the rule of law the EU promotes in its external relations across different foreign policy fields. Existing external policy research has focussed primarily on democracy promotion, treating the rule of law as the means in order to reach democratic ends, with a strong focus on enlargement or the European Neighbourhood Policy,¹⁷ rather than a more wide-ranging approach across more foreign policy areas. This is problematic to the extent that it blurs conceptual boundaries and that the ensuing observations are necessarily limited to the field from which they arose. Thus, treating these observations as reflective of general trends in EU external relations at large would amount to an arbitrary inference. Furthermore, the debate has very often been couched within the confines of the EU's mechanism of conditionality and questions regarding its effectiveness.¹⁸ The last decade has, however, seen the emergence of academic literature towards conceptualisations of the rule of law as a legal

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- 17 See for example Elena Baracani 'EU Democratic Rule of Law Promotion' in Amichai Magen & Leonardo Morlino (eds) *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* (2008), p. 53; Elena Baracani 'U.S. and EU Strategies for Promoting Democracy' in Federiga Bindi (ed) *The Foreign Policy of the European Union: Assessing Europe's Role in the World* (2010), p. 303; Richard Youngs 'What Has Europe Been Doing?' 19 *Journal of Democracy* (2008), p. 161; Jan Zielonka 'Europe as a Global Actor: Empire by Example?' 84 *International Affairs* (2008), p. 471.
- 18 See for example, Marko Kmezić 'EU Rule of Law Conditionality: Democracy or 'Stabilitocracy' Promotion in the Western Balkans' in Jelena Džankić, Soeren Keil & Marko Kmezić (eds) *The Europeanisation of the Western Balkans. A Failure of EU Conditionality?* Basingstoke: Palgrave Macmillan (2018), pp. 87-109; Dimitry Kochenov *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* The Hague: Kluwer Law International (2008); Heather Grabbe *The EU's Transformative Power: Europeanization Through Conditionality in Central and Eastern Europe* New York: Palgrave Macmillan (2006); Frank Schimmelfennig & Ulrich Sedelmeier (eds) *The Europeanization of Central and Eastern Europe* New York: Cornell University Press (2005); James Hughes, Gwendolyn Sasse & Claire Gordon (eds) *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe: The Myth of Conditionality* New York: Palgrave Macmillan (2004); Karen E. Smith 'The Evolution and Application of EU Membership Conditionality' in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 105-140; Heather Grabbe 'How Does Europeanization Affect CEE Governance? Conditionality, Diffusion and Diversity' 8 *Journal of European Public Policy* (2001), pp. 1013-1031; Karen E. Smith 'The Conditional Offer of EU Membership as an Instrument of EU Foreign Policy: Reshaping Europe in the EU's Image?' 8 *Marmara Journal of European Studies* (2000), pp. 33-46; Karen E. Smith 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' 3 *European Foreign Affairs Review* (1998), pp. 253-274.

and political value in EU external relations.¹⁹ In many of these accounts the need for a detailed exposition of the EU rule of law in external relations has been highlighted.²⁰ Not only in order to fill the gap and do justice to the acknowledged pivotal role of the rule of law in relation to the EU's other two well-researched primary values of human rights and democracy, but also for reasons of consistency and clarity. Relevant EU instruments tend to pay little attention to conceptual issues and rarely specify what the rule of law stands for, adapting the content on a case-by-case basis. Moreover, in the few accounts on the rule of law in external relations to date, scholars have concluded that the EU, when acting as an exporter of values, has adopted 'superficial, diverse and/or unconvincing definitions'²¹ of the rule of law. With more focus than ever on the external aspects of the rule of law in the EU's external action and in the light of its post-Lisbon global ambitions as an international actor and the related attempts at externalising certain value-laden goals, research efforts in order to clarify and square the EU's seemingly inconsistent approach to the rule of law, are called for.

In this light, the present thesis tackles the largely unexplored question of the EU's conceptualisation of the rule of law 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? 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

19 Marko Kmezić *EU Rule of Law Promotion. Judiciary Reform in the Western Balkans* London: Routledge (2017); Laurent Pech 'The EU as a Global Rule of Law Promoter: The Consistency and Effectiveness Challenges' 14 *Asia Europe Journal* (2016), pp. 7-24; Olga Brulyuk 'An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine)' 6 *Hague Journal on the Rule of Law* (2014); Laurent Pech 'Promoting the Rule of Law Abroad: On the EU's Limited Contribution to the Shaping of an International Understanding of the Rule of Law' in Fabian Ambtenbrink & Dimitry Kochenov (eds) *The EU's Shaping of the International Legal Order* Cambridge: Cambridge University Press (2013), pp. 108-129; Laurent Pech 'Rule of Law as a Guiding Principle of the European Union's External Action' *CLEER Working Papers* (2012); Nicole Wichmann, *Rule of Law Promotion in the European Neighbourhood Policy: Normative or Strategic Power Europe?* Baden-Baden: Nomos (2010); Neil Walker 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing (2009); Nicole Wichmann 'The EU as a Rule of Law Promoter in the ENP' in Thierry Balzacq (ed) *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security* Hampshire: Palgrave Macmillan (2009), p. 111; Erik Wennerström *The Rule of Law and the European Union* Uppsala: Iustus Förlag (2007); Nicole Wichmann 'Promoting the Rule of Law in the European Neighbourhood Policy: Strategic or Normative Power?' 2 *Politique Européenne* (2007), pp. 81-104; Marise Cremona 'The European Neighbourhood Policy: Partnership, Security and the Rule of Law' in Nathaniel Copsey & Alan Mayhew (eds) *European Neighbourhood Policy and Ukraine* Brighton: Sussex European Institute (2005); Marise Cremona 'The European Neighbourhood Policy: Legal and Institutional Issues' *CDDRL Working Paper* no. 25 (2004); Dale Mineshima 'The Rule of Law and EU Expansion' 24 *Liverpool Law Review* (2002), p. 73.

20 See for example Wennerström (2007), chapter 5; Wichmann (2007), p. 82; Brulyuk (2014), pp. 26-46.

21 Pech (2012), p. 8.

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?

3. DELINEATING THE RESEARCH QUESTION

It is submitted that there are four major difficulties in defining the rule of law in the area of EU external relations. First, the concept, even in its internal dimension, is opaque, with no concrete definition of the term provided in the Treaties.²² Secondly, in policy documents, the rule of law is linked to a number of areas, such as trade, the protection of human rights, good governance, law enforcement, anti-corruption, judicial reform, and security policy agendas.²³ The multitude of substantive areas with which it is associated prevents the emergence of a core, common understanding of the notion both in its internal and external dimension. Thirdly, another problem of conceptualising the EU rule of law is the fact that it is applied in two distinct contexts: the EU context and the national context. Member States' respect for the rule of law is a *conditio sine qua non* in order for the EU legal order, with its legal interdependence and mutual trust among its members, to constitute a 'Community based on law'.²⁴ However, whereas states have to tackle such questions as how to constrain governmental powers, how to ensure various forms of justice and open government, and how to shape fair ways of regulatory enforcement, the Court of Justice's case law on the rule of law has reduced the substance of this community of law roughly to the

22 The substantive vagueness of the concept has also been acknowledged, amongst others, in the Council Conclusions 'Fundamental rights and the rule of law' Doc. 10168/13, 29 May 2013 and in the Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, where it stated that 'there is not yet a clearly agreed common understanding of the concept of the rule of law and of the extent of its coverage within the systems of governance in Member States', Commission 2012 Report on the Application of the Charter of Fundamental Rights of the European Union, COM(2013) 271 final, 29 May 2013, pnt. 9.

23 Kleinfeld (2012); Wichmann (2009), p. 113; Cremona (2005); Cremona (2004); Sionaidh Douglas-Scott 'The Rule of law in the European Union - Putting the Security in the Area of Freedom, Security and Justice' 29 *European Law Review* (2004).

24 Walter Hallstein 'Die EWG als Schritt zur Europäischen Einheit' in Thomas Oppermann (ed) *Europäischen Gemeinschaften und der Rechtsstaatsgedanke* Stuttgart: Deutsche Verlags-Anstalt (1979), p. 109.

requirement of effective legal protection at the EU level.²⁵ Accordingly, the focus of the case law has been mostly on the rule of law within the Union itself, not in the Member States. However, in its external relations, where it is tasked with the promotion (Article 3(5) TEU) and the consolidation and support (Article 21(2)(b) TEU) of the rule of law, the EU is engaged at the national level of states and their efforts to strengthen this value. In other words, in its various external policies such as in development cooperation, enlargement, and the European Neighbourhood Policy, the EU is involved in rule of law related state-building activities at the domestic level.²⁶ On the basis of the foregoing, it becomes clear that both contexts necessarily encapsulate a different understanding of the rule of law.

The potential for conceptual confusion on the basis of the intermingling of the EU and the national contexts, however, stems from the reliance on values in the Union's own constitutionalisation-narrative. Over the last two decades, the Union has purposefully and increasingly positioned itself as a 'union of values',²⁷ both internally and externally,²⁸ thereby repeatedly underscoring that the rule of law constitutes an essential element of its identity.²⁹ Moreover, since Article 6 EU on the EU's constitutive values was included in the EU Treaty with the Amsterdam revision, the rule of law, as a value 'common to the Member States', explicitly pertains to the constitutional law profile of the Union, which is not only applicable to the EU itself, but also to the Member States (see Articles 2 and 7 TEU). Consequently, conceptualisations of the rule of law as it manifests itself in the national traditions of the Member States underpin the EU's constitutive identity rhetoric and form the foundation for the rule of law as an objective of its external policies (Article 3(5), 21(1) and 21(2)(b) TEU).

Finally, it is asserted that one of the most problematic aspects of the concept is that it is used to serve a number of different functions – a fact often overlooked in literature. More particularly, most of the existing studies focus on the content and do not take into consideration the functions

25 On this argument see Schroeder (2016), p. 6; Monica Claes & Matteo Bonelli 'The Rule of Law and the Constitutionalisation of the European Union' in Schroeder (2016), pp. 265-289 at 271-274. For case law substantiating this point see, for example, Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23; Case 2/88 *IMM – Zwartveld and Others* [1990] ECR I-4405, para. 16; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Bakaraat international Foundation v Council and Commission* [2008] ECR I-6351, para. 281; Case 583/11 P *Inuit Tapiriit Katanami and Others v Parliament and Council*, EU:C:2013:625, 3 October 2013, paras. 91-92.

26 In relation to the Western Balkans, see for instance, Andrea Lorenzo Capussela *State-Building in Kosovo: Democracy, Corruption and the EU in the Balkans* London: I.B. Tauris (2015)

27 Commission's Second Annual Reports on the 'Stabilization and Association Process for South East Europe' COM(2003) 139 final, 26 March 2003, p. 3.

28 See for example the Laeken Declaration on the Future of the Union, Presidency Conclusions, European Council Laeken, 14-15 December 2001.

29 On the relationship between the EU's values and, in particular, its external identity, see Marise Cremona 'Values in the EU Constitution: The External Dimension' *CDDRL Working Paper* (2004).

that the rule of law serves, in order to arrive at a definition.³⁰ As it will be discussed in detail below, the EU uses the rule of law in order to pursue a wide array of goals. Definitions that do not take into account the distinct functions the concept serves, do not accurately describe the notion.

Against this background, it is submitted that the research question (defining the concept of the rule of law in EU external relations) cannot be answered before explaining, at the outset, the function to which it is related. For this purpose, the goal of the next section is to delineate the research question by identifying and discussing the main functions of the rule of law in the EU. It will be argued that there are four major functions, namely, the rule of law as a foundational value, the rule of law as a value 'common to the Member States', the rule of law as a benchmark and objective in external relations, and the rule of law as a guarantee for EU security. It will be asserted that although these functions are, to a certain extent, interrelated, a better understanding of these will aid the discussion in the next chapters. A brief caveat needs to be introduced at this point. Although the identification of the functions of the rule of law are helpful in understanding *the place* of the rule of law in EU external policy, these functions do not per se inform the definition of the rule of law. As such, the discussion below provides the necessary background in order to introduce the reader to the various roles the rule of law fulfils, it will, however, not form part of the analytical framework of the thesis (which will be explained at the end of Part I), since the research question focusses on the definition of the rule of law rather than its function. In order to delineate the research question also geographically, the overview of the rule of law-functions will be followed by a brief exploration of the selected two case-studies for this thesis.

3.1 The four functions of the rule of law in the EU

According to the Treaty on European Union the rule of law has four inter-related functions. It applies not only to the Union itself as (1) a foundational value, but, as evidenced by Article 2 TEU in which the notion is mentioned as one of the values underpinning the EU,³¹ (2) as a core value of the legal order of its component parts, the Member States:³²

30 See for example Kochenov (2008).

31 The Preamble of the TEU calls it a 'universal value'. On this point see for example N.S. Marsh, 'The Rule of Law as a Supra-National Concept' in A.G. Guest (ed.) *Oxford Essays in Jurisprudence* Oxford: Oxford University Press (1961). For evidence to the contrary see for example Ruti Teitel 'Global Rule of Law: Universal and Particular' in András Sajó (ed) *Human Rights with Modesty – The Problem of Universalism* Leiden: Martinus Nijhoff Publishers (2004), p. 231; Douglas J. Simsovic 'No Fixed Address: Universality and the Rule of Law' 35 *Revue Juridique Thémis* (2001), pp. 739-773.

32 Also see the fourth paragraph of the Preamble of the TEU.

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.

Furthermore, (3) the rule of law is a benchmark and guiding principle for EU external action. According to Article 3(5) TEU, the EU shall uphold and promote the rule of law in its relations with the wider world, as well as seek to develop relations and build partnerships with third countries, and international, regional or global organisation that share these values (Article 21(1) TEU).³³ Consequently, as the Member States have endowed the Union with the task of consolidating and supporting it in all fields of its international relations (Article 21(2)(b) TEU), the rule of law is used as a benchmark and guiding principle for the EU's external action (Article 21(1) TEU). Finally, (4) the notion serves as a guarantee for the EU's own security. On the basis of Article 21(2)(a) TEU, the rule of law is linked to the Union's own security and fundamental interests, which it shall strive to safeguard through its external action. These four aspects of the rule of law, while inter-related, fulfil different functions in the EU context.

In the following sections, each aspect is discussed in turn. Through this comprehensive approach it will be demonstrated that the EU rule of law is used differently, depending on the function it fulfils. It will be argued that each function answers to a different set of questions and finds its relevance in different academic contexts.

3.1.1 *The rule of law as a foundational value*

As mentioned above, according to Article 2 TEU, the EU is founded on a number of values, the rule of law among them.³⁴ As a foundational value, the rule of law has two aspects. First, it is a standard for the EU's own conduct³⁵

33 The European Neighbourhood Policy, laid down in Article 8 TEU, forms a specific category of relations based on the rule of law and the other values: 'The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation.'

34 Also see Article 21(1) TEU in which the rule of law is mentioned as an inspiring principle for the EU's own creation and subsequent integration. Curiously, the Preamble to the EU Charter of Fundamental Rights does not explicitly mention the rule of law as a *foundational* value, instead listing the 'indivisible, universal values of human dignity, freedom, equality and solidarity'. However, the same paragraph stresses that the Union is 'based on the principles of democracy and the rule of law'.

35 See Commission Communication on A new EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014.

and that of the Member States.³⁶ Secondly, it has a constitutive dimension³⁷ for the EU's own identity and for its self-perception as a value-driven international actor.³⁸ This first aspect of the rule of law relates to those questions associated with the content and meaning of the rule of law for the European Union legal order itself: What did the Court of Justice of the European Union mean in relation to the rule of law concept when it referred to respect for 'the principle of the rule of law within the Community context' in *Granaria*³⁹ and its description of the Community as 'a Community based on the rule of law' in *Les Verts*?⁴⁰ What is the specific significance of the rule of law for the functioning of the EU as one of the values mentioned in Article 2 TEU?⁴¹

The second aspect of the rule of law as a foundational value is linked to those questions related to the literature in the fields of political science, history, and sociology on the role of the rule of law in relations to the nature and identity of the European Union.⁴² What are the values that constitute the European identity? If these values are projected externally in EU foreign policy, what role do they play in the EU's identity formation process as a 'normative actor'? How does this process contribute to a construction of an identity that differentiates the EU from other international organisations? Is it possible to give specific meaning to the rule of law as a value, rather than looking at the role of the values *en groupe*?

The development of both aspects has been heavily influenced by the way the EU has progressively focussed on the promotion of its values in its external relations: the identification with the rule of law as well as the other values has become an increasingly important part of EU policy-making,

36 See for instance the pre-accession process which links progression towards accession, and thus to the status of Member State, to the applicant's respect for the Union's values. See for example the fourth paragraph of the Preamble of Regulation (EU) No 231/2014 of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II), OJ[2014] L77/11.

37 See for example Joined cases C-402/05 P and C 415/05 P *Kadi v Council* [2008] ECR I-6351, para. 285. See also Annex I to COM(2014) 158 final/2 in which the Commission refers to the rule of law as 'a legally binding constitutional principle'.

38 Recently, see the EU Global Strategy (2016), pnt. 3.5.

39 Case 101/78 *Granaria BV v Hoofdprodukschap voor Akkerbouwproducten* [1979] ECR 623, para. 5.

40 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23.

41 See for example Timothy Moorhead 'The Values of the European Union Legal Order. Constitutional Perspectives' 16 *European Journal of Law Reform* (2014); Pech (2009).

42 See for example Jeffrey T. Checkel & Peter J. Katzenstein *European Identity* Cambridge: Cambridge University Press (2009); Furio Cerutti & Sonia Lucarelli *The Search for a European Identity* London: Routledge (2008); Erik Eriksen 'The EU – A Cosmopolitan Polity?' *Journal of European Public Policy* 13 (2006), pp. 252–269; Ludger Kühnhardt 'From National Identity to European Constitutionalism' *Center for European Integration Studies Bonn, Working Paper* (2004); Thomas Risse 'European Institutions and Identity Change: What Have We Learned?' in Richard Herrmann, Marilynn Brewer & Thomas Risse (eds) *Transnational Identities* (2004) pp. 247–272.

both internally⁴³ and externally,⁴⁴ ever since the inclusion of the rule of law as a 'fundamental element' of the 'European Identity' of the Member States dating back to the early 70s.⁴⁵ In fact, the constitutionalisation of the Union's values, including the rule of law, has to a large part been the result of the EU's external action.⁴⁶ This is for example demonstrated by the revision of then Article 6 TEU with the Treaty of Amsterdam to include the rule of law as a foundational value, a direct codification of enlargement practice.⁴⁷ At the same time, the EU's growing self-identification as a 'Union of values'⁴⁸ underwrites the legitimacy of its value-promotion abroad.⁴⁹ In the mid 90s the Commission already argued for the close link between the external promotion of values and their constitutive nature when it stated that 'the European Union has gradually come to define itself in terms of promotion of rights and democratic freedoms.'⁵⁰

The Commission's proposal for 'A new framework to strengthen the rule of law' serves as an example of external policy influencing the rule of law as standard for the EU's own actions.⁵¹ Precipitated by the problems following the accession of Romania and Bulgaria and the political events in new Member States such as Hungary and Poland, inter-institutional debates⁵² gave rise to an intensified discussion on the discrepancies between strong pre-accession monitoring and little post-accession supervision, and the use of Article 7 TEU. The latter provides a preventive as well

43 In this regard, see Jacobs, who stated that 'the ultimate source of authority is no longer the sovereign in the shape of a monarch, or even in the shape of a Parliament; but rather certain values, or certain fundamental principles, which form an inherent part of a well-functioning legal system.' Francis G. Jacobs *The Sovereignty of Law: The European Way* Cambridge: Cambridge University Press (2007), pp. 61-62.

44 Burluk (2014); Marise Cremona 'Values in EU Foreign Policy' in Malcolm Evans & Panos Koutrakos (eds) *Beyond the Established Orders: Policy Interconnections between the EU and the Rest of the World* Oxford: Hart Publishing (2011), p. 281.

45 Copenhagen European Summit 14-15 December 1973 Declaration on the European Identity *Bull EC* 12-1973.

46 See for example, Neil Walker 'Big "C" or small "c"?' 12 *European Law Journal* (2006), pp. 12-14.

47 See Christophe Hillion 'The Copenhagen Criteria and their Progeny' in Christophe Hillion (ed) *EU Enlargement: A Legal Approach* Oxford: Hart Publishing (2004).

48 Commission Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, 9 July 2003, p. 12.

49 Andrew Hurrell *On Global Order: Power, Values and the Constitution of International Society* Oxford: Oxford University Press (2007), pp. 77-83.

50 Commission Communication on The External Dimension of the EU's Human Rights Policy: From Rome to Maastricht and Beyond, COM(1995) 567 final, p. 3.

51 Commission Communication on A New EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014.

52 See for example the Tavares Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012), 2012/2130/(INI), A7-0229/2013, 24 June 2013.

as sanctioning mechanism in case of (a clear risk of) a serious breach of the values mentioned in Article 2 TEU.⁵³

The prospect of the ‘big-bang’ accession round in 2004 heightened the necessity of having access to a mechanism for the protection and consolidation of the rule of law within the member States: ‘With the forthcoming enlargement and the increased cultural, social and political diversity between Member States that will ensue, the Union institutions must consolidate their common approach to the defence of the Union’s values.’⁵⁴ In other words, Article 7 TEU was devised to keep domestic changes in the area of democratic values, the rule of law, and the protection of fundamental rights in post-communist countries locked in after their accession to the Union, as accession would mean the end of membership conditionality.⁵⁵ Looking into the possibility of regular assessment of the Member States on their continued compliance with the rule of law, as it had been doing on the basis of annual progress reports in the context of the pre-accession process, the Commission proposed a new framework, complimenting Article 7 TEU. This framework is to address and resolve situations where there is a systemic threat to the rule of law, before the conditions for activating the mechanism foreseen in Article 7 TEU are met.⁵⁶

External policy has also influenced the rule of law in its second functions as a foundational value in relation to the EU’s own identity as a value-

53 On the (problems with the) use of Article 7 TEU see for example Carlos Closa, Dmitry Kochenov & J.H.H. Weiler ‘Reinforcing Rule of Law Oversight in the European Union’ *RSCAS EUI Working Papers* no. 25 (2014). Further, the literature mentioned in footnote 16. Violations of the rule of law related to EU law can be tackled on the basis of the infringement procedure under Article 258 TFEU. In relation to Hungary, the Commission started infringement proceeding for violation of the equal treatment directive (Directive 2000/78/EC) and the data protection directive (Directive 95/46/EC). The CJEU ruled against Hungary in both cases. The reform of the judiciary was struck down on the basis of age discrimination (Case C-286/12, *Commission v Hungary*, EU:C:2012:687, 6 November 2012). By prematurely ending the term served by the supervisory authority for the protection of personal data, Hungary has also failed to fulfil its obligations under the data protection directive (Case C-288/12 *Commission v Hungary*, EU:C:2014:237, 8 April 2014).

54 Commission Communication on Article 7 of the Treaty on European Union. Respect for and promotion of the values on which the Union is based, COM(2003) 606 final 15 October 2003, p. 4.

55 Vera van Hüllen & Tanja A. Börzel ‘The EU’s Governance Transfer: From External Promotion to Internal Protection’ *SFB-Governance Working Paper Series* (2013) No. 56, p. 5.

56 Described by Barroso as ‘the nuclear option’, the mechanism has shown to be too politically sensitive to be used effectively. José Manuel Barroso ‘State of the Union Address 2012’, SPEECH/12/596, 12 September 2012, available at: http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm.

driven international actor. In line with its 'missionary principle'⁵⁷ anchored in Article 3(5) TEU, the EU is wont to make broad, sweeping statements on its 'ethics of responsibility'⁵⁸ towards other countries, such as those of the Laeken Declaration: 'What is Europe's role in this changed world? Does Europe not, now that it is finally unified, have a leading role to play in the new world order, that of a power able both to play a stabilizing role worldwide and to point the way ahead for many countries and peoples?'⁵⁹ Similarly, the European Security Strategy espouses: 'Europe should be ready to share in the responsibility for global security and in building a better world. ... Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order.'⁶⁰ In the area of development cooperation the EU's New European Consensus on Development states: 'The EU and its Member State will promote the universal values of democracy, good governance, the rule of law and human rights for all, because they are preconditions for sustainable development and stability, across the full range of partnerships and instruments in all situations and in all countries, including through development action.'⁶¹

57 On the missionary principle in relation to the EU's development cooperation policy see Morten Broberg 'Don't Mess with the Missionary Man! On the Principle of Coherence, the Missionary Principle and the European Union's Development Policy' in Paul James Cardwell (ed) *EU External Relations Law and Policy in the Post-Lisbon Era* The Hague: T.M.C. Asser Press (2012), pp. 181-196; Morten Broberg 'What is the Direction for the EU's Development Cooperation After Lisbon? A Legal Examination' 16 *European Foreign Affairs Review* (2011) pp. 539-557. On the missionary principle in relation to Article 3(5) TEU specifically, see Herlin-Karnell (2013), pp. 90-91; Konstadinides (2017), p. 67.

58 Sonia Lucarelli 'Values, Principles, Identity and European Union Foreign Policy' in Sonia Lucarelli & Ian Manners *Values and Principles in European Union Foreign Policy* London: Routledge (2006), p. 3; Lisbeth Aggestam 'Introduction: Ethical Power Europe?' 84 *International Affairs* (2008), pp. 1-11. Also see the EU's own statements on its 'political and moral weight' in external affairs. For example Commission Communication on the European Union's role in promoting human rights and democratization in third countries, COM(2001) 252 final, 8 May 2001.

59 Laeken Declaration on the Future of the Union, Presidency Conclusions, European Council Laeken, 14-15 December 2001.

60 European Council 'European Security Strategy – A Secure Europe in a Better World' 12 December 2003.

61 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ[2017] C210/1, pnt. 61.

Also see the previous Consensus on Development, in which it was stated that 'EU Partnership and dialogue with third countries will promote common values of: respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, the rule of law, solidarity and justice.' Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, 'The European Consensus', 22 November 2005, OJ[2006] C46/1.

Such statements have led authors such as Manners, to construct the idea of 'normative power Europe'.⁶² This idea suggests that the EU is constructed on a normative basis, which predisposes the Union to act in a normative way in its foreign policy.⁶³ It argues that the EU's value rhetoric is a performative act, which corresponds to its foreign interests and which shapes a collective understanding of its identity.⁶⁴ Whereas it is not surprising that the EU's identification in terms of its values⁶⁵ is reflected in the external projection of itself, this idea goes one step further and proposes that the EU's external self-representation says something about the constitutive nature of the EU as a political, legal and social system.⁶⁶ In other words, the way the rule of law is used in EU external rhetoric, informs us of the EU's own identity and of the importance of the rule of law as a foundational value. However, while the external discourse indicates the EU's willingness to frame its policies and action in terms of the rule of law, it does not contribute substantively to the interpretation of the concept of the rule of law as such. It is a reflection of the importance the EU attaches to this value for its own legal order and informative for the dynamic nature of the EU's process of identity construction.

To summarise, the rule of law as a foundational value serves a dual function: it is both a standard for the EU's own conduct as well as that of the Member States, and a reason and legitimation for its external action.

3.1.2 *The rule of law as a value 'common to the Member States'*

The importance of respect for the rule of law within each of the Member States cannot be overestimated; as will be shown below, it is a vital precondition for the functioning of the EU legal order itself. In addition to this, it will be argued in this section that the specific fact that the rule of law is

62 Ian Manners 'Normative Power Europe: A Contradiction in Terms?' 40 *Journal of Common Market Studies* (2002), pp. 235-258. Richard Whitman (ed) *Normative Power Europe: Empirical and Theoretical Perspectives* Basingstoke: Palgrave Macmillan (2011); Tuomas Forsberg 'Normative Power Europe, Once Again: A Conceptual Analysis of an Ideal-type' 49 *Journal of Common Market Studies* (2011). For a critical reflection see Thomas Diez 'Constructing the Self and Changing Others: Reconsidering Normative Power Europe' 33 *Millennium: Journal of International Studies* (2005), pp. 613-636;

63 Manners (2002), p. 252.

64 Lucarelli (2006), p. 4.

65 On values, see Andrew Williams *The Ethos of Europe: Values, Law and Justice in the EU* Cambridge: Cambridge University Press (2009); Christian Callies 'The Transnationalization of Values by European Law' 10 *German Law Journal* (2009), pp. 1367-1382.

66 See for example Helen Sjursen 'The EU as a Normative Power: How can this be?' 13 *Journal of European Public Policy* (2006), p. 235; Ester Herlin-Karnell 'EU Values and the Shaping of the International Legal Context' in Fabian Amtenbrink & Dimitry Kochenov (eds) *European Union's Shaping of the International Legal Order* Cambridge: Cambridge University Press (2013), pp. 89-107 at 91; Joseph H.H. Weiler 'Deciphering the Political and Legal DNA of European Integration' in Julie Dickson & Pavlos Eleftheriadis *The Philosophical Foundations of European Union Law* Oxford: Oxford University Press (2012), pp. 137-158.

described in Article 2 of the EU Treaty as a value *common* to the Member States, indicates that the national rule of law traditions not only safeguard the way the EU operates, they also inform the understanding of the rule of law as an EU foundational value. Moreover, it will be shown that the national rule of law traditions form a source for understanding the concept of the rule of law in the Union's external relations.

The Union has increasingly phrased its integration narrative in terms of its values. To give a recent example, Commissioner Navracsics for Education, Culture, Youth and Sport, acknowledged the importance of the EU's values as 'the most powerful driver of integration'.⁶⁷ Expressing the same sentiment in his 2017 State of the Union address, Commission President Jean-Claude Juncker stressed that 'Europe is more than just the single market. More than money, more than a currency, more than the euro. It was always about values.'⁶⁸ Amongst the EU's values, the rule of law occupies a central position. As one of the EU's foundational values (Article 2 and Article 21(1) TEU)⁶⁹, the rule of law is a standard both for the Union's own conduct⁷⁰ and for that of the Member States.⁷¹ Moreover, in the light of its acknowledged constitutive dimension for the EU's own identity⁷² the proper functioning of the rule of law within each of the Member States becomes of paramount importance, not only as a source of legitimacy for the EU's own external conduct as a value-driven international actor,⁷³ but also as a vital precondition for the functioning of the EU legal order itself.

Ensuring proper respect for the rule of law in the individual Member States is critical, particularly because of the potentially far-reaching conse-

67 Tibor Navracsics 'The Value of Our Values', keynote Speech at Hanns Seidel Foundation Conference on, New Societal Challenges and Europe's Search for Identity, 30 November 2016, available at: https://ec.europa.eu/commission/commissioners/2014-2019/navracsics/announcements/value-our-values_en.

68 Jean-Claude Juncker 'State of the Union Address 2017', SPEECH/17/3165, 13 September 2017, available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

69 Article 3(1) of the Partnership Instrument also makes a direct link between the EU's own founding values and those same values as objectives of its external activities: 'The Union seeks to promote, develop and consolidate the principles of democracy, equality, respect for human rights *and the rule of law on which it is founded*, by means of dialogue and cooperation with third countries.' Regulation (EU) 234/2014 of the European Parliament and of the Council of 11 March 2014 establishing a Partnership Instrument for cooperation with third countries, OJ[2014] L77/77.

70 See Commission Communication on A New EU Framework to Strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014.

71 See for instance the pre-accession process which links progression towards accession, and thus to the status of Member State, to the applicant's respect for the Union's values. See for example the para 4 of the Preamble of Council Regulation (EC) 231/2014 establishing an Instrument for Pre-accession Assistance (IPA II), [2014] OJ L77/11.

72 See for example Joined Cases C-402/05 P and C 415/05 P *Kadi v Council* [2008] ECR I-6351, para 285. See also Annex I of the Commission Communication on the EU Rule of Law Framework (COM(2014) 158 final/2) in which the Commission refers to the rule of law as 'a legally binding constitutional principle'.

73 Recently, see the EU Global Strategy (2016), para 3.5.

quences for the EU itself when that respect fails. This is so, for two related reasons. First, the EU as a ‘Community of law’ is dependent on mutual recognition and mutual trust between the Member States. The ‘mutually interdependent legal relations’⁷⁴ linking the EU and its Member States, and its Member States with each other, are premised on the existence of mutual trust between Member States in recognition of the Union’s shared values and respect for EU law.⁷⁵ After all, it is at the domestic level that the Member States need to secure administrative and judicial implementation and compliance. In this way, mutual trust and subsequent mutual recognition are strongly tied to the duty of sincere cooperation enshrined in Article 4(3) TEU.⁷⁶ The Commission has described mutual trust among the Member States and their respective legal systems as the foundation of the whole Union edifice.⁷⁷ Within this structure, the rule of law is accorded a decisive place, for ‘[t]he way the rule of law is implemented at national level plays a key role in this respect. The confidence of all EU citizens and national authorities in the functioning of the rule of law ... will only be built and maintained if the rule of law is observed in all Member States.’⁷⁸

In the recent case *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*,⁷⁹ arguably the most important judgement on the rule of law and its meaning in the EU legal order since *Les Verts*, the Court weighed in on exactly this point: the relationship between the protection of the rule of law in the Member States, as found in Article 2 TEU, the principle of sincere cooperation (Article 4(3) TEU), and the role of domestic courts

74 Opinion 2/13 *ECHR II* EU:C:2006:81, para. 167.

75 *Ibid.*, para. 168.

76 Carlos Closa ‘Reinforcing EU Monitoring and the Rule of Law. Normative Arguments, Institutional Proposals and the Procedural Limitations’ in Closa & Kochenov (2016), pp. 15-35 at 17. Also see Commission Recommendation regarding the rule of law in Poland, C(2017) 5320 final, 26 July 2017, pnt. 4 of the Preamble.

77 Commission Communication on A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014, p.2.

78 *Ibid.*, p.2.

79 Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018. For comments see, Michał Krajewski ‘Associação Sindical Dos Juizes Portugueses: The Court of Justice and Athena’s Dilemma’ 3 *European Papers* (2018), pp. 395-407 (European Forum, 30 May 2018); Pierre-Emmanuel Pignarre ‘Does the End Justify the Means?’ 27 June 2018, available at: <https://rsiblog.blogactiv.eu/2018/06/27/does-the-end-justify-the-means-by-pierre-emmanuel-pignarre/>; Alessandra Silveira & Sophie Perez Fernandes ‘A Union Based on the Rule of Law Beyond the Scope of EU Law- The Guarantees Essential to Judicial Independence in Associação Sindical dos Juizes Portugueses’ 3 April 2018, available at: <https://officialblogofunio.com/2018/04/03/a-union-based-on-the-rule-of-law-beyond-the-scope-of-eu-law-the-guarantees-essential-to-judicial-independence-in-associacao-sindical-dos-juizes-portugueses/>; Laurent Pech ‘Rule of Law Backsliding in the EU: The Court of Justice to the Rescue? Some Thoughts on the ECJ Ruling in Associação Sindical dos Juizes Portugueses’ 13 March 2018, available at: <http://eulawanalysis.blogspot.com/2018/03/rule-of-law-backsliding-in-eu-court-of.html>; Michał Ovádek ‘Has the CJEU just Reconfigured the EU Constitutional Order?’ 28 February 2018, available at: <https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/>.

in the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU. The Court was asked to pronounce on the question whether a 2014 Portuguese legislative measure temporarily reducing the remuneration of people working in public administration, including judges, infringed the principle of judicial independence. On the basis of a combined reading of the abovementioned Articles, the Court held that mutual trust between the Member States, and, in particular, their courts and tribunals, 'is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU'.⁸⁰ Furthermore, Article 19 TEU, 'which gives concrete expression to the value of the rule of law',⁸¹ entrusts a responsibility for ensuring judicial review in the EU legal order also to national courts and tribunals. Accordingly, the Member States, in line with the principle of sincere cooperation, have a duty to establish a system of legal remedies and procedures ensuring effective judicial review in the fields covered by EU law and the central place of domestic courts therein, since, '[t]he very existence of effective judicial review designed to ensure compliance with EU law is of the very essence of the rule of law'.⁸² Moreover, the Court observed that in order for the EU legal system to operate efficiently and for individuals to benefit from effective judicial protection of their EU rights at the domestic level, it is essential the national courts are independent.⁸³

The necessity of preserving mutual trust and the functioning of national courts has also been at the heart of the Commission's efforts in addressing systemic threats to the rule of law in some of the Member States. As underlined by the Commission in its Recommendation of 20 December 2017 regarding the Rule of Law in Poland, respect for the rule of law is not only a prerequisite for the protection of all the values listed in Article 2 TEU, it is also 'a prerequisite for upholding all rights and obligations deriving from the Treaties and for establishing *mutual trust* of citizens, businesses and

80 Case C-64/16, para. 30.

81 *Ibid.*, para. 32.

82 *Ibid.*, para. 36.

83 *Ibid.*, paras. 40-42. For an example of what happens in practice when mutual trust is undermined because of doubt surrounding the rule of law in one of the Member States, see the Court's judgment in Case C-216/18 PPU. The CJEU was asked to consider whether the rule of law crisis and the systemic deficiencies in the Polish judicial system could justify the refusal of execution of a European Arrest Warrant issued by that Member State. The Court affirmed the right of the referring Irish court to refuse to extradite if it finds a real risk to the person's right to a fair trial because of a lack of judicial independence. Case C-216/18 PPU LM, EU:C:2018:585, 25 July 2018. More recently, on October 4 2018, a Dutch court refused to send a suspect back to Poland following a request on the basis of a European Arrest Warrant. Citing concerns over the changes made to the Polish judicial system and the lack of judicial independence, the court stated it will keep the request for surrender pending until the Polish authorities have replied to its questions, Rechtbank Amsterdam 4 October 2018, Case No. 13/751441-18, RK 18/3804.

national authorities in the legal system of all other Member States.’⁸⁴ Similarly, it is exactly these concerns about the effects of a serious breach of the rule of law by one of the Member States in relation to the interdependent relations between them, that underpinned the European Parliament’s resolution when it called on the Council to determine, pursuant Article 7(1) TEU, whether there has been a breach of Article 2 TEU in relation to Hungary. According to the resolution, any clear risk of a serious breach by a Member State of the EU’s core values ‘does not concern solely the individual Member State where the risk materialises but also has an impact on the other Member States, on mutual trust between them and on the very nature of the Union....’⁸⁵ Thus, upholding the rule of law in the Member States is not only indispensable for the functioning of the EU’s policies by buttressing mutual trust and mutual recognition that are vital for their success,⁸⁶ but also underpins the whole of the EU project itself.

The second reason in relation to the specific importance of the rule of law at the domestic level of the Member States, revolves around the all-

84 Commission Recommendation of 20 December 2017 regarding the rule of law in Poland, complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C(2017) 9050 final, pnt. 41 [emphasis added].

85 Motion for a European Parliament Resolution on a proposal calling on the Council to determine, pursuant to Article 7(1) of the Treaty on European Union, the existence of a clear risk of a serious breach by Hungary of the values on which the Union is founded, (2017/2131(INL)), pnt. B, 4 July 2018.

86 As a prime policy example, justice and home affairs (JHA) should be mentioned, though which asylum policy and immigration, judicial, customs, and policy cooperation have become ‘areas of common interest’ (ex Article K.1 EU). The JHA envisaged establishment of the area of freedom, security and justice, is based on the idea that national courts and administrations, as well as law enforcement authorities need to cooperate with one another, in particular by exchanging information and by mutually recognising judicial decisions in civil and criminal matters. According to the Commission’s EU Justice Agenda 2020 mutual trust in Member States between courts, administrations, citizens, legal practitioners, and judges ‘is the bedrock upon which EU justice policy should be built’ (COM(2014) 144 final, 11 March 2014, p. 4). Mutual trust helps judicial authorities to recognise and enforce decisions and facilitates access to justice on equal terms between the Member States, which in turn will help with external challenges, including terrorism and other perceived threats to the internal security of the EU (COM(2014) 154 final, 11 March 2014, p. 13). It furthermore ensures that EU instruments such as the European arrest warrant or the regulations on the conflict of laws issues between Member States are efficiently applied and relied on throughout the EU. A key requirement to achieving these objectives is the independence, quality and efficiency of the judicial systems (including enforcement bodies), and thus, respect of the rule of law. Further see Olivier De Schutter ‘The Role of Evaluation in Experimentalist Governance: Learning by Mentoring in the Area of Freedom, Security, and Justice’ in Charles F. Sabel & Jonathan Zeitlin (eds) *Experimentalist Governance in the European Union: Towards a New Architecture* Oxford: Oxford University Press (2010), p. 262; Neil Walker ‘In Search of the Area of Freedom, Security and Justice: A Constitutional Odyssey’ in Neil Walker (ed) *Europe’s Area of Freedom, Security and Justice* Oxford: Oxford University Press (2004), p. 5; European Council ‘The Stockholm Programme - An open and secure Europe serving and protecting citizens’ OJ[2010] C115/1, p. 12; Guidelines for the Area of Freedom, Security and Justice 2014-2020, Presidency Conclusions Brussels European Council, 27 June 2014, p. 1

affected principle.⁸⁷ This principle reinforces the critical role of the rule of law at the national level by underlining the results of its erosion. The effects of the demise of the rule of law in a Member State are not only felt within that state but extend beyond its borders. Lack of rule of law in one state endangers the legitimacy of EU decision-making in a normative sense: every Member State, by virtue of their role in the European Council and the Council, at least indirectly participates in governing the lives of all the citizens of Europe.⁸⁸ If one Member State changes its standards in relation to the rule of law, this affects the EU's decisions as well. Moreover, since, as shown above, the whole structure of the Union is necessarily built on mutual trust, the underlying presumption must be that each Member State upholds the same rule of law, democracy, and governance standards.⁸⁹ On this basis, it is clear that the mutual interdependence, created through the process of integration, implies that the erosion of the rule of law in a Member State, through the all-affected principle, endangers the entire functioning of the EU itself, thus underscoring the importance of a functioning rule of law in each of the Member States.

Having established the importance of respect for the rule of law at the domestic level, the focus of this section now turns towards the instrumental function of the national rule of law traditions in understanding them as a source for the EU's conceptualisation of the rule of law, both internally as in its external relations. Whereas Article 6(3) TEU requires the EU to rely on national traditions when interpreting fundamental rights,⁹⁰ Article 2 TEU simply states the fact that the values mentioned are 'common to the Member States.' This leaves the question open what the meaning and scope of application of the EU rule of law is and to what extent national conceptions can be helpful in supplying answers. The German and French versions use *Rechtsstaatlichkeit*, and *état de droit* respectively. However, while the semantic field of these expressions seems to be the same, the historical and conceptual specificity underlying the national traditions should not be overlooked.⁹¹ Even if differences in conceptions within continental Europe were to be minimised, their conceptual equivalence is far from straightforward. Terminological differences epitomise the diversity of cultural contexts and

87 On the all-affected principle generally, see David Owen 'Constituting the Polity, Constituting the Demos: On the Place of the All Affected Interests Principle in democratic Theory and in Resolving the Democratic Boundary Problem' 5 *Ethics & Global Politics* (2012), pp. 129-152; Sofia Näsström 'The Challenge of the All-Affected Principle' 59 *Political Studies* (2011), pp. 116-134; Robert Goodin 'Enfranchising All Affected Interests, and its Alternatives' 35 *Philosophy & Public Affairs*, pp. 40-68.

88 Carlos Closa & Dimitry Kochenov 'Reinforcement of the Rule of Law Oversight in the European Union: Key Options' in Schroeder (2016), p. 177.

89 Carlos Closa 'Reinforcing EU Monitoring of the Rule of Law' in Closa & Kochenov (2016), pp. 18-19.

90 Article 6(3) TEU: Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of law.

91 See chapter 1 of the thesis.

the contrast between the civil law and common law systems should offer enough preventive effect from considering the notions as simply synonymous.⁹² This semantic complexity characterises the whole historical span of rule of law traditions that cannot be detached from national cultures where it is actually used.

Some authors argue that the Union must respect the values of Article 2 TEU because they are 'common to the Member States' as they are defined by what is common in them, thus relying on national constitutional traditions to offer a basis for determining what these principles mean in the EU context.⁹³ Others maintain that, even though an EU definition of the rule of law should be guided and inspired by national understandings of the notion, both levels (EU – Member States) should be kept strictly separated because it is impossible to draw direct parallels between the national legal orders with respect to the precise meaning of the rule of law espoused by each system.⁹⁴ The opposing point of view, which argues for the need of an autonomous EU concept since the way the rule of law or allied concepts are understood in their national setting cannot be determinative as these will be conditioned by a particular legal or historical context and may vary from state to state, is also present in the discourse.⁹⁵

It is submitted that national constitutional conception of the rule of law, although not determinative on an individual basis for reasons outlined *supra*, do need to be taken into account and necessarily inform the EU interpretation of the rule of law, providing its elements and benchmarks. While it is impossible to establish one unitary conception of the rule of law stemming from all the Member States and acknowledging their national differences, the thesis takes it as a starting point the fact that there are generally some common characteristics of the rule of law in the Member States, which necessarily feed into the Treaty's conception of the rule of law.⁹⁶ As former Advocate General Jacobs pointed out, 'the rule of law embodies certain values which seem, at least in Europe, widely accepted as essential to modern social and political life; and that we shall be able to identify some of those values.'⁹⁷ Similarly, the Commission argued in its 2014 Communication on

92 Danilo Zolo 'The Rule of Law: A Critical Reappraisal' in Pietro Costa & Danilo Zolo (eds) *The Rule of Law. History, Theory and Criticism* Dordrecht: Springer (2007), p. 3.

93 Amaryllis Verhoeven *The European Union in Search of a Democratic and Constitutional Theory* The Hague: Kluwer Law International (2002), p. 322.

94 Kochenov (2009), p. 14-21.

95 Arnall (2002), p. 240.

96 On a similar point of view, see Konstadinides, who, in his quest to identify and conceptualise the rule of law in the European Union in its internal dimension, has stated that '[t]hese formal [national] rule of law attributes which are historically embedded in the constitutional heritage of these Member States undermine any effort to conceptualise the EU rule of law as a universal European concept. Finding shared traits between the Member States that can be stretched in order to create a state of (pan-European) rule of law euphony without distorting those States' legal heritage appears to be a more realistic option.' Konstadinides (2017), p. 39.

97 Jacobs (2007), p. 8.

the new internal EU Framework to strengthen the rule of law, in which it recognised the work of the CJEU, the ECHR, and the Council of Europe's Venice Commission in articulating the principles and standards stemming from the rule of law in the constitutional traditions of the Member States, that these 'define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU'.⁹⁸

However, a further crucial nuance needs to be added, missing in the current debate. In any EU rule of law formulation, the level at which it is advanced and the function the Union attributes to it needs to be taken into account. As a foundational value, the rule of law functions within the context of the EU as a supranational organisation. Against this setting the Court relied on the value to pry open Article 173 EEC (Article 263 TFEU) and broaden the catalogue of annulment actions to include actions against measures adopted by the European Parliament intended to have legal effect *vis-à-vis* third parties,⁹⁹ interpreting it mainly in procedural terms. In its external relations, however, the EU conception of the rule of law is advanced at the national level of states in its primary function of protection against arbitrariness, ensuring a secure environment in which human rights will be upheld.¹⁰⁰ It is on that level and within that function that the national rule of law conceptualisations will be most useful in providing common elements and benchmarks. Therefore, any discussion on the notion of the rule of law in EU external relations must include an exposition of the national rule of law conceptions in the most prominent national rule of law traditions. It is an analysis of these and the demonstration of their common core as well as their subsequent interpretation and theoretical formulation in legal doctrine, which will comprise chapter 1 of the thesis.

In sum, it was shown that respect for and observance of the rule of law in the Member States is vital to the functioning of the EU legal order as a whole. Without this there can be no mutual trust which is necessary for the operation of all of the EU's policies. Additionally, it was demonstrated that the national rule of law traditions provide the building blocks for the EU's rule of law conceptualisation. It was argued that since the EU advances

98 Commission Communication on A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014, p. 4.

99 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339. In *Les Verts*, the Court essentially formulated a combination of both judicial review and the individual right to judicial protection, which are 'intrinsic components' of the EU legal system preserving the rule of law. See Koen Lenaerts 'The Rule of Law and the Coherence of the Judicial System of the European Union' *Common Market Law Review* (2007) 44, p. 1626; Piet Jan Slot Editorial comments 'The Rule of Law as the Backbone of the EU' 44 *Common Market Law Review* (2007), pp. 875-881. According to Jacobs, '[t]he key to the notion of the rule of law is, (...) the reviewability of decisions of public authorities by independent courts.' Francis Jacobs *The Sovereignty of Law: The European Way* Cambridge: Cambridge University Press (2007), p. 35. The Court itself called judicial review 'a constitutional guarantee forming part of the very foundations of the Community.' Joined cases C-402/05P and C-415/05P *Kadi v Council* [2008] ECR I-6351, para. 290.

100 See chapters 1 and 2 of this thesis.

the rule of law in its external relations at the national level, the rule of law conceptions in the Member States provide the elements and benchmarks which the Union uses in its external relations.

3.1.3 *The rule of law as a benchmark in and objective of the EU's external relations*

In the EU's external relations, the rule of law is used as a foreign policy objective (Articles 3(5) and 21 TEU) and as a benchmark to assess the actions and progress of (potential) candidate countries. It is a condition for membership (Article 49 TEU) and a condition for close(r) cooperation with the Union. The rule of law has come to increasingly permeate various instruments of EU external policies.¹⁰¹ Ever since the fifth paragraph of the Preamble to the Single European Act (1986) obliged the Member States to 'display the principles of democracy and compliance with the law and with human rights', the Union has attributed an exportable quality to its values, and the rule of law among these, in its external action. This is clear not only from the evolution of the relevant Treaty provisions, but also from the development of its external policies, in particular development cooperation and enlargement.

The EU advances the rule of law in a variety of ways, in various combinations simultaneously relying on technical and financial assistance instruments, bilateral instruments, political dialogue, or by making it an essential element of the contractual relationship.¹⁰² As an illustration, three of these ways, namely, the political dialogue in the context of the Cotonou Agreement, Regulation 231/2014, which provides for pre-accession assistance for candidate countries, and the inclusion of the rule of law as an element in a contractual essential elements clause, will be briefly discussed here in order to show some of the ways through which the EU relies on the rule of law in its external policies. The point here is merely to provide some examples in order to frame the discussion; detailed analysis of the relevant instruments will be undertaken in the respective case studies.

Political dialogues are a well-established practice¹⁰³ of the EU in its relations with third countries. Based on the rationale that '[t]he most effective way of achieving change is a positive and constructive partnership with

101 See for an example in relations to the European Neighbourhood Policy and the EU's relations with the Ukraine, Burlyuk (2014).

102 Cremona (2011), pp. 292-293; Karen E. Smith 'The Use of Political Conditionality in the EU's Relations with Third Countries: How Effective?' 3 *European Foreign Affairs Review* (1998), p. 256.

103 For criticism on the lack of positive developments stemming from this practice see, for example, European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy in the matter, (2010/2202(INI)), paras. 21 and 157

governments, based on ... support and encouragement',¹⁰⁴ the EU has focussed on dialogues primarily to promote respect for human rights, but also on issues linked to democracy and the rule of law. In fact, in the in 2004 updated Guidelines on Human Rights Dialogues with Third Countries, the rule of law is identified as one of the priority issues 'which should be included on the agenda for every dialogue'.¹⁰⁵ Some bilateral treaties include specific provisions to raise rule of law related issues in the context of the agreement. As an example, the Cotonou Agreement, which forms the framework for the EU's relations with 79 countries from Africa, the Caribbean, and the Pacific (ACP), stresses the pivotal role of dialogue¹⁰⁶ and commits the parties to 'regularly engage in comprehensive, balanced and deep dialogue'.¹⁰⁷ More importantly, the dialogue is also tailored to encompass a regular assessment of the developments concerning the rule of law.¹⁰⁸

Regulation 231/2014 (IPA II) is the instrument specifically designed for pre-accession assistance for (potential) candidate countries.¹⁰⁹ Its general objective is to support the applicant countries in adopting and implementing the political, institutional, legal, administrative, and economic reform required in order to comply with the Union's values and to progressively align to the Union's rules and standards, with a view to EU membership.¹¹⁰ The strengthening of the rule of law is a specific objective of the Regulation,¹¹¹ and from the list of thematic priorities listed in the annex it is apparent that the focus is on '[e]stablishing and promoting from an early stage the proper functioning of the institutions necessary in order to secure the rule of law.'¹¹² The rest of the paragraph makes clear that the intended interventions in this area should be aimed in particular at establishing independent, accountable, and efficient judicial systems. Progress towards achievement of the objectives set out in the Regulation is monitored and assessed, with the possibility of rewarding individual countries for particularly positive achievements.¹¹³

104 Commission Communication on The European Union's role in promoting human rights and democratisation in third countries, COM(2001) 252 final, 8 May 2001, p. 8.

105 EU guidelines on human rights dialogues with third countries – Update, p. 6, available at https://eeas.europa.eu/sites/eeas/files/eu_guidelines_on_human_rights_dialogues_with_third_countries.pdf.

106 Article 2 Cotonou Agreement.

107 Article 8(1) Cotonou Agreement.

108 Article 8(4) Cotonou Agreement.

109 Regulation (EU) No 231/2014 of the European Parliament and the Council of 11 March 2014 establishing an instrument for pre-accession assistance for the period 2014-2020, OJ[2014] L77/11. It replaced the IPA I Regulation, which covered the period 2007-2013, Council Regulation (EC) No 1085/2006 establishing an instrument for pre-accession assistance (IPA), OJ[2006] L210/82.

110 Article 1 Regulation 231/2014.

111 Article 2 Regulation 231/2014.

112 Annex II under (b) Regulation 231/2014.

113 Article 14 Regulation 231/2014.

Turning to the third example, since the 90s, the EU has progressively pushed for the systematic inclusion of an 'essential elements clause' in all of its agreements concluded with third countries.¹¹⁴ The clause marked the beginning of economic and political conditionality and became standard for bilateral association and cooperation agreements with other countries.¹¹⁵ As of 1995, inclusion of the clause is mandatory.¹¹⁶ Together with a suspension clause, which allows for the adoption of negative measures in cases of non-compliance or abuse of one of the essential elements, this has given the rule of law, next to the protection of human rights and democratic principles, a prominent place in the EU's bilateral instruments. For example, Article 9(2) of the Cotonou Agreement states:¹¹⁷

... The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law. Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, shall underpin the domestic and international policies of the Parties and constitute the essential elements of this Agreement.

This brief excursion into three different instruments demonstrates that the EU actively promotes the rule of law in its external relations, in line with Articles 3(5) and 21(1) TEU. However, the instruments themselves do not provide much insight into the EU's conception of the rule of law, let alone a comprehensive definition including minimum standards and benchmarks. For this reason, it is hard not to agree, for example, with the European Parliament when it called on the Council and the Commission to develop 'specific quantifiable indices and benchmarks' in relation to its political dialogues,¹¹⁸ for how else can the EU measure the effectiveness of its policies? Regarding the Union's external action more generally, schol-

114 European Commission, *Inventory of Agreements containing the Human Rights Clause*, DG RELEX/B2 – Treaties Office, 7 July 2011.

115 Der-Chin Horng 'The Human Rights Clause in the European Union's External Trade and Development Agreements' *European Law Journal* 9 (2003) 5, pp. 677-701.

116 Commission Report on the Implementation of Measures intended to Promote Observance of Human Rights and Democratic Principles, COM(95) 191 final, 22 July 1995, Annex 2; Council Conclusions 'Human Rights Clauses in Community Agreements with Third Countries', 1847th General Affairs Council, Luxembourg 29 May 1995.

117 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (Cotonou Agreement), OJ[2000] L317/3, revised in 2005, OJ[2005] L209/27, and 2010, OJ[2010] L287/04. The Agreement is revised every five years.

118 European Parliament resolution of 16 December 2010 on the Annual Report on Human Rights in the World 2009 and the European Union's policy in the matter, (2010/2202(INI)), para. 21.

arly literature¹¹⁹ and reports by NGOs¹²⁰ echo the Parliaments call. Thus, while the Union's active engagement with the rule of law in its external relations is evident in both primary and secondary EU law as well as from its practice, a clear conceptualisation of the notion flowing from the legal framework is missing.

3.1.4 *The rule of law as a guarantee for EU security*

According to Article 21(2)(a) TEU, the Union's objective to safeguard the rule of law as one of its values is linked to the protection of its fundamental interests, security, independence, and integrity. However, next to the Treaty's setting out of the objective of the rule of law's preservation through its external action, it also enounces the EU's general external aims¹²¹ of the consolidation and support for democracy, the rule of law, human rights and the principles of international law (Article 21(2)(b) TEU), as well as the preservation of peace, prevention of conflicts and the strengthening of international security (Article 21(2)(c) TEU). Ever since the development and consolidation of the rule of law was a specific intention of the Union's Common Foreign and Security Policy (CFSP, ex Article 11 EU), the EU has connected (some authors would say conflated¹²²) the 'progressive spread of the rule of law' to issues such as security, stability, and the absence of corruption and organised crime.¹²³ Furthermore, it has also increasingly come to recognise that internal and external aspects of EU security are intrinsically intertwined.¹²⁴ Or, in the words of the 2016 Global Strategy, 'our security at home entails a parallel interest in peace in our neighbouring

119 See for example Wennerström (2007), chapter 5; Burlyuk (2014), pp. 26-46.

120 Kenneth Roth, executive director of Human Rights Watch, stated in the organisation's 2011 World Report, that '[t]he [EU's] failure to set clear, public benchmarks is itself evidence of a lack of seriousness...'. Kenneth Roth 'A Façade of Action: World Report 2011. Events of 2010.' New York: Seven Stories Press (2011), p. 4.

121 See case Case C-130/10 *Parliament v Council*, EU:C:2012:472, 19 July 2012, para. 62. The case provides post-Lisbon insights into the question of the delineation of specific CFSP aims in terms of the EU's foreign policy and issues of the Union's security, and the Union's external objectives more generally. For analysis, see Christophe Hillion 'A Powerless Court? The European Court of Justice and the Common Foreign and Security Policy' in Marise Cremona & Anne Thies (eds) *The European Court of Justice and External Relations Law* Oxford: Hart Publishing (2013), pp. 47-70 at 58-65.

122 Konstadinides (2017), p. 146. On the conflation of the rule of law and law and order generally, see Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad. In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 31-73 at 39-42.

123 European Council 'European Security Strategy – A Secure Europe in a Better World' 12 December 2003.

124 EU Global Strategy (2016), p. 14; Commission Communication on The EU internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010) 673 final, 22 November 2010; Commission Communication on A strategy on the external dimension of the area of freedom, security and justice, COM(2005) 491 final, 12 October 2005, p. 5.

and surrounding regions.¹²⁵ Efficient border management is vital to fight cross-border trafficking in drugs, women, and illegal immigrants, and its potential links with terrorism. Security is fundamental to international business transactions and to tackling cross-border crime.¹²⁶

For the EU, the rule of law has a dual purpose, which is related to the value's immediate connection to security and law and order objectives. First, a rule of law-based society is more stable, less sensitive to crime, and better able to protect the lives and property of its citizens domestically. Secondly, the assumption is that societies that place a high emphasis on law and order will more readily cooperate in order to adopt a common approach against foreign threats. This much is apparent from the Commission's Strategy on the External Dimension of the Area of Freedom, Security and Justice (AFSJ), in which it is stated that societies based on the rule of law 'will be more effective in preventing domestic threats to their own security as well as more able and willing to cooperate against common international threats.'¹²⁷ In addition to attributing this particular causal understanding of the rule of law, the EU has construed its notion of security in increasingly wide terms, clearly illustrated by the European Security Strategy, the Internal Security Strategy,¹²⁸ and their follow-up reports.¹²⁹ The latter set out the security challenges facing the Union, both internally and externally, in terms of terrorism, regional conflicts, state failure, and organised crime. The policies covered by the AFSJ are relevant to almost all of these challenges.¹³⁰

The way the notion of the rule of law is used by the Union in the context of the protection of its own values and security, unquestionably

125 EU Global Strategy (2016), p. 14.

126 Commission Communication on A strategy on the external dimension of the area of freedom, security and justice, COM(2005) 491 final, p. 4.

127 *Ibid.*, p. 5.

128 Council 'Internal Security Strategy for the European Union: Towards a European Security Model', 23 February 2010; Commission Communication on The EU internal Security Strategy in Action: Five steps towards a more secure Europe, COM(2010) 673 final, 22 November 2010.

129 On the European Security Strategy, see the Report on the Implementation of the European Security Strategy - Providing Security in a Changing World, drafted under the responsibility of EU High Representative Solana and adopted by the European Council, Brussels, 11 December 2008. On the Internal Security Strategy, see Commission Communication on First annual report on the implementation of the EU Internal Security Strategy, COM(2011) 790 final, 25 November 2011; Commission Communication on Second report on the implementation of the EU Internal Security Strategy, COM(2013) 179 final, 10 April 2013; Commission Communication on The final implementation report on the implementation of the EU Internal Security Strategy 2010-2014, COM(2014) 365 final, 20 June 2014.

130 Therefore, development in the area of the Internal Security Strategy is done so 'with the guidance of the Stockholm Programme', Commission Communication 'The EU internal Security Strategy in Action: Five steps towards a more secure Europe', COM(2010) 673 final, 22 November 2010, p. 2.

demonstrates an instrumental approach,¹³¹ *i.e.* the rule of law is understood as a means to the realisation of security-related ends (without necessarily making explicit what the exact relationships are between the rule of law and those end goals, or how these will be achieved). Strengthening the rule of law is seen as a means to achieving social order, secure environments, and good governance, which in turn will make states and peoples better able to withstand criminal activity, better able to handle economic failure without this turning into a political problem or violent conflict, and better able to fight signs of corruption, abuse of power and lack of government accountability. Moreover, within the broader security context, the Global Strategy makes it clear that the EU applies a similar instrumental rule of law-approach to more economic goals, such as prosperity, increased investments, and trade. It is the assumption that these, in turn, will also help foster more stable and resilient societies.¹³² In this way, the consolidation and strengthening of the rule of law is seen as the main catalyst for stability and prosperity underlying the Union's multi-dimensional approach to security in the wider world.¹³³

This instrumental approach towards the rule of law is confirmed by the EU concept of Security Sector Reform (SSR) in the context of Common Security and Defence Policy (CSDP) operations. According to the Council, SSR 'seeks to increase the ability of a state to meet the range of both internal and external security needs in a manner consistent with democratic norms and sound principles of good governance, human rights, transparency and the rule of law. It concerns not only state stability and regime security of nations, but also the safety and well-being of their people.'¹³⁴ CSDP action to support SSR is set up to contribute to the goal of reaching a situation where the security of a state is effectively organised, ensuring the protection of citizens through democratic oversight and well-functioning state institutions.¹³⁵

The central function of the rule of law in CSDP missions was recognised by the 2000 Feira European Council, identifying strengthening of the rule of law as one of the four priority areas to enhance the Union's capability in civilian aspects of crisis management.¹³⁶ So far, three such missions have

131 Walker (2009), p. 120. For a wide-ranging discussion of the growth of legal instrumentalism, see Brian Z. Tamanaha *Law as a Means to an End: Threat to the Rule of Law* Cambridge: Cambridge University Press (2006).

132 EU Global Strategy, pp. 26-27.

133 *Ibid.*, p. 28.

134 'EU Concept for ESDP support to Security Sector Reform', Doc. 12566/4/05 REV, 13 October 2005, pnt. 17.

135 *Ibid.*, pnt. 25.

136 The other three priority areas are: policing, strengthening civilian administration, and civil protection. 'Study on concrete targets of civilian aspects of crisis management', Presidency Conclusions, Santa Maria da Feira European Council, 19-20 June 2000, Appendix 3.

been carried out:¹³⁷ in Georgia (EUJUST THEMIS),¹³⁸ Iraq (EUJUST LEX),¹³⁹ and Kosovo (EULEX KOSOVO).¹⁴⁰ The three missions differ in scope and ambition. The mission in Georgia was of limited size, lasted for a year, and dealt mostly with guidance for criminal justice reform and support for planning of new legislation, such as a Criminal Procedure Code. The mandate for the operation in Iraq was completed by 31st December 2013. It focussed mostly on addressing the urgent needs in the Iraqi criminal justice system through providing training for high and mid-level officials in senior management and criminal investigation.¹⁴¹

The EULEX mission in Kosovo has been set up to assist the judicial authorities and law enforcement agencies in their progress towards sustainability and accountability, and in further developing multi-ethnic institutions, free from political interference.¹⁴² In order to fulfil its objectives, the mission shall implement a number of measures related to a wide area, amongst others: monitoring of the competent institutions on all areas related to the wider rule of law; ensuring the maintenance and promotion of the rule of law, including public order and security; ensuring that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes, are properly investigated, prosecuted, adjudicated and enforced; contributing to the fight against corruption, fraud and financial crime, and organised crime.¹⁴³

To conclude, even though this section is far from comprehensive in its treatment of security issues in relation to the rule of law and the European Union, the various policy areas involved in the development of the EU's security concept demonstrate that for the EU, the rule of law is vital for the protection of its own interests. It was shown that the Union has adopted an instrumental understanding of the rule of law; underlying its security policy is the assumption that by promoting the rule of law there will be economic prosperity, which in turn will foster stability and, thus, increase security. It was shown that for the Union, the surest way of improving its own security is through rule of law reform both abroad and at home.

137 For a detailed overview of all CSDP civilian missions see Panos Koutrakos *The EU Common Security and Defence Policy* Oxford: Oxford University Press (2013), pp. 133-182.

138 Council Joint Action 2004/532/CFSP of 28 June 2004 on the European Union Rule of Law Mission in Georgia, EUJUST THEMIS, OJ[2004] L228/21.

139 Council Joint Action 2005/190/CFSP of 7 March 2005 on the European Union Integrated Rule of Law Mission for Iraq, EUJUST LEX, OJ[2005] L62/73.

140 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, OJ[2008] L42/92.

141 Article 2, Council Joint Action 2005/190/CFSP, OJ[2005] L62/73.

142 Article 2, Council Joint Action 2008/124/CFSP, OJ[2008] L42/92.

143 Article 3, Council Joint Action 2008/124/CFSP, OJ[2008] L42/92.

3.1.5 Focus of the thesis

Having discussed the four functions of the rule of law in the EU, it should be pointed out that there is an extent of overlap between them, whereby the second function, the rule of law as a common value found within all the Member States, fulfils a pivotal role. As it was shown, the existence of the rule of law within the constitutional traditions of the Member States ensures the functioning of the EU's policies by guaranteeing the mutual legal interdependence and mutual trust among its members, thereby underpinning the whole of the EU's legal order. Furthermore, it was demonstrated that this function of the rule of law also fulfils a more instrumental purpose: the national traditions form the source for the EU's claim to this value as a foundational one (the first function), and, subsequently, they are a point of reference for the Union's own conceptualisation of the rule of law, particularly so when it comes to rule of law promotion in third countries. After all, the value which inspired the EU's own creation and development as a democratic system of governance based on the law,¹⁴⁴ can be legitimately exported to third parties¹⁴⁵ (the third function). Indeed, this is shown by Article 21(1) TEU, in which the Treaty directly links the internal and external dimension of the rule of law: the principles which have inspired the EU's own creation, development and enlargement, are to be advanced in the wider world.

In addition to the close connections between the rule of law as a value common to the Member States on the one hand, and the rule of law as an EU foundational value and as a yardstick in its external relations on the other, obvious similarities can be identified between the latter (the third function) and the way the Union makes use of the rule of law in order to guarantee its own security (the fourth function). Not limited to it – placed as it is under the '*General provisions on the Union's external action*' (emphasis added), Article 21(2)(a)-(c) TEU reflects the text of the former provision on the specific aims of the CFSP.¹⁴⁶ However, while this suggests, at least in relation to the aim of the consolidation of and support for the rule of law (Article 21(2)(b) TEU), an overlap of objectives of both rule of law functions, a distinction should be drawn. Where the third function is concerned with the particular aim of upholding and promoting (Article 3(5) TEU) and consolidating and supporting (Article 21(2)(b) TEU) the rule of law *per se* in the EU's external relations in general, in the fourth function, the advancement of the rule of law is used to other ends, tied to security and ideals of law and

¹⁴⁴ Opinion 1/91 *EEA Agreement* [1991] ECR 6097, para. 1.

¹⁴⁵ Konstadinides (2017), p. 77.

¹⁴⁶ Leading Advocate General Bot to suggest that 'action by the European Union on the international stage which pursues one or more of the objectives referred to in Article 21(2) (a) to (c) TEU, in particular the objective of preserving peace and strengthening international security, must be regarded as falling within the sphere of the CFSP.' Opinion of Advocate General Bot in Case C-130/10 *Parliament v Council*, para. 64.

order (both nationally, transnationally, and internationally), whereby those goals are often equated with rule of law promotion.

Turning back to the research question outlined above, *i.e.* the EU's conceptualisation of the rule of law in its external relations, and, more particularly, the question whether, and if so to what extent, there is a difference between theory and practice, as well as the follow-up question whether a common EU rule of law concept is apparent in its practice, it is evident that the focus of the thesis lies squarely within the third rule of law function. However, at the same time, the study takes as its point of departure the national understandings of the rule of law (the second function) from which the building blocks for the EU's understanding can be distilled. These components and sub-components will then be analysed against the background of legal theory. This analytical framework will then be tested against the backdrop of two specific case studies: the EU's development cooperation policy and enlargement policy.

3.2 Delineating the research field: the two case-studies

The delineation of the thesis to development cooperation and enlargement gives rise to two interlinked questions: why two case studies, and why these two case studies in particular? Case study research can bring an understanding of a complex issue, emphasising detailed contextual analysis of a limited number of conditions and their relationships. It adds to and extends what is already known through previous research, in this case the abundant materials and analyses related to the notion of the rule of law, both from the point of view of theory as well as that of practice. As indicated previously, on the intersection of the extensive rule of law and EU external relations literature, a detailed comparative contextual analysis of the EU's conceptualisation of the rule of law as it is advanced through its external action is absent, necessarily limiting the ensuing findings to the field from which they arose.

By way of contrast, this work tests its theoretical rule of law framework against two different case studies. This provides a sounder methodological basis for drawing more general conclusions about the external EU concept of the rule of law. Furthermore, existing research is limited to an ad hoc analysis of (few) documents, rather than on an in depth comprehensive study of all relevant material. In contrast, this work provides a detailed and in-depth analysis of all relevant material stemming from the inception of the relevant policy areas to current practice. By doing so, the thesis provides not only a comprehensive exposition of the topic, but also an insight into the possible evolution of the concept of the rule of law over time. Furthermore, the comparative approach allows for the drawing of conclusions about the possible contextual insight the EU might have attempting to strengthen the notion in these two external policy areas. In other words, does the EU promote the same interpretation of the concept in the two case studies, or does it allow for variations, thereby demonstrating a more nuanced understanding of the rule of law in its particular policies.

A few words on the reasons underpinning the choice of these particular two case studies. Both have a long-standing connection to the rule of law, at the level of EU primary law and through its practice. Ever since its insertion in the Treaty, development cooperation has included the development of the rule of law specifically as one of its policy objectives (Article 177(2) EC; ex 130u EEC). In addition to this, the EU has turned to the rule of law as a condition for development cooperation, see, for example, the rule of law related provisions in the Cotonou Agreement, outlined above. In relation to enlargement, Article 49 TEU formally links EU membership to respect of the rule of law; a codification of existing practice before this link was explicitly recognised in the provision.¹⁴⁷

In relation to the Union's development cooperation policy, the reasons for inclusion are manifold. To start with, its development policy stretches back as far as the EU itself; the weight of colonial inheritance forced the Union from its very inception to deal in a common fashion with the countries and territories under the Member States' respective national jurisdiction.¹⁴⁸ Over time, the EU has built up a unique and impressive record of development cooperation activities. Currently, the EU and its Member States collectively are the world's leading donor, providing over 50% of all global development aid.¹⁴⁹ The EU has been steadfast in the acknowledgement of its responsibility to take on the challenges posed by the eradication of poverty and sustainable development in the developing world.¹⁵⁰ Moreover, in addition to that more general goal, the Union has from early on indicated it wishes to use its place in the international arena as a vehicle for advocating the values it considers important, the rule of law included.¹⁵¹ This also holds true for its development cooperation policy.¹⁵²

147 Bruno de Witte & Gabriel N. Toggenburg 'Human Rights and Membership of the European Union' in Steve Peers & Angela Ward (eds) *The European Union Charter of Fundamental Rights* Oxford: Hart Publishing (2004), pp. 59-82 at 60.

148 Enzo R. Grilli *The European Community and the Developing Countries* Cambridge: Cambridge University Press (1993), p. 1.

149 https://ec.europa.eu/europeaid/policies/european-development-policy_en.

150 Acknowledging its 'moral' obligation, the 2006 European Consensus on Development expresses: 'The EU, both at its Member States and Community levels, is committed to meeting its responsibilities. Working together, the EU is an important force for positive change. The EU provides over half of the world's aid and has committed to increase this assistance, together with its quality and effectiveness.' Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Development Policy: 'The European Consensus' OJ[2006] C46/01, pnt. 2.

151 Karin Arts & Anna K. Dickson 'EU Development Cooperation: From Model to Symbol?' in Karin Arts & Anna K. Dickson (eds) *EU Development Cooperation: From Model to Symbol* Manchester: Manchester University Press (2009), pp. 1-16 at 1.

152 See for example a 1982 Commission Memorandum on the then Community's development policy: 'Development policy is a cornerstone of European integration ... Today it is a manifestation of Europe's identity in the world at large and a major plank in the Community's external policies generally.' Commission Memorandum on the Community's development policy, COM(82) 640 final, 5 October 1982, p. 8.

Recently, in the New European Consensus on Development, a joint statement by the EU institutions and the representatives of the governments of the Member States meeting within the Council, expressed that:

The EU and its Member State will promote the universal values of democracy, good governance, the rule of law and human rights for all, because they are preconditions for sustainable development and stability, across the full range of partnerships and instruments in all situations and in all countries, including through development action.¹⁵³

Furthermore, the EU utilises in its development cooperation, next to bilateral, regional, and multilateral agreements, a number of financial instruments, such as the European Instrument for Democracy & Human Rights (EIDHR),¹⁵⁴ the Development Cooperation Instrument (DCI),¹⁵⁵ and the European Development Fund (EDF).¹⁵⁶ Subsequently, this policy area provides a large variety of legal instruments that can be tested against the analytical framework. However, one of the most important reasons for the inclusion of this case study in the thesis lies in the existence of the ACP-EU Partnership Agreement, signed in Cotonou on 23 June 2000 and concluded for a 20-year period from 2000-2020.¹⁵⁷ It is the most comprehensive and sophisticated partnership between developing countries and the EU. It builds on the previous Yaoundé and Lomé Conventions and has been the framework for the EU's relations with 79 countries from Africa, the Caribbean and the Pacific since 2000. Combining political dialogue with cooperation on trade and development, the agreement is based on shared principles and values, including the rule of law. Designated by the Commission as 'one of the most important facets of the European Union's external activities',¹⁵⁸ the EU-ACP relationship has been described in the literature as 'the most

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- 153 Joint statement by the Council and the representatives of the Governments of the Member States meeting within the Council, the European Parliament and the European Parliament 'The New European Consensus on Development 'Our World, Our Dignity, Our Future' OJ[2017] C210/1, pnt. 61.
 - 154 Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, OJ[2014] L77/85.
 - 155 Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014-2020, OJ[2014] L77/44.
 - 156 Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, OJ[2015] L58/17.
 - 157 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (Cotonou Agreement), OJ[2000] L317/3, revised in 2005, OJ[2005] L209/27, and 2010, OJ[2010] L287/04.
 - 158 Commission Green Paper on Relations between the European Union and the ACP countries on the Eve of the 21st Century – Challenges and Options for a New Partnership' COM(96) 570 final, 20 November 1996.

important area of [value] promotion',¹⁵⁹ as well as 'the most visible and important component of the EU development cooperation programme'.¹⁶⁰ Indeed, the highly institutionalised system of the EU-ACP relationship has formed the model for the Union's relations with other third countries and regional areas and is thus exemplary for the EU's development cooperation policy more generally.¹⁶¹ Moreover, it is also in the EU's relations with the ACP countries that a distinctive EU approach to development policy is most apparent.¹⁶² Lastly, it should be mentioned that it is in the context of the Cotonou Agreement and in relation to its essential elements clause that the Commission has proffered one of its very sparse definitions of the rule of law.

Regarding the inclusion of the EU's enlargement policy as the second case study, it should be stated that enlargement is one of the most advanced and successful¹⁶³ areas of EU foreign policy.¹⁶⁴ The development of the regulatory intensive (enhanced) pre-accession process with the documents related to the assessment of the rule of law as one of the political Copenhagen criteria, such as the opening, interim, and closing benchmarks and the annual country assessment reports, are a very rich and detailed source of information for the analysis of the EU's conception of the rule of law. Furthermore, the evolving nature of the policy itself, through the rounds of enlargement that have occurred over time, gives an insight into the development of the concept of the rule of law. More particularly, by focusing on this

159 Gorm Rye Olsen 'The European Union: An Ad Hoc Policy with a Low Priority' in Peter Schraeder (ed) *Exporting Democracy: Rhetoric vs. Reality* Boulder CO: Lynne Rienner (2002), pp. 131-145 at 138.

160 Arts & Dickson (2009), p. 1.

161 Charlotte Bretherton & John Vogler *The European Union as a Global Actor* London: Routledge (1999), p. 135; Karen E. Smith 'The ACP in the European Union's Network of Regional Relationships: Still Unique or Just One in the Crowd?' in Karin Arts & Anna K. Dickson (eds) *EU Development Cooperation: From Model to Symbol* Manchester: Manchester University Press (2009), pp. 60-79 at 60.

162 Bretherton & Vogler (1999), p. 135.

163 Report of Wim Kok to the European Commission 'Enlarging the European Union. Achievements and Challenges' *European University Institute* (2003), p. 66.

164 On the question whether enlargement can be considered an area of EU foreign policy, it should be said that while some authors, mostly from the field of political science, have pointed to the fact that enlargement is ultimately a passing phase in a longer process which domesticates what were previously foreign relations, the commonly held opinion in scholarly literature is that is foreign policy nature is a given. See Christophe Hillion 'The Creeping Nationalisation of the EU Enlargement Policy' *Swedish Institute for European Policy Studies* No. 6 (2010), p. 7; Marise Cremona 'Enlargement: A Successful Instrument of Foreign Policy?' in Takis Tridimas & Paolisa Nebbia (eds) *European Union Law for the Twenty-First Century: Volume 1. Rethinking the New Legal Order* Oxford: Hart Publishing (2004), pp. 397-413; Karen E. Smith & Helene Sjursen 'Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement' in Thomas Christiansen & Ben Tonra (eds) *Rethinking EU Foreign Policy. Europe in Change* Manchester: Manchester University Press (2004), pp. 126-141; Helene Sjursen 'Enlargement and the Common Foreign and Security Policy: Transforming the EU's External Policy?' *ARENA Working Papers* No 18 (1998).

highly developed area, it would be possible for example to identify whether and to what extent the concept of the rule of law has been informed by the problems following the accession of Romania and Bulgaria. Additionally, considering the fact that enlargement prepares applicant states for accession, and thus for the status of Member State, one would expect the EU to have a highly specific understanding of the (level of) rule of law it wants applicant states to achieve.

The inclusion of these two policy areas in the case studies and their particularities – developing and developed countries, weak states and highly developed aspirant Member States, to name a few – provide a sound methodological basis on which general conclusions about the EU external rule of law concept can be drawn.

4. STRUCTURE

This section will explain the structure of the thesis. The aim of Part I, consisting of chapters 1 and 2, will be to provide the rule of law analytical framework. As mentioned above, 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’. Therefore, the traditions of the Member States form the point of departure for exploring the theoretical definition of the rule of law in chapter 1. For this purpose, 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) will be examined. It will be proven that although there is no common definition of the concept, a number of common elements can be identified. The next chapter (chapter 2) will then proceed 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 will be concluded that, indeed, the common elements found in the legal systems of the three Member States analysed, are also to be located in the literature, albeit the case that some elements have been given more attention than others.

Following this, and in order to facilitate the discussion in the case studies, Part I of the thesis will end with the introduction of the analytical framework. It will be asserted that the elements can be categorised as follows: *formal*, *procedural*, and *institutional* – whereby 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, in Part II, the following two chapters will examine 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, the analytical framework will be tested against the background of two case studies, namely the EU’s development cooperation policy (chapter 3)

and its enlargement policy (chapter 4). Chapters 3 and 4 will examine the development and use of the rule of law with detailed reference to the relevant EU legal framework, instruments, and policy in the respective policy areas.

The final, and concluding, chapter of the thesis will then analyse the findings of the case studies in relation to the analytical framework. It will be argued that, while in theory there is an emphasis on the formal and procedural aspects of the rule of law, in practice, the EU accords weight primarily to the procedural and institutional aspects of the rule of law, conceptualising the rule of law strongly in terms of an anatomical approach of judicial reform – an aspect that is downplayed both in legal theory and at the national level. It will be claimed that the divergence between the analytical framework and the findings in the case studies reflects the discrepancy between the stages of development of the legal systems the concept originates from and the legal systems to which it is supposed to apply. While the theoretical definition comes from legal systems that are highly developed, and therefore the institutional aspect is implicitly inherent to their conceptualisations of the rule of law and the procedural aspects build on a long tradition, in practice the legal systems of the third states lack the prerequisite institutional and procedural foundations for the rule of law. Thus, in practice the emphasis is on the development of those aspects that do not feature prominently in relation to the notion as expounded by legal doctrine. Additionally, it will be asserted that these findings can be further explained on the basis of the methodologies underlying both the EU's development cooperation policy as well as the enlargement policy. The assessment of progress strongly relies on benchmarks and indicators against which developments can be measured. It will be claimed that, while this is to some extent necessary, it also prioritises 'measurable elements' over others. Finally, it will be argued that the EU frequently conflates its instrumental use of the rule of law in order to achieve self-serving security related ends, with rule of law reform in third countries, both in the context of development cooperation as well as in enlargement.

5. CONTRIBUTION TO LEGAL SCHOLARSHIP

The framework, structure, and analysis of this thesis offer an original perspective to the growing debate concerning the rule of law in EU external relations. More particularly, the contribution of the present thesis is twofold. First, it answers the question of how the EU conceptualises the rule of law in two core fields of its external relations. As discussed above, this has been identified as an important gap in the literature, and the thesis aims to fill this gap. Secondly, by doing so, the thesis feeds into two distinct debates that touch upon the rule of law: the debate pertaining to the EU's identity as a global normative power, and the emerging debate on the EU's internal rule of law.

The EU's identity as a global actor is firmly anchored in a distinct normative and political agenda.¹⁶⁵ Apart from an economic power, the Union has consistently portrayed itself as a virtuous normative power committed to the promotion of the rule of law, democracy, and human rights, both internally and externally. In recent years the use by the EU of its economic clout as a tool, in order to export its standards and values (including the rule of law), has gained much scholarly attention.¹⁶⁶ However, the discussion has proceeded largely along theoretical lines, and it has been acknowledged that the lack of evidence as to what the EU actually does on the ground leaves little room for scholars to make accurate statements about what kind of power the EU actually is.¹⁶⁷ By providing a clear picture of what the EU understands as 'rule of law' in its reform activities in the fields of development cooperation and enlargement, the thesis furnishes concrete evidence in order to assess what kind of normative power the Union really is. This could be used in the context of this debate in order to further investigate whether, and if so, to what extent, there is a gap between EU identity rhetoric and actual practice.

In relation to the second debate, ever since the European Commission's Communication on the new EU framework to strengthen the rule of law,¹⁶⁸ a significant body of literature has materialised analysing the concrete legal bases and instrument the EU may avail of enforcing the rule of law internally.¹⁶⁹ The current debate is mostly limited to the pitfalls of internal rule of law oversight mechanisms,¹⁷⁰ leaving the role of the Union's pre-accession process in the emerging systemic threat to the rule of law largely unexplored. However, in reality the consolidation of the rule of law in new Member States is supposed to occur at a much earlier stage, *i.e.* during the pre-accession process. By highlighting the pitfalls of the rule of law definition in enlargement, the thesis raises the question as to whether the current

165 Guy Harpaz & Eyal Rubinson 'The Interface between Trade, Law and Politics and the Erosion of Normative Power Europe: Comment on Brita' 35 *European Law Review* (2010), pp. 551-570. Further, see Burlyuk (2014); Cremona (2011); Aggestam (2008); Lucarelli (2006); Marise Cremona 'The Union as a Global Actor: Roles, Models and Identity' 41 *Common Market Law Review* (2004), pp. 553-573.

166 See for example Jan Wouters, Axel Marx, Dylan Geraets & Bregt Natens (eds) *Global Governance through Trade. EU Policies and Approaches* Cheltenham: Edward Elgar (2015)

167 Chad Damro 'Market Power Europe and New EU Trade Policies' in Jan Wouters, Axel Marx, Dylan Geraets & Bregt Natens (eds) *Global Governance through Trade. EU Policies and Approaches* Cheltenham: Edward Elgar (2015), pp. 19-42 at 21.

168 Commission Communication on A new EU Framework to strengthen the Rule of Law, COM(2014) 158 final/2, 19 March 2014.

169 Recently, see Konstadinides (2017); Kochenov (2017); Schroeder (2016); Closa and Kochenov (2016); Barbou des Places (2016); Kochenov and Pech (2015); Douglas-Scott (2015), pp. 51-66; Bogdandy and Ioannidis (2014).

170 See for example Kochenov & Bárd (2018); Hillion (2016), p. 59; Closa and Kochenov (2016), pp. 173-196.

value crises could partially relate to the ways in which the EU attempts to consolidate the rule of law in the applicant States through its enlargement policy; an aspect of the debate that has been hitherto largely overlooked.

6. METHODOLOGY

This thesis will describe the rule of concept within the context of two case studies in the field of EU external relations: development cooperation and the Union's accession policy, from the very first enlargement round until Croatia's enlargement in July 2013 and the ongoing monitoring of the current candidate countries, Albania, the Former Yugoslav Republic of Macedonia, Montenegro, Serbia and Turkey, as well as the potential candidate countries Bosnia and Herzegovina, and Kosovo.

The undertaken research relies heavily on two types of source material. For the theoretical chapter, the main sources come from academic literature. While there is an abundance of theoretical material on the rule of law in general, there is less in existence on the rule of law in connection to the EU, although this seems to be growing at a steady pace, reflecting the increased importance of the topic. For the case studies, the research is based on the relevant documents produced by the EU institutions, such as Conclusions of the Council and the European Council, Commission Communications and monitoring reports, Country and regional Strategy Papers, reports and resolutions of the European Parliament, as well as Accession Partnerships and European Partnerships, and Agreements.

A final note on terminology. The Treaties refer to the rule of law both as a value (Article 2 TEU) and as a principle (the TEU Preamble), even within the same provision (Article 21 TEU, also see the Preamble of the EU Charter on Fundamental Rights). Interestingly, since the Lisbon revision, the rule of law has changed from a foundational principle (Article 6 EU), into a foundational value (Article 2 TEU). Considering this term change, Von Bogdandy makes the appealing argument that the tenets laid down in Article 2 TEU, although denoted as values, are to be understood as legal norms and founding principles. And since the values of Article 2 TEU produce legal consequences, as demonstrated by Articles 7 and 49 TEU, they are legal norms and thus principles.¹⁷¹ In a nutshell, values can be characterised as ethical convictions of a given society: 'Everything social actors appreciate, appraise, wish to obtain, recommend, set up or propose as an ideal, can be considered as a value.'¹⁷² Every value has an object, *i.e.* that which is valued, and can be qualified by a judgment as valuable or as good or bad,

171 Armin von Bogdandy 'Founding Principles of EU Law: A Theoretical and Doctrinal Sketch' 16 *European Law Journal* (2010), pp. 95-111 at 106.

172 Daphna Oyserman 'Sociology of Values' in Smelser & Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* (2001), p. 16153.

desirable or not. Values are often bound together, interdependent and might be difficult to separate. The more a value is deeply rooted, the more it takes a central place in the system. If on the one hand values make up the background of the value-system of the lawmakers, principles belong to the field of the law itself.

There are many possible ways of characterising principles: as legal norms, as general legal norms, or as standards upon which legal rules should be based. Underlying this is the idea of principles providing standardised manners of behaviour for subjects of law. Principles give the reasons for arguing in a certain direction, without necessitating a particular decision. Intersecting principles must be resolved on their relative weight, their importance. The difference between values and principles lies in the fact that values sustaining a legal system have their origin in either social or political discourse and might therefore have a different scope. As such, values and principles constitute different categories, with the former operating as meta-norms in relation to the latter.

If values are understood as the identity-constitutive dimension of the Union, principles can be taken as indicative of an 'activation' of the common values in the Union's external relations.¹⁷³ Thus, in the various external policies and actions, foundational values take the shape as principles, revealing the more active aspect.¹⁷⁴ Values say something about the moral, cultural and political underpinnings of a polity, putting them into practice gives them the characteristic of guiding principles. A value refers to a particular idea that is cherished and grounded in the identity of a specific community.¹⁷⁵ In that sense it can be seen that the mention of safeguarding of values in the second paragraph of Article 21 TEU, refers to the safeguarding of the Union's own identity, independence and security. Values can

173 Fernandez Esteban distinguishes between values and principles on the grounds that a value is of a more indeterminate configuration, whereas principles possess a more confined structure, which makes them more suitable for the creation of legal rules through judicial adjudication. Maria Louisa Fernandez Esteban *The Rule of Law in the European Constitution* The Hague: Kluwer Law International (1999), pp. 38-39.

174 The background of Article 21 TEU is particularly interesting in this regard. During the European Convention in 2002, the Working Group on External Action VII under the heading 'Principles and Objectives of EU External Action' (CONV 459/02), recommended the text of the provisions, solely referring to values in the first and second paragraph. The Draft constitutional Treaty used both principles and values in paragraph 1 ('the principles which have inspired its own creation', and 'the Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations, which share these values') and values in paragraph 2. In the version of the Draft Constitutional Treaty, after editorial and legal adjustments by the Working Party of IGC Legal Experts (CIG 50/03), the reference to values in the second half of the first paragraph had been altered to 'these principles', preserving internal consistency in the Article. See further Cremona (2004), pp. 4-6.

175 Helen Sjursen & Karen E. Smith 'Justifying EU Foreign Policy: The Logics Underpinning EU Enlargement' *Arena Working Paper* WP01/1, p. 3.

be promoted across the Union's own borders, but the shape in which this promotional action takes place is by virtue of principles, as the same Article mentions in paragraph 1.¹⁷⁶

176 The TEU follows mostly the same reasoning, starting in the Preamble with a mention of the Union's values in the context of the cultural, religious and humanist inheritance of Europe, while subsequently mentioning the attachment to the principles (both including the rule of law). Whereas Article 2 TEU lists the EU's foundational values, Article 3 TEU seems to deviate from the value/principle set up. However, Article 3(1) TEU with the reference of to the promotion of peace, values and the well-being of the Union's citizens, can easily be read in the light of the EU's internal objectives, especially when considering that paragraph 5 relates to the Union's relation with the wider world, while still referring to the internal values. The same logic can be applied to Article 21 TEU, where paragraph 2(a) refers to the safeguarding of the Union's own internal values and interests and both paragraphs 1 and 2(b) mention the role of the principles in the EU's external relations.

PART I

1 | The common core of the rule of law: the concept in the most prominent legal systems of the EU

1. INTRODUCTION

The aim of this thesis is to determine whether, and to what extent, the European Union has adopted a coherent 'rule of law' concept in its external relations through two case studies, namely development cooperation and enlargement. However, from the outset, some sort of explanation of what the rule of law is, or should be, needs to be provided in order for any meaningful analysis and comparison to take place. As pointed out in the introduction, the EU Treaties do not provide a definition of the rule of law, nor lay down any applicable standards. The Treaty on European Union does, however, provide a foothold for further enquiry, by stating that the rule of law is a value 'common to the Member States'.¹ It follows from this that the national constitutional conceptions necessarily inform the EU's interpretation of the rule of law. This proposition is further supported by the fact that, tasked by the Member States to promote and consolidate the rule of law in its external relations,² the Union sets the rule of law as a standard, not at the

1 Article 2 TEU.

2 Articles 3(5) and 21 TEU.

international level,³ but at the national level of states.⁴ Thus, since the rule of law originally developed to be applied to and within states⁵ as an ideal for legal systems,⁶ examining the common rule of law features should start at the national level.

Accordingly, the primary focus of this chapter is to elucidate the common core of the concept of the rule of law by comparing the three most prominent European legal systems,⁷ namely the German *Rechtsstaat*, the

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- 3 For the rule of law as a standard for international legal systems see for example Geert De Baere, Anna-Louise Chané & Jan Wouters 'Assessing the Contribution of the International Judiciary to the Rule of Law: Elements of a Roadmap' *Working Paper Leuven Centre for Global Governance Studies* No. 157 (2015); Ian Hurd 'Three Models of the International Rule of Law' 23 *Revista de Filosofia Eidos* (2015), pp. 37-48; Michael Zürn, André Nollkaemper & Randall Peerenboom (eds) *Rule of Law Dynamics. In an Era of International and Transnational Governance* Cambridge: Cambridge University Press (2014); James Crawford *Chance, Order, Change: The Course of International Law* The Hague: Hague Academy of international Law (2014), pp. 342-371; Jeremy Waldron 'Are Sovereigns Entitled to the Benefit of the International Rule of Law' 22 *European Journal of International Law* (2011), pp. 315-343; Stéphane Beaulac 'The Rule of Law in International Law Today' in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 197-223; Simon Chesterman "'I'll Take Manhattan": The International Rule of Law and the United Nations Security Council' 1 *Hague Journal on the Rule of Law* (2009), pp. 67-73; André Nollkaemper 'The Internationalized Rule of Law' 1 *Hague Journal of the Rule of Law* (2009), pp. 74-78; Simon Chesterman 'An International Rule of Law?' 56 *American Journal of Comparative Law* (2008), pp. 331-362; Philip Allott *Towards the International Rule of Law* London: Cameron May (2005); Terry Nardin 'Theorising the International Rule of Law' 34 *Review of International Studies* (2004), pp. 385-401; Andrea Bianchi 'Ad Hocism and the Rule of Law' 13 *European Journal of International Law* (2002), pp. 263-272; Ian Brownlie *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations* The Hague: Martinus Nijhoff (1998); Arthur Watts 'The International Rule of Law' 36 *German Yearbook of International Law* (1993), pp. 15-45.
- 4 Amichai Magen 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' 45 *Stanford Journal of International Law* (2009), pp. 51-115 at 70-71.
- 5 Jan Wouters & Matthieu Burnay 'The International Rule of Law: European and Asian Perspectives' 2 *Revue Belge de Droit International* (2013), pp. 299-306 at 299.
- 6 Crawford (2014), p. 342.
- 7 Laurent Pech 'The Rule of Law as a Constitutional Principle of the European Union' *Jean Monnet Working Paper* No. 4, p. 22. Most other legal systems in the EU can be traced back in some way to these three. Eric Carpano *État de Droit et Droits Européen* Paris: L'Harmattan (2005), pp. 26-29.
- See for more comparative studies James R. Silkenat, James E. Hickey & Peter D. Barenboim (eds) *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* Dordrecht: Springer (2014); Danilo Zolo 'The Rule of Law: A Critical Reappraisal' in Pietro Costa & Danilo Zolo (eds) *The Rule of Law. History, Theory and Criticism* Dordrecht: Springer (2007) pp. 3-71; Michel Rosenfeld 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 *Southern California Law Review* (2001), pp. 1307-1351; Rainer Grote 'Rule of law, Rechtsstaat, and Etat de Droit. The Origins of the Different National Traditions and the Prospects for their Convergence in the Light of Recent Constitutional Developments' in Christian Starck (ed) *Constitutionalism, Universalism and Democracy – A Comparative Analysis* Baden-Baden: Nomos (1999), pp. 269-306; Jacques-Yvan Morin, 'The Rule of Law and the Rechtsstaat Concept: A Comparison' in Edward McWhinney, Jereld Zaslove and Werner Wolf (eds) *Federalism-in-the-Making: Contemporary Canadian and German Constitutionalism, National and Transnational* The Hague: Martinus Nijhoff (1992), pp. 60-85.

French *état de droit*, and the Anglo-Saxon rule of law. By examining these three national rule of law conceptions the chapter attempts to answer the question whether different national conceptualisations of the rule of law share common elements that will enable the assumption that there is a common core of the concept throughout the Member States. A number of authors contend that the rule of law can only be understood in its historical and institutional context, and that separated from this, the notion is merely an empty shell.⁸ By way of contrast to this point of view, it will be demonstrated that the rule of law has a common core that is shared by the three Member States. It follows from this that, while it cannot be refuted that as a constitutional principle the rule of law may have different features and manifestations depending on the shape and structure of a particular society,⁹ the rule of law is a meta-concept with common features that is present in many modern states. The term meta-concept is used here to denote the idea that there is a common underlying core to the notion that can be found in each one of its many diverging manifestations, irrespective of the political, legal, and economic values of a country concerned.¹⁰

In this light, this chapter asserts that the rule of law in Germany, France and the United Kingdom has four common features. First, the rule of law has been introduced in each Member State as a solution to address two interrelated problems: the need to restrain governmental power and the need to ensure individual liberty.

Secondly, it will be demonstrated that the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law are all underpinned by the doctrine of separation of powers as a means to ensuring that the judiciary remains outside the sphere of influence of both the executive and legislative branches of government. It will be shown that, although there are variations in the manner in which the checks and balances between the judicial, legislative, and executive branches are organised, based on historical developments and the difference between the British common law and the two continental legal systems, all three ensure at a minimum judicial independence.

Thirdly, it will be argued that the three legal systems share a common substantive core, namely the principle of legality. More particularly, it will be asserted that legality provides requirements both for the government – to act on the basis of law, and for the validity of law itself.

8 Lautenbach (2013), pp. 18-19; Jacques Chevallier *L'État de Droit* Paris: Montchrestien (2003), p. 52; Gerhard Casper 'Rule of Law? Whose Law?' *CDDRL Working Papers* (2004) No. 10, p. 4.

9 Randall Peerenboom *China's Long March Towards Rule of Law* Cambridge: Cambridge University Press (2002), p. 131; Jacques-Yvan Morin 'The Rule of Law and the *Rechtsstaat* Concept: A Comparison' in Edward McWhinney, Jerald Zaslove & Werner Wolf *Federalism-in-the Making: Contemporary Canadian and German Constitutionalism, National and Transnational* Dordrecht: Martinus Nijhoff (1992), p. 60.

10 See also Dimitry Kochenov *EU Enlargement and the Failure of Conditionality* The Hague: Kluwer Law International (2008), pp. 108-109.

Fourthly, this chapter will finish by demonstrating that the rule of law is safeguarded in similar ways mainly through the mechanism of judicial review, as a check to ensure that government has kept within the boundaries of the law. On this basis, it will be concluded that even though most scholars explore the concept in relation to a particular national structure, four common features can be identified, building a common core.

A caveat should be added here. It should be noted that the purpose of the present chapter is not to provide an exhaustive overview of the intricate constitutional structures of the Member States under examination. The focus will be on demonstrating the commonality of the four features of the rule of law in the three Member States. Historical developments will be provided in order to frame the discussion and explain national particularities only where this is deemed necessary.

2. THE RULE OF LAW ADOPTED AS A SOLUTION TO COMMON PROBLEMS: RESTRAINT OF POWER AND PRESERVATION OF INDIVIDUAL LIBERTY

This section will show that the national notions of the rule of law were developed in the three Member States of the European Union as a solution to common problems that emerged with the birth of sovereignty and the formation of the modern state. Modern constitutional development has been driven by a dynamic between power and liberty. Since the powers of government have become increasingly extensive, liberty can only be maintained by ensuring that these powers are confined, channelled and checked.¹¹ Accordingly, in the three national conceptions, the rule of law is relied on to address the problem of how to restrain power in order to ensure individual liberty. Thus, the rule of law is relied on in order to restrict governmental rule by maintaining that governmental rule should take place on the basis of law, and, moreover, be itself bound by it.

This way of curbing power is not only addressed by modern day conceptions of the rule of law. On the contrary, as the writings of Plato and Aristotle demonstrate, the idea of the rule on the basis of law has ancient roots in political thought, where it appeared as a rule of restraint on the exercise of political power by subjecting the latter to law and ensuring that it was bound thereby.¹² However, in the modern day state the concept of the rule of law finds its basis in liberal ideology, rather than on the idea that the control of state power is necessary in order to curb the often-unbridled

11 Martin Loughlin *Foundations of Public Law* Oxford: Oxford University Press (2010), p. 313.

12 Ricardo Gosalbo Bono 'The Significance of the Rule of Law and its Implications for the European Union and the United States' 72 *University of Pittsburgh Law Review* (2010), pp. 229-360 at 232.

rule¹³ of aristocratic oligarchies, democracy, or tyranny.¹⁴ Indeed, at the core of liberalism lies individual liberty,¹⁵ which means that, as long as individuals do not deprive others of their liberty or impede their efforts to obtain it, the pursuit of one's own freedom is the highest aim.¹⁶

Plato discussed the virtue of rule by means of law and stated that '[w]here the law is subject to some other authority and has none of its own, the collapse of the state ... is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.'¹⁷ In a similar vein, Aristotle argued that the rule of law is preferable to that of any individual; the latter should be made only guardians and ministers of the law.¹⁸ Moreover, he advocated rule under law in order to avoid the risks of corruption and abuse connected to the concentration of power in government.¹⁹ However, in contrast to Plato and Aristotle, who were mainly concerned with how to use law in order to avoid popular tyranny in a democracy,²⁰ historical developments in the three Member States saw the emergence of the idea of the rule of law as a means of protecting the freedom of individuals from the absolute power of the ruler. Even though influential philosophers such as Cicero, who stated that a king who does not abide by the law is 'the foulest and most repellent creature imaginable',²¹ and Aquinas, who argued that law is a certain 'ordinance of reason for the common good, made by him who has care of the community',²² further affirmed the rule of law ideal, this development only took place after the Middle Ages. The latter saw the emergence of the absolute powers of the king whereby the few restrictions placed on royal sovereignty were merely

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- 13 T.R.S. Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' 44 *Cambridge Law Journal* (1985), pp. 111-143 at 111.
 - 14 See book VIII of Plato's *Republic* in which he discusses five types of regimes (aristocracy, timocracy, oligarchy, democracy, and tyranny) whereby, apart from the first category of aristocracy under the rule of the philosopher king for whom law can be an obstacle standing in the way of justice, all other regimes need to rely on law in order to prevent the escalation of power. Plato *The Republic* (transl. R.E. Allen) New Haven: Yale University Press (2006). Accordingly, Hart argued that the law of the city state not only exists to secure that men have the opportunity to lead a morally good life, but, more importantly, to see that they do. H.L.A. Hart 'Social Solidarity and the Enforcement of Morality' in H.L.A. Hart *Essays in Jurisprudence and Philosophy* Oxford: Oxford University Press (1983), pp. 248-262 at 262.
 - 15 Jeremy Waldron, 'Theoretical Foundations of Liberalism' 37 *Philosophical Quarterly* (1987), pp. 127-150 at 127.
 - 16 John Stuart Mill *On Liberty and Other Writings* Cambridge: Cambridge University Press (1989), p. 16.
 - 17 Plato *The Laws* (transl. Trevor J. Saunders) London: Penguin (1970), p. 174.
 - 18 Aristotle *Politics* (transl. Benjamin Jowett) Kitchener: Batoche Books (1999), p. 77.
 - 19 Aristotle (1999), p. 78.
 - 20 Gosalbo Bono (2010), p. 234.
 - 21 Cicero *The Republic and The Laws* (transl. Niall Rudd) Oxford: Oxford University Press (1998), book III, at 150.
 - 22 Thomas Aquinas *Summa Theologica*, Treatise on Law, question 90: 'Of the Essence of Law'.

derived from natural or divine law.²³ Thus, it was not surprising that, underpinned by the dominant writings of, amongst others, Kant, Rousseau, Montesquieu, and Locke, the conceptual understanding of the rule of law developed with the aim of controlling governmental power for the protection of the individual.

The idea that the law binds the ruler him/herself found its early expression in England. According to Locke, the power of government, 'being only for the good of the society, as it ought not to be arbitrary and at pleasure',²⁴ should be kept within bounds. The way to do this is through law.²⁵ As early as 1610, the English courts determined that the King did not have the power to change the law unilaterally; he himself must also obey to the law of the land.²⁶ Changes to the law of the land were dependent on the consent and interests of Parliament. It was primarily the common law, which protected the liberties of the people against arbitrary rule, administered by the courts.²⁷ In this way, the rights and liberties of the citizens were at the heart of the British form of government, underpinned by the powers and privileges of Parliament, and formed the limitations to the King's prerogatives.²⁸ Through access to courts the three 'primary rights' of all citizens, *i.e.* personal security, personal liberty, and private property, could be protected and maintained.²⁹ This was affirmed by Dicey in his seminal work on the *Study on the Law of the Constitution*, where he wrote that: 'The rule of law ... may be used as a formula for expressing the fact that with us the laws of the constitution ... are not the source but the consequence of the rights of the individuals, as defined and enforced by the courts.'³⁰

The rule of law as a solution to the problem of unbridled governmental rule in order to protect individual liberties is equally found in the Ger-

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- 23 Thomas Hobbes *Leviathan* New York: Oxford University Press (1996); Jean Bodin *Six Books of the Commonwealth* (transl. M.J. Tooley) Oxford: Blackwell's Political Texts (1955); Julian H. Franklin *Jean Bodin and the Rise of Absolutist Theory* Cambridge: Cambridge University Press (1973).
 - 24 John Locke *Second Treatise of Government* Indianapolis: Hackett Publishing Company (1980), section 137. In contrast to this understanding, and stretching the connection between the core ideal of the rule of law and rule by law to its thinnest, is the view favoured by Hobbes, that the law-maker cannot be limited by the law, since 'he that is bound to himself only, is not bound.' Thomas Hobbes *Leviathan* New York: Oxford University Press (1996), chapter XXVI 'Of civil laws', section 2.
 - 25 According to the idea of supremacy of law, the government is to act according to standing law, since '[w]here-ever law ends, tyranny begins.' Locke (1980), section 202. On supremacy of law see generally John Dickinson *Administrative Justice and the Supremacy of Law* Clark, New Jersey: The Lawbook Exchange (2006); Allan (1985).
 - 26 *Case of Proclamations* 77 ER 1352, (1611) 12 Co Rep 74.
 - 27 Edward Coke *The Second Part of the Institutes of the Laws of England* (1642) (R.H. Helmholz & Bernard D. Reams eds, William S. Hein Co. (1986), p. 50.
 - 28 William Blackstone *Commentaries on the Laws of England; Volume I* (1765) Chicago: University of Chicago Press (1979), pp. 130-135.
 - 29 Blackstone (1979), p. 136.
 - 30 Albert Venn Dicey *Introduction to the Study of the Law if the Constitution* Houndmills: Macmillan (1959), p. 190.

man *Rechtsstaat* and in the French *état de droit*. However, in contrast to the Anglo-Saxon understanding of the rule of law, instead of relying primarily on the role of courts and the law of the land in order to achieve this aim, the continental notions of the rule of law developed along the lines of a constitutional approach, with an emphasis on liberty and its preservation by the constitution and the legislature.³¹ For instance, in Germany, the doctrinal attempt³² to domesticate the power of the monarchical state by restricting their exercise to the protection of life, liberty, and property of individuals relied heavily on the works of Kant,³³ who advocated the idea that a state governed by the laws of justice protected the freedom, equality, and autonomy of its citizens.³⁴ Citizens who, either directly or via their representatives, are involved in the making of those laws, which they have to also observe as members of society.³⁵ It is clear that Kant's main concern was the protection of individual autonomy, by using state laws the purpose of which was securing individual liberty and property.

Furthermore, Kant's writings were of great influence up until the first half of the nineteenth century. Basing himself on Kant's thought, Von Mohl, credited with popularising the term *Rechtsstaat*, juxtaposed the notion with that of the police state and defined the former on the basis of three elements.³⁶ First, he rejected the idea that political order is divinely ordained – hitherto the main legitimation for monarchical power; state order by way of a government was the product of the aims of free, equal

31 Loughlin (2010), p. 317.

32 German professor Von Mohl is credited with popularising the term *Rechtsstaat* and elevating it to the status of doctrine, see Robert von Mohl *Das Staatsrecht des Königreichs Württemberg* Tübingen: Laupp (1829).

33 Rainer Grote 'The German *Rechtsstaat* in a Comparative Perspective' in J.R. Silkenat, J.E. Juckey Jr & P.D. Barenboim (eds) *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* Heidelberg: Springer (2014), pp. 193-207 at 194. See Immanuel Kant *Die Metaphysik der Sitten* (1797), translated as *The Metaphysics of Morals* in *The Cambridge Edition of the Works of Immanuel Kant. Practical Philosophy* (transl. Mary Gregor) Cambridge: Cambridge University Press (1996), section 6:256.

34 'Der bürgerliche Zustand also, bloß als rechtlicher Zustand betrachtet, ist auf folgende Prinzipien a priori gegründet:

1. Die *Freiheit* jedes Gliedes der Sozietät, als Menschen.

2. Die *Gleichheit* desselben mit jedem anderen, als Untertan.

3. Die *Selbständigkeit* jedes Gliedes eines gemeinen Wesens, als Bürgers.'

Immanuel Kant *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht in der Praxis II: Vom Verhältnis der Theorie zur Praxis im Staatsrecht (Gegen Hobbes)* (1793) Berlin: Holzinger (2014), p. 46. Also see Gosalbo Bono (2010), p. 229. For more on Kant's concept of the state see for example Wolfgang Kersting 'Kant's Concept of the State' in Howard Williams (ed) *Essay's on Kant's Political Philosophy* Chicago: University of Chicago Press (1992); Jeremy Waldron 'Kant's Theory of the State' in Pauline Kleingeld (ed) *Towards Perpetual Peace and Other Writings in Politics, Peace and History. Immanuel Kant* New Haven: Yale University Press (2006).

35 Immanuel Kant *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht in der Praxis II: Vom Verhältnis der Theorie zur Praxis im Staatsrecht Gegen Hobbes* (1793) Berlin: Holzinger (2014), pp. 46–48.

36 Von Mohl (1829).

and rational individuals.³⁷ Secondly, to this end, government must be directed towards securing the property and liberty of the citizens. Thirdly, more generally, according to Von Mohl, the state should be organised on the basis of the principles of a responsible government, judicial independence, rule by means of law, and the recognition of basic liberties.³⁸ Thus, with its origins in Kant's writing, the *Rechtsstaat* was limited to the purpose of securing individual liberty and private property as the material basis for individual autonomy, thereby rejecting the far-reaching policing powers that the monarchical state had claimed.³⁹ In this way, safeguarding the liberties of the individual informed the *Rechtsstaat's* reliance on law as a means of restricting governmental power with a particular aim.

Similar to the original development of the *Rechtsstaat* in Germany, France also struggled with the transition of power from monarchical rule to a state that protects its citizens. Aided by the writings of philosophers of the Enlightenment period such as Voltaire and Rousseau,⁴⁰ the French Revolution at the end of the eighteenth century brought enough political change in order to transfer traditional sovereignty from the monarch to a new entity, the French citizens.⁴¹ Accordingly, it was the people who, acting through their representatives, ruled the country on the basis of laws that expressed the general will.⁴² This form of government relied heavily on the works of Rousseau, according to whom laws voted for by the people had infallible qualities.⁴³ He equated the rule of law with rule in accordance with the will of the people and understood the supremacy of law as the supremacy of Parliament,⁴⁴ since all laws of Parliament, regardless of their outcome, were an expression of the will of the people. For this reason, law as expression of the general will could not in any way infringe upon the liberties of citizens as the mere generality of its will excluded any arbitrary action.

However, Rousseau's writings did not satisfactorily address the question of the restraint of power.⁴⁵ Indeed, by the late-nineteenth century a

37 This echoed Kant's idea that individuals should be subject to no laws other than those which they have chosen to give themselves, Kant (2014), pp. 46–48.

38 As synthesised by Ernst-Wolfgang Böckenförde 'The Origin and Development of the Concept of the *Rechtsstaat*' in his *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (transl. J.A. Underwood) New York: Berg (1991), pp. 47–70.

39 Grote (2014), p. 195.

40 Jean-Jacques Rousseau *Du Contrat Social* (1762) Paris: Union Générale d'Éditions (1963).

41 According to Article 3 of the 1789 Declaration of the Rights of Man and of the Citizen, the new entity was the 'nation', a concept used to convey the sovereignty of the French citizens: *Le principe de toute Souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément.*

42 Article 6 of the Declaration: *La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation.* Also see François Furet & Mona Ozouf (eds) *A Critical Dictionary of the French Revolution* Cambridge: Belknap Press (1989), p. 313.

43 Rousseau (1963), book 2, chapters 1 and 6.

44 Chevallier (2003), p. 37 *et seq.*

45 Grote (1999), p. 304.

discussion had started in French legal theory on how the exercise of state powers could be made subject to law. To this end, Carré de Malberg, one of the leading French constitutional scholars of that time, pitched the idea of the *état de droit*. He proposed an understanding of the rule of law which submitted all powers, including the legislative powers of Parliament, to the law. In contrast to the political conception according to which administrative authority was in all cases to be subordinated to the legislative organ, and could thus only act in execution of, or on concession of, the law (*état legal*),⁴⁶ the idea of *état de droit* was designed to protect the individual rights and liberties of the citizens against the tyranny of the majority and the potential arbitrariness of the state.⁴⁷ Thus, the notion of *état de droit* aimed to subject legislation to constitutional rules.⁴⁸ In this way, the idea of *état de droit* sought to supply authoritative norms that not only determined the relationship between the administration and the individual, but which also conditioned the exercise of legislative power.⁴⁹

This section examined the development of national notions of the rule of law in the three Member States as a solution to common problems that came about with the emergence of the modern state and the demise of monarchical rule. It was shown that, in all three states, the rule of law developed in order to address the common problem of the balance between the restraint of power and individual liberty. It was demonstrated that the rule of law means both the restriction of governmental power on the basis of law as well as the political understanding that the government is itself also bound by the law. In particular, it was asserted that the rule of law developed as a means of protecting the individual from arbitrary power. Thus, it can be concluded that the national notions of *Rechtsstaat*, *état de droit*, and Anglo-Saxon rule of law, were born out of the same need, namely to restrain government authority in order to safeguard individual liberty.

3. THE COMMON UNDERPINNINGS OF THE RULE OF LAW: SEPARATION OF POWERS AS A MEANS OF ENSURING JUDICIAL INDEPENDENCE

In this section it will be demonstrated that the aforementioned common solutions of the rule of law in the three national legal systems are underpinned by the doctrine of the separation of powers. It will be argued that, in the modern state, the separation of powers is the necessary corollary of

46 Alain Laquière 'État de Droit and National Sovereignty in France' in Petro Costa & Danilo Zolo (eds) *The Rule of Law: History, Theory, and Criticism* Dordrecht: Springer (2007), p. 266.

47 Raymond Carré de Malberg *Contribution à la Théorie Générale de l'État* vol. I Paris: Librairie de la Société du Recueil Sirey (1920), pp. 492-493.

48 Carré de Malberg (1920), pp. 490-492.

49 Marie-Joëlle Redor *De l'État Légal à l'État de Droit: L'Évolution des Conceptions de la Doctrine Publiciste Française 1879-1914* Paris: Economica (1992), pp. 294-316; Loughlin (2010), p. 323.

the rule of law requirement that the government is bound by the law. Of course, the institutional arrangements by which the separation of powers with various checks and balances is achieved in each of the Member States under examination differs, and the different historical context within which the doctrine was developed can account for such differences. However, it will be asserted that this will not detract from the fact that the need for the separation of powers in order to guarantee judicial independence is a common feature underpinning the rule of law in all three countries.

Historically, attempts to ensure that monarchical authority was restricted by law were based on natural and divine law and had to rely on cultural understanding,⁵⁰ practice,⁵¹ and expectations.⁵² However, in the modern nation state it is generally accepted that other ways had to be found to guarantee governmental rule through law, and, more importantly, that the government itself was bound by law. For this reason, the doctrine of the separation of powers has developed to ensure that the power of the sovereign is divided into different component parts, whereby certain parts of government bind other parts of government to the law.⁵³ In particular, it is commonly accepted that the ability to restrain the ways in which power is exercised needs to be institutionalised through the separation of powers.⁵⁴ In this way, the separation of powers provides a system of checks and balances under which each branch impinges upon another and in turn is impinged upon.⁵⁵ Consequently, a form of the separation of powers necessarily underpins the rule of law, and is indeed vital to the effective functioning of the latter.⁵⁶ In particular, since 'le pouvoir arrête le pouvoir',⁵⁷ a functional separation of powers ensures that power cannot be exercised arbitrarily because those who enact general rules are not the same as those executing the same rules. However, the degree of separation required is an

50 Under Germanic law, for example, it was understood that the law applied to everyone, including the rulers. In medieval times, the belief was that everyone operated within the restraints of natural or divine law. Harold J. Berman *Law and Revolution. The Formation of the Western Legal Tradition* Cambridge: Harvard University Press (1983).

51 For an overview of the various ways by which rulers could be bound by the law in the pre-modern period see Brian Z. Tamanaha 'The History and Elements of the Rule of Law' *Singapore Journal of Legal Studies* (2012), pp. 232-247 at 237-239.

52 Andre Tunc 'The Royal Will and the Rule of Law' in Arthur Sutherland (ed) *Government Under Law* Cambridge: Harvard University Press (1956), pp. 404-406.

53 Tamanaha (2012), p. 240. For the historical aspects of the development of the doctrine see for example Sharon Krause 'The Spirit of Separate Powers in Montesquieu' 62 *The Review of Politics* (2000), pp. 231-265; William B. Gwyn *The Meaning of the Separation of Powers: An Analysis of the Doctrine from its Origin to the Adoption of the United States Constitution* The Hague: Martinus Nijhoff (1965).

54 Martin Krygier 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 51-79 at 59.

55 Gwyn (1965), p. 120.

56 *The complete Works of M. de Montesquieu: The Spirit of Laws* London: Evans (1777), Book II, chapter 6.; Locke (1980).

57 Montesquieu (1777), p. 300.

area of uncertainty; complete separation is impossible.⁵⁸ An examination of the three legal regimes at issue will show that, indeed, they share common underpinnings, and that their various institutional arrangements all fall under the doctrine.⁵⁹

Heavily influenced by the writings of Montesquieu and against the background of the French Revolution, the 1789 Declaration of the Rights of Man and of the Citizen introduced the separation of powers in France in relation to constitutional government and the protection of rights. Hence, Article 16 of the Declaration reads that: 'Any society in which the guarantee of rights is not assured or the separation of powers is not established, has no constitution.' Accordingly, in order to ensure the protection of rights and liberty, the legislative, executive, and judicial power must be kept separate.⁶⁰

However, the French development of the doctrine faced two particular features: the particular importance of parliamentary sovereignty since it represented the *volonté générale* – the will of the people, the very thing *état de droit* aimed to protect; and the traditional distrust of the judiciary because of its negative role prior to the revolution.⁶¹ The idea of judicial bodies modifying the will of the elected legislature, and therefore the sovereign will of the people whom the legislature represents, was rejected as a distortion of the democratic process and the rule of law.⁶² Hence, revolutionary thought prohibited judges from meddling in the exercise of legislative power. As a consequence, encroachment upon the administration was excluded by ways of entrusting the decision of administrative controversies to the administrative bodies themselves.

This is also the reason behind the fact that the judicial activities of the Council of State (*Conseil d'État*), created at the end of the eighteenth century, were severely limited in practice.⁶³ It would be only at the end of the nineteenth century that this Court started to extend its control beyond formal and procedural requirements to the substance of administrative measures.⁶⁴ By then, the earlier necessity to shield the use of administrative prerogative from judicial scrutiny had diminished and the Council's purpose was to regulate and limit the exercise of power by administrative bodies in the

58 Geoffrey Marshall *Constitutional Theory* Oxford: Clarendon Press (1971), pp. 124-126; Hans Kelsen *General Theory of Law and State* (transl. A. Wedberg) Clark, New Jersey: The Lawbook Exchange (2007), p. 269.

59 Gwyn (1965), p. 128.

60 Montesquieu (1777), p. 199.

61 Chevallier (2003), p. 66; Jeremy Jennings 'From "Imperial State" to "État de Droit": Benjamin Constant, Blandine Kriegel and the Reform of the French Constitution' 44 *Political Studies* (1996), pp. 488-504 at 490.

62 Laurent Pech 'Rule of Law in France' in Randall Peerenboom (ed) *Asian Discourses of Rule of Law. Theories and Implementation of rule of law in twelve Asian Countries, France and the U.S.* London: Routledge (2004), pp. 79-112 at 84.

63 Grote (1999), pp. 292-293.

64 L. Neville Brown & John S. Bell *French Administrative Law* Oxford: Oxford University Press (2003), p. 239 *et seq.*

interests of society, whose needs the administration was deemed to serve.⁶⁵ Nonetheless, the real control of constitutionality of parliamentary laws by the judiciary was only instituted during the Fifth Republic.⁶⁶

After the First and Second World Wars it became clear that the ascendancy of the executive branch of government meant that the powers of parliament had to be curtailed and the role of the executive strengthened.⁶⁷ For this reason, a Constitutional Court (*Conseil Constitutionnel*) was created, primarily to oversee the legislative branch of government, which has to make sure that Parliament does not overstep its constitutionally defined competences, for example by passing laws which unduly interfere with the prerogatives of the executive.⁶⁸

Like *état de droit* in France, the *Rechtsstaat* in Germany is anchored in the doctrine of the separation of powers. For historical reasons,⁶⁹ from the perspective of the state, the doctrine of the *Rechtsstaat* precluded the possibility of the primacy of law over the state.⁷⁰ Following from this was a separation of the political structure from the legal system, which alone must guarantee, independently of the political structure, liberty and security.⁷¹ With the strong state in place, law and legislation could find their genuine force only where there was a judicial authority robust enough for their realisation.⁷² Thus, the *Rechtsstaat* presupposes a form of separation of powers with priority given to the safeguarding of the legal system performed by the judiciary and a wide scope of judicial powers of review,⁷³ as will be discussed further below in the section on the rule of law's safeguarding mechanisms.

Similar to Germany, the United Kingdom puts strong emphasis on the independence of the judicial branch. Judicial review of executive action is a core feature of the legal system.⁷⁴ Like Blackstone advocated, there is a 'distinct and separate existence of the judicial power in a peculiar body of

65 Pech, (2004), p. 84; Chevallier (2003), p. 34; Grote (1999), p. 284.

66 The Fifth Republic is the current constitution of France, introduced 4 October 1958.

67 John Bell *French Constitutional Law* Oxford: Clarendon Press (1992), p. 78 *et seq.*

68 Christian Dadomo & Susan Farran *The French Legal System* London: Sweet & Maxwell (1993), pp. 108-109; Bell (1992), p. 27; Grote (1999), p. 294.

69 Ernst-Wolfgang Böckenförde 'Entstehung und Wandel des Rechtsstaatsbegriffs' in Ernst-Wolfgang Böckenförde *Recht, Staat, Freiheit* Frankfurt am Main: Suhrkamp (1991), pp. 143-169 at 146.

70 Neil MacCormick 'Der Rechtsstaat und die rule of law' 39 *Juristen Zeitung* (1984), pp. 65-70 at 68.

71 Franz Neumann *Die Herrschaft des Gesetzes* Frankfurt am Main: Suhrkamp (1980) p. 204.

72 Gustavo Gozzi 'Rechtsstaat and Individual Rights in German Constitutional History' in Pietro Costa & Danilo Zolo (eds) *The Rule of Law. History, Theory and Criticism* Dordrecht: Springer (2007), pp. 237-259 at 246.

73 Reinhold Zippelius & Thomas Würthenberger *Deutsches Staatsrecht* Munich: C.H. Beck (2008), pp. 111-112.

74 See generally Anthony Wilfred Bradley 'The Constitutional Position of the Judiciary' in: David Feldman (ed) *English Public Law* Oxford: Oxford University Press (2009), pp. 281-313.

men...separated from both the legislative and the executive power'.⁷⁵ As has been shown above, the separation of powers in France also emphasises the independence of the judiciary branch. More recently judicial independence was strengthened by the 2005 Constitutional Reform Act, establishing the Supreme Court of the United Kingdom, thereby ending the judicial function of the House of Lords and moving even closer to a constitutional separation between legislative and judicial powers.⁷⁶

Because of the emphasis on parliamentary sovereignty, there is, however, a weaker institutional separation of the legislative and executive branches.⁷⁷ The executive does not possess any autonomous law-making powers and can only act on the basis of common law or by way of statutory authorisation.⁷⁸ There is still no clear separation between Parliament and government, as all ministers are required to be a member of one of the houses of Parliament.⁷⁹ For historical reasons, since the common law protects individual liberty, there was never a need to create public law instruments in order to impose limits on the exercise of political or administrative power.⁸⁰ The appropriate remedy was found in the uniform application of ordinary rules to any infringement of the law, whether perpetrated by government officials or individuals.⁸¹

In sum, this section examined the common underpinnings of the rule of law in the three legal systems at issue. It was demonstrated that in order to fulfil one of the core requirements of the rule of law, namely, that a government itself is bound by the law, a form of separation of powers is indispensable. Furthermore, it was asserted that although the three legal systems have differing institutional arrangements in relation to the separation of the judicial, legislative, and executive branches of government, all three rely on some form of the separation of powers in order to ensure the rule of law. In particular, it was shown that these variations can be explained on the basis of particularities linked to the historical developments in all three Member States.

75 William Blackstone, *The English Constitution* 7th ed, 1984, 10, quoted in Allan (1985).

76 Catherine Fairbairn & Sally Broadbridge 'The Constitutional Reform Bill: A Supreme Court for the United Kingdom and Judicial Appointments' House of Commons research paper No. 06 (2005), available at: www.parliament.uk/briefing-papers/RP05-06.pdf.

77 Cheryl Saunders 'Separation of Powers and the Judicial branch' 11 *Judicial Review* (2006), pp. 337-347 at 341; William Wade & Christopher Forsyth *Administrative Law* Oxford: Oxford University Press (2009), p. 731; Paul Craig 'Fundamental Principles of Administrative Law in Relation to Basic Principles of Constitutional Law' in David Feldman (ed) *English Public Law* Oxford: Oxford University Press (2009), pp. 593-613 at 610.

78 Grote (1999), p. 297.

79 Lukas Prakke 'The United Kingdom of Great Britain and Northern Ireland' in Lukas Prakke & Constantijn Kortmann (eds) *Constitutional Law of the 15 EU Member States* Deventer: Kluwer (2004), pp. 861-927 at 878.

80 Grote (1999), p. 275.

81 See the works of Dicey, who argued that 'It means ... equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.' Dicey (1959), p. 190.

4. THE COMMON SUBSTANCE OF THE RULE OF LAW:
THE ELEMENT OF LEGALITY

In the previous sections, it was established that the rule of law has been introduced in the three states as a means of addressing the problem of arbitrary power with the aim of protecting individual liberty. Furthermore, it was shown that in order to bind governmental rule to law it is vital to introduce some form of separation of powers in the organisation of government. Against this background, this section asserts that the legal systems of the three Member States share a further common element in their particular understanding of the rule of law, namely, the principle of legality. It will be shown that that legality is a corollary of the fact that the rule of law limits power by demanding that governments govern though law. More particularly, it will be claimed that legality operates in two similar ways in the three legal systems: on the one hand, it sets requirements for government in its relation to its laws and on the other hand, it provides criteria for the validity of law itself. Moreover, it will be demonstrated that the principle of legality in the *Rechtsstaat*, *état de droit*, as well as in the Anglo-Saxon rule of law, necessarily presupposes that governmental power is divided over all branches of government.

The pre-war notion of the *Rechtsstaat* is the clearest example of the understanding of the rule of law as the principle of legality.⁸² As argued above, the Kantian liberal approach provided the background against which individuals have rights by virtue of their humanity and which therefore impose limitations on the authority of the state.⁸³ However, the latter-half of the nineteenth century saw a rise of legal positivism as the leading paradigm in constitutional theory and the dominant method of German legal scholarship, which gradually undermined the material interpretation of the idea of the *Rechtsstaat*.⁸⁴ As a result, the Kantian approach was rejected in favour of a more statist conception of rights,⁸⁵ whereby rights are created as a product of legislative action. Thus, the power to establish individual rights belonged solely to the legislator and could therefore be limited or taken away.⁸⁶ Furthermore, within this 'purely juridical concept',⁸⁷ the *Rechtsstaat* had little to do with the purposes of the state but was increas-

82 Stefan Martini 'Die Pluralität von Rule-of-Law-Konzeptionen in Europa und das Prinzip einer europäischen Rule of Law' in Matthias Köttler & Gunnar Folke Schuppert (eds) *Normative Pluralität ordnen: Rechtsbegriffe, Normenkollisionen und Rule of Law in Kontexten dies- und jenseits des Staates* Baden-Baden: Nomos (2009), pp. 303-344 at 308-309.

83 Loughlin (2010), p. 320.

84 Grote (2014), p. 195. Also see the works of two of the greatest proponents of German legal positivism at the time, Rudolf von Jhering *Der Zweck im Recht* Leipzig: Breitkopf & Härtel (1877) and Georg Jellinek *Allgemeine Staatslehre* Berlin: Häring (1914).

85 Klaus Stern *Das Staatsrecht der Bundesrepublik Deutschland* Munich: C.H. Beck (1984), pp. 768-774.

86 Stern (1984), p. 771; Grote (2014), p. 195; Grote (1999), pp. 285-288.

87 Loughlin (2010), p. 321.

ingly concerned with the methods and means of its realisation. Moreover, since legality, as a set of formal requirements for the validity of law itself, provided no specific substantive normative standard, the emphasis came to be on the development of general principles of administrative law which would provide citizens with a sufficient measure of protection against abuse of power by administrative authorities.⁸⁸ Of course, the abuse of the concept by the National Socialist regime demonstrated that the positivistic theories failed to take into account the potential arbitrary use of legislative power. Where the *Rechtsstaat* afforded protection through law and through the imposition of the requirement that the state acts through the promulgation and implementation of laws, rather than through mere deployment of the will of the monarch,⁸⁹ legality provided no assurances that those laws would be fair. Consequently, as argued by Kelsen,⁹⁰ the pre-war notion of the *Rechtsstaat* came to be synonymous with 'law of the state' which placed high emphasis on the principle of legality and which was characterised by a purely technical and formal concept of law, detached from ethical and political content.⁹¹ In other words, if law is clear, ascertainable, and non-retrospective, its validity was considered irrespective of its content.

However, as all efforts to conceive of the *Rechtsstaat* in purely formal terms were discredited by the experiences of the National Socialist regime, in the context of the framing of a new constitution for the Federal Republic of Germany, the 1949 Basic Law rejected a purely positivist conception of the *Rechtsstaat*.⁹² Accordingly, in the Basic Law, legality was complemented by substantive principles to which all state activity had to conform.⁹³ In this manner, the constitution subordinated positive legality to entrenched substantive principles and values. With the resurrection of the idea of rights as a limit to state interference with individual liberty, it was recognised that the enjoyment of these rights might also require positive measures by the state in order to create the minimum conditions indispensable for the exercise

88 Ernst Wolfgang Böckenförde *Recht, Staat, Freiheit* Frankfurt a. M.: Suhrkamp (1991), pp. 153-154.

89 Arthur J. Jacobson & Bernhard Schlink 'Introduction: Constitutional Crisis' in Arthur J. Jacobson & Bernhard Schlink (eds) *Weimar: A Jurisprudence of Crisis* Berkeley: University of California Press (2000), pp. 5-6; Michel Rosenfeld 'The Rule of Law and the Legitimacy of Constitutional Democracy' *Southern California Law Review* 74 (2001), pp. 1307-1351 at 1326.

90 Hans Kelsen *Pure Theory of Law* New Jersey: The Lawbook Exchange (2002), pp. 279-319. Kelsen was supported by the influential writings of Schmitt and Koellreutter, see for example Carl Schmitt 'Was Bedeutet der Streit um den Rechtsstaat' *Zeitschrift für die gesamte Staatswissenschaft / Journal of Institutional and Theoretical Economics* 95 (1935), pp. 189-201; Otto Koellreutter *Deutsches Verfassungsrecht, ein Grundriss* Berlin: Junker & Dünhaupt (1936).

91 Gosalbo-Bono (2010), p. 243; Grote (1999), p. 280.

92 Loughlin (2010), p. 321.

93 Grote (1999), p. 285.

of individual rights. This gave rise to the idea of the *sozialer Rechtsstaat*,⁹⁴ which was recognised in Article 28(1) of the Basic Law: 'The constitutional order in the states must conform to the principles of the republican, democratic and social state under the rule of law.'⁹⁵

In Germany's current legal system, the principle of legality is explicitly enshrined in Article 20(3) of the Basic Law, which determines that the legislature is bound by the constitution, and the executive and the judiciary by the law.⁹⁶ Thus, the provision embodies the idea of legality on the level of government. In addition, Article 80 delimits the delegation of legislative powers to the executive since statutory authorisation is needed in which the conditions for its exercise are narrowly defined.⁹⁷ Legality is complemented by the respect for and the protection of the unamenable constitutional value⁹⁸ of dignity of man as the guiding principle of all state action.⁹⁹ The protection of individual dignity has been recognised by the Federal Constitutional Court (*Bundesverfassungsgericht*; further FCC) as the supreme value of the constitutional order.¹⁰⁰ The pre-war positivist approach, which put the creation of rights within the purview of the legislator, is superseded by paragraph 2 of Article 1, which acknowledges the 'inviolable and inalienable human rights as the basis of every community, of peace, and of justice

94 Jörg Müller-Volbehr 'Der soziale Rechtsstaat im System des Grundgesetzes' *Juristenzeitung* (1984), pp. 6-13 at 6.

95 Article 28(1) GG: Die verfassungsmäßige Ordnung in den Ländern muß den Grundsätzen des republikanischen, demokratischen und sozialen Rechtsstaates im Sinne dieses Grundgesetzes entsprechen. A similar homogeneity rule is included in relation to the European Union, as Article 23 provides that '... Germany shall participate in the development of the European Union that is committed to democratic, social, and federal principles, to the rule of law, and to the principle of subsidiarity, and that guarantees a level of protection of basic rights essentially comparable to that afforded by [the] Basic Law.' Article 23(1) GG: Zur Verwirklichung eines vereinten Europas wirkt die Bundesrepublik Deutschland bei der Entwicklung der Europäischen Union mit, die demokratischen, rechtsstaatlichen, sozialen und föderativen Grundsätzen und dem Grundsatz der Subsidiarität verpflichtet ist und einen diesem Grundgesetz im wesentlichen vergleichbaren Grundrechtsschutz gewährleistet.

96 Article 20(3) GG: Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.

97 Article 80(1) GG: Durch Gesetz können die Bundesregierung, ein Bundesminister oder die Landesregierungen ermächtigt werden, Rechtsverordnungen zu erlassen. Dabei müssen Inhalt, Zweck und Ausmaß der erteilten Ermächtigung im Gesetze bestimmt werden. Die Rechtsgrundlage ist in der Verordnung anzugeben. Ist durch Gesetz vorgesehen, daß eine Ermächtigung weiter übertragen werden kann, so bedarf es zur Übertragung der Ermächtigung einer Rechtsverordnung.

98 According to Article 79 amendments to Article 1-20 are inadmissible in any circumstance, save the adoption of a new constitution.

99 Article 1(1) GG: Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.

100 See for example BVerfGE 12, 45; 1 BvL 21/60, 20 December 1960; BVerfG 30, 1; 2 BvF 1/69, 2 BvR 629/68 and 308/69, 7 July 1970;

in the world.¹⁰¹ In this way, the extra-legal character of the rights – they exist irrespective of their official recognition by the state – is recognised.¹⁰² Moreover, the centrality of fundamental rights in the constitution is further highlighted by the fact that they are binding not only on administrative bodies and the judiciary, but also on the parliament itself in the exercise of its legislative powers (Article 1(3) Basic Law). Restrictions of rights are possible – to the extent that such a restriction is by or pursuant to law, that such law applies generally, and specifies the affected rights (Article 19(1) Basic Law).¹⁰³ However, in no case may any branch of government encroach upon the essence of a basic right (Article 19(2) Basic Law).¹⁰⁴

In the French legal system, the substance of the rule of law is also synonymous with the principle of legality. Similar to its role in the German system, legality limits the state's law-making powers in a mostly formal sense, and sets requirements for the quality of laws.¹⁰⁵ Additionally, the discussion in France has focussed on legality as a demand for a hierarchy of legal sources, whereby law has to comply with the constitution or the general principles recognised therein.¹⁰⁶ The French legal system makes a distinction between governmental regulations and parliamentary laws. Reflecting the *volonté générale*, the will of the people, parliamentary laws are of hierarchically higher order than regulations. However, the parliament is prohibited from legislating in certain areas of law where the executive has a monopoly on regulating.¹⁰⁷ To counter this, regulations must always conform to general principles of law.¹⁰⁸ Since the expression of the *volonté générale* is found in particular in the constitution, all laws must conform to this. Accordingly, the constitution forms the apex in the hierarchy of laws.¹⁰⁹

101 Article 1(2) GG: Das Deutsche Volk bekennt sich darum zu unverletzlichen und unveräußerlichen Menschenrechten als Grundlage jeder menschlichen Gemeinschaft, des Friedens und der Gerechtigkeit in der Welt.

102 Christian Starck 'Entwicklung der Grundrechte in Deutschland' in Ulrich Immenga (ed) *Rechtswissenschaft und Rechtsentwicklung* Göttingen: Schwarz (1980), pp. 89-105 at 100.

103 Article 19(1) GG: Soweit nach diesem Grundgesetz ein Grundrecht durch Gesetz oder auf Grund eines Gesetzes eingeschränkt werden kann, muß das Gesetz allgemein und nicht nur für den Einzelfall gelten. Außerdem muß das Gesetz das Grundrecht unter Angabe des Artikels nennen.

104 Article 19(2) GG: In keinem Falle darf ein Grundrecht in seinem Wesensgehalt angetastet werden.

105 Both the *Conseil Constitutionnel* and the *Court de Cassation* have developed formal standards that require laws to be for example intelligible and accessible. See Chevallier (2003), p. 101.

106 On this discussion in general see André-Jean Arnaud *Dictionnaire Encyclopedique de Theorie et Sociologie de Droit* Paris: Librairie Generale de Droit et de Jurisprudence (1993).

107 Jean Rivero & Jean Waline (eds) *Droit Administratif* Paris: Dalloz (2006), pp. 251-252.

108 *Ibid.*, pp. 254-255.

109 On the discussion of the place of international treaties, and particularly the status of EU law, in this order see in general Chevallier (2003), p. 109; Rivero & Waline (2006), p. 273.

Similar to France, the particular understanding of parliament has influenced the British understanding of the substance of the rule of law. Accordingly, the principle of legality in the United Kingdom has to be understood against the particular backdrop of common law and the sovereignty of parliament. The latter means that in the exercise of its legislative power, the parliament itself is not bound by any higher law.¹¹⁰ Furthermore, no parliament can bind a future parliament, and since statutes are no different, formally speaking, from any other piece of legislation they can be repealed by a later act of parliament.¹¹¹ Thus, the parliament has the right to make or abolish any law, and no other institution, organ or individual has the right to ignore parliamentary legislation.¹¹² According to this, when acting in partnership, the parliament and the courts are the sources of law within the British constitution.¹¹³

Against this background of parliament's legal sovereignty, legality in the UK context connotes the idea that rights and constitutional principles recognised by the common law will not be treated as overridden by parliamentary statute unless by express language or by clear and necessary implication.¹¹⁴ Moreover, all acts of government that affect individual rights and duties must be shown to have strict legal pedigree,¹¹⁵ which means that power may only be exercised by the authority upon which it is conferred – which in most cases is, directly, or indirectly, the parliament.¹¹⁶

On the basis of the doctrine of parliamentary sovereignty, the parliament's range of legislative regulation is so wide that the interpretation of statutes has long been at the centre of legal argument. Accordingly, where constitutional principles can be established or rights have been recognised, statutory interpretation will be moulded around them.¹¹⁷ Furthermore, on the basis of the principle of legality, courts have a duty to review whether public authority wielding statutory power has acted *ultra vires*. This means that the right in question in a particular case cannot be abrogated by the state, save by specific provision by an Act of Parliament or by regulations to

110 Dicey (1959), p. 192.

111 Emilio Santoro 'The Rule of Law and the "Liberties of the English": The Interpretation of Albert Venn Dicey' in Petro Costa & Danilo Zolo (eds) *The Rule of Law: History, Theory, and Criticism* Dordrecht: Springer (2007), pp. 160-169.

112 Santoro (2007), p. 163.

113 Loughlin (2010), p. 315. In the continental traditions, the state is both the source of law and its subject, see Kaarlo Tuori 'The Common Core of the Rule of Law and the Rechtsstaat' contribution to the conference on 'The Rule of Law as a Practical Concept' of the European Commission for Democracy through Law (Venice Commission), 2 March 2012 Lancaster House, London. Available at [http://www.venice.coe.int/webforms/documents/CDL\(2013\)016-e.aspx](http://www.venice.coe.int/webforms/documents/CDL(2013)016-e.aspx).

114 *R v Secretary of State for the Home Department ex parte Simms*, [2000] 2 AC 115.

115 Wade & Forsyth (2009), p. 17.

116 Lautenbach (2013), p. 25; Wade & Forsyth (2009), p. 259

117 Philip Sales 'A comparison of the Principle of Legality and Section 3 of the Human Rights Act 1998' paper delivered at the Statute Law Society Conference, Belfast (2008), p. 4.

which main legislation has specifically conferred the power to abrogate.¹¹⁸ *Ultra vires* review includes both formal grounds, such as illegality and excess of power, as well as substantive grounds, such as the principle of reasonableness.¹¹⁹

In this section, it was demonstrated that legality is a shared element of all three legal systems. The demand that the administration acts on the basis of law, and, moreover, is bound by it, is present in all of them. As such, the principle is intimately connected to the rule of law's objectives. Moreover, it was shown that legality provides requirements for the quality and validity of law itself, another demand the three Member States have in common. Furthermore, it was asserted that in the three legal systems, legality presupposes some form of separation of powers, since it is addressed to both the legislature and the judiciary as it sets criteria for both law-making and judicial review.

5. THE COMMON MECHANISM FOR SAFEGUARDING THE RULE OF LAW: JUDICIAL REVIEW

As demonstrated in the previous section, legality presupposes judicial review, since it is the judiciary that controls in individual cases whether or not the legislature has kept within the boundaries provided for by law. In this section, it will be demonstrated that all three legal systems rely on judicial review as a safeguarding mechanism for upholding and ensuring the rule of law and see it as one of the main ways in relation to the rule of law through which power can be checked and balanced.

Germany has a strong tradition of judicial review before the World Wars, and even more so after. Strongly advocated by Kelsen at the beginning of the twentieth century, it was the understanding of Nazi-rule as a failure of democratic government that led to a post-war stress on law and basic rights.¹²⁰ Correspondingly, a strong system of judicial review to safeguard the parliamentary political system was emphasised. In order to attain this, Germany has set up many administrative courts and an elaborate system of legal protection against abuse of power by the administrative authorities.¹²¹ Under Article 19(4) of the Basic Law, individuals whose rights have allegedly been violated by public authority have recourse to court. Within this system, the Federal Constitutional Court is tasked with maintaining the constitution and the protection of rights. Accordingly, it is

118 *R v Lord Chancellor ex parte Witham* [1998] QB 575 (DC).

119 Anthony Bradley, Keith Ewing & Christopher Knight *Constitutional and Administrative Law* Harlow: Pearson Education (2014), p. 698; Wade & Forsyth (2009), pp. 259-262.

120 Christophe Möllers 'Scope and Legitimacy of Judicial Review in German Constitutional Law - the Court versus the Political Process' in Hermann Pünder & Christian Waldhoff *Debates in German Public Law* Oxford: Hart Publishing (2014), pp. 3-26 at 5.

121 Klaus Stern *Das Staatsrecht der Bundesrepublik Deutschland* Munich: Beck (1984), p. 839.

the court of last instance in fundamental rights cases (Article 93(1) sub 4a Basic Law). As ordinary courts do not have jurisdiction to declare legislative measures enacted by Parliament unconstitutional,¹²² parliamentary statutes need to be attacked directly before the FCC. Moreover, the Basic Law provides standards for judicial independence (Articles 92, 95, 97 Basic Law) and access to judicial review (Article 19(4) Basic Law).

As it was demonstrated above, in contrast to Germany, France has had a traditionally distrustful relationship with the judiciary, which has initially impeded the development of judicial review. From a historical point of view, the lack of strong constitutional safeguarding mechanisms is explained by the fact that the French revolution was directed primarily against private oppression, such as the remnants of the feudal system and the power and privileges of the church, which were protected by the judicial class,¹²³ rather than against abuse of public power. Therefore, the outcome of the revolution, while it did include a constitution, emphasised mainly the importance of individual rights and the introduced a civil code based on the principles of equality, the personal and economic autonomy of the individual, and ownership and freedom from alienation of property.¹²⁴

However, strong control of constitutionality of parliamentary laws by ways of constitutional review was finally instituted during the Fifth Republic. A Constitutional Court (*Conseil Constitutionnel*) was created, primarily to oversee the legislative branch of government, which has to make sure that Parliament does not overstep its constitutionally defined competences.¹²⁵ Its competence was strengthened by a 1971 landmark case, in which the Constitutional Council extended its review of constitutionality to the substance of parliamentary statutes on the basis of the Preamble of the Constitution in which reference is made both to the Declaration and the Preamble of the 1946 Constitution;¹²⁶ both texts entrenched civil and political rights, and socio-economic rights.¹²⁷ In this way, the Council qualified the rights provisions contained in these instruments as legally binding principles. Furthermore, basing itself on the *principe de légalité*, the Council affirmed that all organs of the state, including the legislature, are bound by the principles

122 Articles 93(1) sub 2a and 100(1) GG.

123 Martin A. Rogoff 'A Comparison of Constitutionalism in France and the United States' *Maine Law Review* 49 (1997), pp. 21-83 at 23.

124 Rogoff (1997), p. 24.

125 Christian Dadomo & Susan Farran *The French Legal System* London: Sweet & Maxwell (1993), pp. 108-109; Bell (1992), p. 27; Grote (1999), p. 294.

126 Decision of the Conseil Constitutionnel no. 71-44 DC of 16 July 1971. Also see Chevallier (2003), p. 85.

127 A non-written source - the Fundamental Principles recognized by the Statutes of the Republic (*Principes fondamentaux reconnus par les lois de la République*) was added to these two texts to complete the 'Block of constitutionality' (*Bloc de constitutionnalité*), Xavier Philippe 'Constitutional review in France: The Extended Role of the Conseil Constitutionnel through the New Priority Preliminary Rulings Procedure' 53 *Annales Universitatis Scientiarum Budapestinensis de Rolando* (2012), pp. 65-94 at 66.

and rules of constitutional rank.¹²⁸ However, up until the 2008 constitutional amendment, the powers of constitutional review by the Council were confined to the legislative and certain other measures of Parliament.¹²⁹ Its authority was thus restricted to the control of Parliamentary statutes, after their adoption, but before promulgation, upon referral by elected politicians.¹³⁰ A statute, once it had entered into force, was immune to review by any court under French law. Moreover, the jurisdiction of the Council was limited to abstract review; it did not receive referrals of constitutional questions from the judiciary, nor could individuals appeal to it directly.¹³¹ Following the amendment, *ex post* review has been introduced, whereby the Council may consider whether a legislative provision that is already in force violates the rights and freedoms under the Constitution, acting on referral by the *Conseil d'État* or the *Cour de Cassation*.¹³² Accordingly, individuals, within the framework of a court case, are allowed to challenge the constitutionality of statutory provisions infringing their fundamental rights.

In the previous section it was asserted that the principle of legality, the core element of the rule of law in all three legal systems, has a particular understanding in the United Kingdom informed by the sovereignty of parliament. It was also demonstrated that the principle of legality presupposes a form of judicial review. Under UK common law it is even stated that when there is no remedy, there is no right;¹³³ an adage to indicate the importance of ordinary courts in upholding the law of the land. However, unsurprisingly considering the importance of the doctrine, judicial review in the United Kingdom is heavily influenced by parliamentary sovereignty.¹³⁴ Nonetheless, since the country has become a member of the European Union, the principle of Parliamentary sovereignty has been somewhat restricted. Under the 1972 European Communities Act, which incorporates both the Treaties and secondary legislation into British domestic law, British authorities are obliged to give precedence to EU law over conflicting domestic law.¹³⁵ As shown by the *Factortame* litigation, national courts have accepted the supremacy of EU law over national legislation, even in cases where the provisions held to be incompatible with EU law are contained in an Act of Parliament.¹³⁶ As long as Parliament does not expressly indicate

128 Decision of the Conseil Constitutionnel no. 81-132 of 16 January 1982, para.18; Decision no. 82-137 of February 1982, para. 3.

129 Philippe (2012), p. 70.

130 Alec Stone Sweet 'The Politics of Constitutional Review in France and Europe' 5 *International Journal of Constitutional Law* (2007), pp. 69-92 at 71.

131 Rivero & Waline (2006), p. 255.

132 Article 61 of the French Constitution.

133 Dicey (1959), p. 199.

134 Wade & Forsyth (2009), pp. 21-23; Francis Jacobs *The Sovereignty of Law. The European Way* Cambridge University Press (2007), p. 7.

135 See section 2(1) and 2(4) of the European Communities Act.

136 *Factortame Ltd. v Secretary of State for Transport* [1990] 2 AC 85; *Factortame Ltd. v Secretary of State for Transport No. 2* [1991] 1 All ER 70. See also Paul Craig & Gráinne de Búrca (eds) *EU Law: Text, Cases, and Materials* Oxford: Oxford University Press (2008), pp. 366-367.

its will to derogate from EU legislation, and thus to repeal the European Communities Act, national courts will not apply statutory provisions which, according to the jurisprudence of the CJEU, are not consistent with Britain's obligations under EU law.¹³⁷ Thus, the doctrine of parliamentary sovereignty is in some ways limited, although parliament itself still holds that the supremacy of EU law is based on its (the parliament's) own intention.¹³⁸

Additionally, the adoption of the 1998 Human Rights Act, whereby the European Convention of Human Rights (ECHR) is given effect in domestic law, has limited parliamentary sovereignty in some ways, by instituting a form of abstract review of legislation, under which the legislature must indicate the compatibility of new legislation with the ECHR.¹³⁹ However, in relation to judicial review of compatibility of domestic law with the ECHR, the last word is still reserved for parliament.¹⁴⁰ Whereas ordinary courts can review the compatibility of legislation with the Convention, in relation to acts of parliament this form of judicial review is reserved for higher courts.¹⁴¹ Subsequently, if domestic law is found to be incompatible, a parliamentary act cannot be declared null and void. Instead the judiciary can merely issue a declaration of incompatibility,¹⁴² on the basis of which the parliament can use its discretionary power to decide to amend or uphold the disputed act.¹⁴³

In sum, in this section it was shown that the rule of law and its core element of legality require safeguard mechanisms. Judicial review, and, in the case of the continental concepts of *Rechtsstaat* and *état de droit*, constitutional review, safeguard the rule of law in all three Member States. It was also demonstrated that the manner in which the judiciary branch of government and judicial review is organised differs considerably, whereby the latter, in the case of the United Kingdom, has been significantly strengthened under the influence of European law.

6. CONCLUSIONS

In this chapter it was examined, whether, and to what extent, the rule of law in the German *Rechtsstaat*, the French *état de droit*, and the Anglo-Saxon rule of law have some common core elements. It was shown 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

137 *Factortame Ltd. v Secretary of State for Transport* No. 2 [1991] 1 All ER 70.

138 Gordon Anthony *UK Public Law and European Law* Oxford: Hart Publishing (2002), pp. 77-92.

139 Section 19 of the Human Rights Act.

140 Section 4(2) of the Human Rights Act; Jacobs (2007), p. 25.

141 Wade & Forsyth (2009), p. 144.

142 *Ibid.*, p. 144; Gosalbo-Bono (2010), pp. 258-259.

143 Adam Tomkins *Public Law* Oxford: Oxford University Press (2003), p. 122.

of the individual. 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, it was argued 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.

The chapter continued by asserting that in Germany, France, and the United Kingdom, legality forms the rule of law's common substance. More particularly, it was demonstrated that legality provides requirements both for the legislature in relation to the law it produces, as well as for the validity of law itself. Moreover, it was shown that the rule of law, in order to achieve its aims, requires safeguarding mechanisms in the form of judicial review. On the basis of the foregoing, it can be concluded that even though many authors have argued that '*la manière d'appréhender ces concepts peut varier sensiblement d'une société à l'autre, d'une époque à l'autre, d'une doctrine à l'autre*,'¹⁴⁴ the rule of law in the three Member States clearly has a common core, consisting of the four features discussed above. Against this background, the next chapter will focus on the question whether, and to what extent, these features are verified in legal doctrine. In this way, it can be ascertained whether the four core features established above are indeed considered to be pivotal to the rule of law. Moreover, it can be determined if the elements are considered to be of equal importance or whether some are deserving of more attention and why.

144 Carpano (2005), p. 23.

1. INTRODUCTION

In the previous chapter, it was demonstrated that the rule of law is a concept with a core that is 'common to the Member States'. Indeed, it was demonstrated that rule of law serves in the examined states as a restraint of power and is seen as the means to buttressing the preservation of individual liberties. The *Rechtsstaat*, the *état de droit* and the Anglo-Saxon rule of law all demand that the administration acts on the basis, and within the restraints, of the law. Moreover, the rule of law's element of legality is considered to provide various requirements for the validity and quality of law and legal rules. Similarly, it was shown that in the three legal systems, legality presupposes a form of the separation of powers, since it is addressed to the judiciary and the legislature as it sets separate criteria for each of them. Furthermore, it was asserted that within the separation of powers, the three legal systems demonstrate a particular emphasis on the guarantees for judicial independence. It is this particular focus, that also explains the observation that judicial review is found as the common mechanism for safeguarding the rule of law.

In this chapter, these elements will be further tested against legal theory, in order to establish whether, and to what extent, legal doctrine considers the same four features established above crucial for the existence of the rule of law concept. More particularly, since there exists a close connection between the conceptualisation of the rule of law in these Member States and the development of the discussion in legal scholarship (with philosophers such as Dicey, Rousseau, and Locke contributing to the articulation of both), the chapter will focus on examining to what extent the identified rule of law elements are attributed the same weight in the doctrine as in the constitutional traditions of the three Member States.

The chapter begins by asserting that in legal theory the rule of law is first and foremost understood as a way of restraining power – indeed, not only does the rule of law require that rulers govern on the basis of law, the concept presupposes that the government is itself bound by it. Next, it is established that the rule of law's conceptual purpose comports with the way it is understood in the three Member States. The chapter continues by arguing that legal doctrine confirms that the core element of the rule of law comprises the principle of legality. More particularly, it is shown that legal doctrine gives prominence to this element, with scholars such as Fuller and Raz having fleshed out this principle by formulating a number of qualita-

tive formal requirements through which law can attain its aforementioned purpose. It is maintained that there is general agreement that in all legal systems most of these criteria can only be fulfilled to a certain degree and, thus, they cannot all be fully realised at the same time. However, the chapter highlights that the question of minimum thresholds of these elements is insufficiently answered by the doctrine.

In relation to the rule of law's institutional underpinnings, it is further shown that legal theory also relies on the separation of powers as a means of ensuring judicial independence. Just as in the Member States, in theory, the principle of legality presupposes at the very minimum some form of a functional separation of powers, since its requirements are directed at the three different branches of government. More particularly, it is argued that, in relation to the rule of law's theoretical understanding, the debate on the separation of powers revolves around the legal system and its judiciary branch. It is asserted that this can be explained by virtue of the fact that law belongs to a legal system, and that any discussion on the nature and quality of law, inevitably involves an exploration of this system. It is shown that, within this discussion, there is a noticeable emphasis on the core element of judicial independence.

The chapter concludes by asserting that legal theory confirms judicial review as the essential mechanism for safeguarding the rule of law. It is demonstrated that the principle of legality requires that executive action be justified in law and, subsequently, that the judiciary is tasked with safeguarding the rule of law through judicial review of governmental acts that are deemed unlawful. More particularly, it is shown that both legal theory and the national rule of law conceptualisations distinguish between judicial review of executive action and legislation.

On the basis of the analysis of the theoretical understanding of the rule of law, it will be concluded that, even though legal theory is concerned with the extrapolation of a more generic definition of the rule of law as a way to understanding the notion's general nature and purpose,¹ it confirms the four features (purpose, substance, institutional underpinning, and safeguarding mechanism) found in the three Member States, albeit with a an emphasis on some rule of law elements over others.

2. THE PURPOSE OF THE RULE OF LAW: RESTRAINT OF POWER AND THE PROTECTION OF INDIVIDUAL LIBERTY

Taking their cue from the historical context in which the concept developed, legal philosophers understand the rule of law as a means of restraining, if not actually taming,² power, in a manner similar to the *Rechtsstaat*, *état de*

1 Sionaidh Douglas-Scott *Law after Modernity* Oxford: Hart Publishing (2013), p. 219.

2 Amichai Magen 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' 45 *Stanford Journal of International Law* (2009), pp. 51-115 at 60.

droit, and the Anglo-Saxon rule of law. As Dicey stated in relation to the latter: 'The rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.'³ This idea of restraint of government power is further supported in the writings of numerous legal scholars, as demonstrated, for example by Hayek's interpretation of the rule of law: 'Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'⁴ Thus, as seen in the practice of the three Member States, the rule of law means not only ruling on the basis of law, or 'rule by law', but it also presupposes that the government is itself bound by it.⁵

Moreover, in the aforementioned definition provided by Hayek, the protection of individual liberty, espoused by Locke,⁶ Rousseau,⁷ and Hobbes⁸ within the context of the development of the national conceptions of the rule of law, is similarly accorded a prominent place. However, where on the national level individual liberty is understood as the protection of citizens against undue interference, whereby the emphasis is on the constraint of those wielding the power, in legal theory, stress is put on the individual and their development. Accordingly, as demonstrated by Hayek's definition, individual liberty is understood as the freedom to act outside of the constraints of the law. In this way, the purpose of the rule of law is to set boundaries in the understanding that outside of those, there is the freedom to pursue one's activities. Thus, the rule of law in legal theory requires that the law by which governments purport to rule should be such that it can guide human conduct,⁹ and offer a basis for legitimate expectations, or predictability, which brings with it a feeling of security.¹⁰ In other words, according to legal theory, a legal system underpinned by the rule of law is grounded in an understanding of the obligations of the state *vis-à-vis* the citizens and among themselves, on the basis of which citizens have the legitimate

3 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* Houndmills: Macmillan (1959), p. 188.

4 Friedrich A. Hayek *The Road to Serfdom* Chicago: University of Chicago Press (1994), p. 80. See also Fuller 'The purpose I have attributed to the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules.' Lon Fuller *The Morality of Law* New Haven: Yale University Press (1969 revised edition), p. 146.

5 See chapter 1, section 2.

6 John Locke *Second Treatise of Government* Indianapolis: Hackett Publishing Company (1980), section 202.

7 Jean-Jacques Rousseau *Du Contrat Social* (1762) Paris: Union Générale d'Éditions (1963), book 2

8 Thomas Hobbes *Leviathan* New York: Oxford University Press (1996).

9 Joseph Raz *The Authority of Law. Essays on Law and Morality* Oxford: Clarendon Press (1979), pp. 212-214; Hayek (1994), p. 80; Fuller (1969), p. 146.

10 John Rawls *A Theory of Justice* Cambridge: Harvard University Press (1979), p. 238.

expectations that the law will constrain other citizens and officials of state in ways that they can predict.¹¹ In this way, legal theory accords the rule of law the same purpose as was demonstrated in the previous chapter, with the slight difference that the protection of individual liberty is not so much understood as the protection of rights from governmental interference, but, rather, as the freedom individuals have to live their own lives, guided by the boundaries of the law.

3. THE CORE SUBSTANCE OF THE RULE OF LAW: LEGALITY

In this section, it will be demonstrated that legal doctrine understands the principle of legality as the core element of the rule of law, in ways similar to the national conceptions of Germany, France, and the United Kingdom. It will be asserted that in legal theory legality is also considered as a means of attaining the rule of law's purpose of restraint of power by law. More particularly, it will be shown that much of the discussion in legal theory revolves around this rule of law element with a number of scholars having formulated both formal and procedural requirements for the validity of law itself and for law to be able to guide human conduct. It will be demonstrated that together with Fuller¹² and Raz,¹³ as the major reference points of the theoretical discussion,¹⁴ other legal philosophers such as Finnis,¹⁵ MacCormick,¹⁶ and Waldron,¹⁷ all share the view that there are certain features the law must possess in order to successfully fulfil its function as law and for the rule of law to effectively protect citizens and guide individual behaviour. Since the list of eight requirements compiled by Fuller has been the most influential,¹⁸ this section will take these as its point of departure for providing an insight into the requirements of legality in legal theory.

11 Martin Krygier 'Rule of Law' in Neil J. Smelser & Paul B. Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* New York: Elsevier (2001), pp. 13404-13408 at 13406.

12 Fuller (1969), mainly chapter 2.

13 Raz (1979), mainly chapter 11.

14 Gianluigi Palombella 'The Rule of Law and an Institutional Ideal' in Leonardo Morlino & Gianluigi Palombella (eds) *The Rule of Law and Democracy, Inquiring into Internal and External Issues* Leiden: Martinus Nijhoff (2010), pp. 1-37 at 26.

15 John Finnis *Natural Law and Natural Rights* Oxford: Clarendon Press (1980), pp. 270-276.

16 Neil MacCormick 'Natural Law and the Separation of Law and Morals' in Robert P. George (ed) *Natural Law Theory* Oxford: Oxford University Press (1992), pp. 105-133 at 121-125.

17 Jeremy Waldron 'The Concept and the Rule of Law' 43 *Georgia Law Review* (2008), pp. 1-61.

18 This is confirmed by the fact that all legal philosophers, and many more, have frequently engaged with Fuller's work on this issue. See, amongst others, H.L.A. Hart 'Review of the Morality of Law' 78 *Harvard Law Review* (1965), pp. 1281-1296; Ronald Dworkin 'The Elusive Morality of Law' 10 *Villanova Law Review* (1965), pp. 631-639.

3.1 Fuller's legality requirements

If the rule of law is to attain its purpose of restraint of power by law, it is not sufficient simply to have laws passed in the correct legal manner. After all, law is to also guide one's conduct in order to plan one's life. It is from this that legal philosophers have deduced a number of specific attributes that laws should have in order for them to be in compliance with the rule of law.¹⁹ Accordingly, Fuller submits eight requirements for the validity of law: (1) laws must be general, (2) promulgated and made available to the public, (3) non-retroactive, (4) clear and understandable, (5) non-contradictory, (6) only require action that subjects are capable of performing, (7) relatively stable, and (8) there must be congruence between the rules as announced and their actual application.²⁰

The first requirement of generality has two separate aspects: the subjects addressed by the law's norm and the law's norm itself.²¹ In relation to the first aspect, it is clear that law can address both particular individuals and groups of people. A rule addresses its subjects mostly by identifying a general feature that sets them apart, which is connected to what the rule prescribes; the purpose of a specific law will be defeated if it does not address itself to the relevant subjects.²² Closely linked to this is the notion of equality before the law,²³ since generality, at least to some extent, serves as a safeguard against favouritism and partiality and ensures equal treatment of those that subscribe to the same general feature.²⁴ When the law favours or disfavors a certain class or group of people, surely it may only do so

19 See for example Brian Z. Tamanaha 'A Concise Guide to the Rule of Law' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 3-15 at 10-11.

20 Fuller (1969), p. 33-94.

21 Georg H. von Wright *Norm and Action. A Logical Enquiry* New York: Routledge (1963), chapters 1 and 3; Andrei Marmor 'The Rule of Law and its Limits' *USC Public Policy Research Paper* No. 16 (2003), pp. 11.

22 Richard A. Posner 'Corrective Justice' in Christopher B. Grey (ed) *The Philosophy of Law* New York: Garland Publishing (1999), pp. 163-165.

23 H.L.A. Hart *The Concept of Law* Oxford: Oxford University Press (2012), p. 161; Dicey (1959), p. 193.

24 Andrei Marmor *Positive Law and Objective Values* Oxford: Oxford University Press (2002), pp. 147-152.

on the basis of general reasons that warrant differential treatment,²⁵ such as in the case of racial or religious minorities.²⁶ Thus, the requirement of generality is addressed not only to the legislature, but also to the judiciary and necessarily includes the requirement of judicial impartiality.

The second aspect of generality is that of the law's norm. The law can prescribe the performance of a particular action or omission thereof, or it can stipulate a general act. The more general the norm, however, the less it is able to actually guide individual conduct, and the greater the judicial discretion in applying and interpreting it.²⁷ The law's generality is thus a matter of degree. Marmor makes the interesting argument that, while some authors argue that this type of generality raises concerns in the context of the rule of law, these types of legal norms are rarely left to their general and/or possibly vague form;²⁸ the specification of their content is handed to institutions, like administrative agencies and courts. In present day societies, where law has become very detailed due to an increase in governmental tasks,²⁹ the legislature is often justified in leaving its specification to qualified agencies and to courts. After all, the rule of law requires that the law be such that it can actually guide human conduct; it is indifferent about who

25 Hayek subscribes to the view that according the rule of law, individuals should be treated equally under general laws, without regard to their particular qualities or circumstances, even though such complete equality might lead to unattainable and undesirable results. He had a bone to pick with the notions of substantive equality and distributive justice, because, if distributive justice contains the notion that there should be a fair allocation of goods in society, this can only be addressed through substantive equality, for unfair distribution often leads to unequal situations which would need to be addressed by taking the inequalities into consideration. According to Hayek, however, the problem is that 'in spite of many ingenious attempts ... no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law.' For this reason, the rule of law produces economic inequality, which however, 'is not designed to affect particular people in a particular way.' Friedrich A. Hayek *The Constitution of Liberty* Chicago: The University of Chicago Press (1960), pp. 209-232; Friedrich A. Hayek *The Political Ideal of the Rule of Law* Cairo: Bank of Egypt (1955), p. 36. Substantive equality is the notion that equality requires treating differently situated people differently in order to account for the inequality in their situations, thus requiring the articulation of principles through which courts can determine whether the application of a rule to a person is compatible with the application of a different rule to another person. See for example Eduard Vierdag *The Concept of Discrimination in International Law* The Hague: Martinus Nijhoff (1973).

26 Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad. In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 31-73 at 38-39.

27 Marmor (2003), pp. 15-16.

28 *Ibid.*, p. 17.

29 Jacques Chevallier *L'État de Droit* Paris: Montchrestien (2003), p. 98; Henry S. Richardson 'Administrative Policy-Making: Rule of Law or Bureaucracy?' in David Dyzenhaus (ed) *Recrafting the Rule of Law. The Limits of Legal Order* Oxford: Hart Publishing (1999), pp. 309-330 at 309; Edward Rubin 'Law and Legislation in the Administrative State' *Columbia Law Review* (1989), pp. 369-426 at 395.

decides what has to be done, whether it is the legislature, an administrative agency, or the courts.

The second requirement of promulgation stems from the obvious fact that a law, if it is to guide human conduct, needs to be made publicly available. Accordingly, this public aspect is an essential feature of its normativity, for a norm cannot provide a reason for action or abstention unless its subjects are aware of its existence and regard it as such.³⁰ However, the extent of promulgation depends on its purpose.³¹ From a purely functional perspective, only those parts of the law need to be made public to those addressees whose behaviour it purports to regulate: agencies, individual subjects, to name a few. However, if, from a political perspective, critical debate and public scrutiny of the law are also valued, its promulgation needs to be much wider.³² Nonetheless, for law to guide conduct, only functional promulgation seems to be required by the rule of law.

Non-retroactivity of law, Fuller's third requirement, can be understood both from a functional perspective – human conduct cannot be guided retroactively³³ – and from a moral perspective – criminalising behaviour retroactively is an affront to human freedom and conflicts with legal certainty.³⁴ Legal practice shows that there are two exceptions to this requirement, in the form of a court overruling a previous precedent,³⁵ or by distinguishing cases³⁶ – a legal method by which a judge can find that the material facts of a case are sufficiently different from a previous decision to warrant a different outcome.³⁷ *De facto* these judicial actions have a retroactive effect,

30 Gilbert Bailey 'The Promulgation of Law' 36 *American Political Science Review* (1941), pp. 1059-1084 at 1059-1061.

31 Marmor, (2003), p. 22; Raz (1979), p. 215.

32 According to Fuller, '[i]t is the virtue of a legal order conscientiously constructed and administered that it exposes to public scrutiny the rules by which it acts.' Fuller (1969), p. 158. See also on the value of critical appraisal see for example the second chapter of John Stuart Mill *On Liberty and Other Writings* Cambridge: Cambridge University Press (1989).

33 According to Hayek, laws' predictability - prospective laws give rise to legitimate expectations - is a central function of the rule of law, since predictable, efficient legal system allows businesses to plan, enables law-abiding citizens and businesses to stay on the correct side of the law, and provides some level of deterrence against criminal acts. If a legal system is predictable, it is a viable means for solving disputes. See Kleinfeld (2006), p. 42.

34 This last idea requires some nuance: the German courts found, both after the defeat of the national socialist regime and after the 1989 collapse of the Berlin wall in the cases concerning the wall-shootings, that in both cases the positive law of the legal system at the time could not be deemed to be legally valid because it offended against fundamental principles of justice and the rule of law. See for the latter case BVerfGE 95, 96; 2 BvR 1851, 1853, 1875 and 1852/94, 24 October 1996 and Robert Alexy 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed) *Recrafting the Rule of Law. The Limits of Legal Order* Oxford: Hart Publishing (1999), pp. 15-39 at 15.

35 Raz (1979), pp. 185-189. On the question of retroactive effects of judicial law-making in areas of settled case law see Ronald Dworkin *Taking Rights Seriously* Cambridge: Harvard University Press (1978), p. 82.

36 Raz (1979), pp. 189-192.

37 See generally James L. Montrose 'Distinguishing Cases and the Limits of Ratio Decidendi' 19 *The Modern Law Review* (1956), pp. 525-530.

at the very least for the litigants involved.³⁸ However, even though it can be argued that the introduction of legal changes is best left to the legislator, flexibility in the application of the law is equally desirable if law is to function as an effective tool of social control.³⁹ Thus, this requirement places as much emphasis on the legislative branch of government, as it does on the judicial branch.

The fourth requirement that rules need to be clear and understandable is just that: those who need to understand the law should be able to do so. This implies that laws are sufficiently precise, a criterion, which, however, is a matter of degree. After all, clarity of law can also denote rigidity, a feature heavily criticised by scholars pointing out the difference between law-in-the-books and law-in-action.⁴⁰ Nonetheless, it is generally understood in legal theory that the required precision of the law depends on the existence of commonly accepted standards, which might have a level of obscurity, but which have been established on the basis of judicial practice.⁴¹

The fifth requirement establishes that laws may not contradict each other. This entails that the legislature has an obligation to endeavour not to include conflicting provisions within a single law, nor to enact a law that negates a provision, or even objective, of another law. Moreover, the requirement of non-contradiction also acts on a more abstract level of coherence, that of the legal system with its moral-political underpinnings.⁴² Accordingly, Dworkin has argued that law is morally incoherent if its underlying justifications and the various prescriptions cannot be subsumed under one coherent moral theory.⁴³ However, he was well aware of the fact that the laws' moral soundness had to be balanced against the legal system's integrity, thereby allowing for the rectification of possible past mistakes.⁴⁴ Thus, this requirement has to be balanced against the functioning of the legal system as a whole.

Fuller's sixth and seventh requirement – laws may not require the impossible and ought to be stable – are straightforward. Law cannot guide behaviour if it prescribes an impossible course of action. While it can be

38 Raz (1979), p. 198.

39 Marmor (2003), p. 32. Fuller (1969), pp. 51–62.

40 Mauro Zamboni *Law and Politics: A Dilemma for Contemporary Legal Theory* Berlin: Springer (2008), pp. 88–89; Karl Llewellyn 'Some Realism About Realism - Responding to Dean Pound' 44 *Harvard Law Review* (1931), pp. 1222–1264 at 1237; Roscoe Pound 'Law in Books and Law in Action' 44 *American Law Review* (1910), pp. 12–36. See also Fuller, who argued that the ossification of laws would make them essentially dysfunctional. Fuller (1969), pp. 60–62.

41 Geranne Lautenbach *The Concept of the Rule of Law and the European Court of Human Rights* Oxford: Oxford University Press (2013), p. 39.

42 Ronald Dworkin *Law's Empire* Cambridge: Harvard University Press (1986), pp. 176–224.

43 Marmor (2003) p. 36.

44 Dworkin (1986), pp. 65–72. For Raz's opinion on this particular point see Joseph Raz 'The Relevance of Coherence' 72 *Boston University Law Review* (1992), pp. 273–321. For the questionability of the argument on moral coherence in light of current pluralist societies, see John Rawls *Political Liberalism* New York: Columbia University Press (2005), pp. 11–14.

argued that there is a nuance in the word 'impossible' – does Fuller mean actual physical impossibility, basic considerations of cost-effectiveness, or do conscientious objections also qualify? – it is a given that the law should prescribe general guidelines with which individuals have to be able to comply. How else is the rule of law to guide individuals' behaviour? The requirement of stability is again one of degree.⁴⁵ When law changes too frequently its guiding function is under pressure, however, as argued above, ossification of law is not to be preferred either.

The eighth and final requirement prescribes the congruence between rules and their application. For law to function properly various law enforcement agencies and the judiciary must apply it, while simultaneously preventing a discrepancy between the rules as declared and as they are actually administered.⁴⁶ Only if deviations from the rules are treated as such, can rules guide human conduct and will individuals stick to the rules. For this reason, application mechanisms are of crucial importance. However, even though according to the doctrine of the separation of powers this task is chiefly entrusted to the judiciary – thereby placing the responsibility of the law's correct application in practised hands, it makes the correction of abuse dependent upon the willingness and (more often than not) financial abilities of the affected party to litigate a case.⁴⁷

It should be noted that these requirements say nothing about how laws are made – by democratic process or other – and say nothing about the substantive standards the law must satisfy. These requirements, however, provide benchmarks for legal systems in order to regulate both private coercion and violence among citizens themselves, as well as government action. Thus, the rule of law as legality is essentially a negative value involving a formal delimitation of government action so that the power of every authority is exercised in accordance with law. By forcing public authority to follow legal forms and, as it will be demonstrated further below, legal procedures, law operates to reduce the possibility of government to excessively coerce or unreasonably interfere with the life, liberty, and property of citizens.⁴⁸

3.2 Further fleshing out of legality's requirements

As outlined above, Fuller has given an elaborate and sophisticated account of legality, setting quality requirements to law. He has outlined eight requirements of legality, that need to be fulfilled at least to a substantial degree in order for the rule of law to fulfil its primary function of guiding the behaviour of citizens. On the basis of this list a number of other eminent legal philosophers have compiled and outlined their own thoughts on the

45 Fuller (1969), pp. 70-79.

46 *Ibid.*, p. 81.

47 *Ibid.*, pp. 81-82.

48 Ivor Jennings *The Law and the Constitution* London: University of London Press (1959), pp. 45-66.

rule of law.⁴⁹ In *The Authority of Law*, Raz, starting from the same premise of law's capability of guiding the behaviour of its subjects,⁵⁰ outlines similar requirements:⁵¹ laws should be prospective, open and clear; relatively stable; and the making of particular laws should be guided by open, stable, clear, and general rules.⁵² In the same vein, MacCormick includes promulgation, generality, stability, and non-retroactivity as the requirements for law to properly function as law.⁵³ This set of requirements, also found in the works of Hayek⁵⁴ and Unger,⁵⁵ is generally regarded as standard statements of the dominant formal versions of the principle of legality within the rule of law.⁵⁶

However, the exact number of requirements of legality and their precise content has remained undecided and open for discussion. What if a legal system does not meet all requirements as indicated in Fuller's list? Would this lead to the conclusion that there is no rule of law at all? It seems that there is some confusion on this point in the literature, not in the least because of Fuller's statement on what he termed, the 'inner morality of law' in combination with the requirements he outlined. Fuller argued that his eight legality requirements constitute the inner morality of law, in the sense that they are intrinsic to the law itself; compliance with all requirements leads to fair laws. It is a 'morality' because it provides standards for evaluating official conduct. Fuller furthermore emphasised that the principles underlying legality are so profound that deviation or lack of one of them would not merely result in a bad system of law, but it would result in something that can not properly be called a legal system at all.⁵⁷

The confusion lies in the fact that morality is easily equated with more substantive principles such as justice. However, this cannot have been

49 See, for authors not mentioned in the text, for example Fallon, who argues for the following five principles: the capacity of legal rules, standards or principles to guide people in the conduct of their affairs (1), efficacy (the law should actually guide people) (2), stability (the law should be reasonably stable in order to facilitate planning and coordinated action over time) (3), supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens) (4), impartial justice (courts should be available to enforce the law and should employ fair procedure) (5). Richard Fallon "'The Rule of Law' as a Concept in Constitutional Discourse" 97 *Columbia Law Review* (1997), pp. 1-56 at 8-9. Also see Robert S. Summers 'The Principles of the Rule of Law' 74 *Notre Dame Law Review* (1999), pp. 1691-1712.

50 Raz (1979), pp. 214.

51 Unlike Fuller's universal claim on the nature of laws, Raz's non-exhaustive list is presented as context dependent, in so far as these principles 'depend for their validity or importance on the particular circumstances of different societies.' Raz (1979), p. 214.

52 *Ibid.*, pp. 210-229

53 Neil MacCormick 'Der Rechtsstaat und die Rule of Law' 39 *Juristenzeitung* (1984), pp. 65-70 at 68.

54 Hayek (1960); Hayek (1994).

55 Robert Unger *Law in Modern Society* New York: The Free Press (1976), pp. 176-181.

56 Brian Z. Tamanaha *On the Rule of Law. History, Politics, Theory* Cambridge: Cambridge University Press (2004), p. 93.

57 Fuller (1969), p. 39.

the intended outcome of Fuller's analysis of legality since he himself has insisted that in presenting the analysis of law's inner morality, legality is 'over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy.'⁵⁸ Lyons has criticised Fuller's use of the term 'morality' as misleading, since none of the eight requirements have a regular connection to substantive principles. Instead, according to Lyons, Fuller's requirements concern the *effectiveness* of law.⁵⁹ This conclusion is also supported by Dworkin, who has noted that '[f]ailure to produce a law is not in itself a moral fault.'⁶⁰ Accordingly, if Fuller's requirements are viewed along the lines of effectiveness, it can be argued that failure to satisfy one of them, does not necessarily lead to a negative result, it will just be a less effective legal system. This argument is furthermore supported by Raz's writings. According to Raz, there is little point in enumerating a definitive list of legality's requirements, since many requirements depend for their validity on the particular circumstances of the different societies.⁶¹ Thus, it is enough to articulate some common elements of legality, which might occur in any combination, at any given point in time. Such a flexible approach in relation to legality and to the rule of law is preferable, especially considering the various ways in which legal systems are organised,⁶² but also because of the specific nature of some areas of law.⁶³ With regard to criminal law, for example, legality's requirements are especially important, since government interference has a very strong impact on individuals' lives in this particular area. Thus, it is not surprising that the requirement of non-retroactivity is a central tenet of criminal law and codified in most national and international legal systems.⁶⁴

However, after having established that most legal scholars agree on the formal elements of the rule of law – generality, promulgation, clarity, stability, non-retroactivity, non-contradictory – one question still remains on the table. In the previous section it was argued that fulfilment of the requirements mentioned is considered to be a matter of degree. If this is accepted, what then is the minimum threshold for their realisation? It seems

58 *Ibid.*, p. 153.

59 David Lyons *Ethics and the Rule of Law* Cambridge: Cambridge University Press (1984), p. 77.

60 Ronald Dworkin 'Philosophy, Morality, and Law - Observations Prompted by Professor Fuller's Novel Claim' *University of Pennsylvania Law Review* (1965) 113, pp. 668-690 at 675.

61 Raz (1979), pp. 214-218.

62 According to Palombella, the requirements for the validity of law can be matched at different times and in different contexts by a variety of institutional arrangements. Palombella (2010), p. 31.

63 Fuller (1969), p. 93.

64 Dov Jacobs 'International Criminal Law' in Jörg Kammerhofer & Jean D'Aspremont (eds) *International Legal Positivism in a Post-Modern World* Cambridge: Cambridge University Press (2014), pp. 451-474; Kenneth S. Gallant *The Principle of Legality in International and Comparative Criminal Law* Cambridge: Cambridge University Press (2009), p. 241.

that most scholars have refrained from addressing this issue,⁶⁵ or when they do address it, they have only managed to vaguely sketch the outlines of a minimum threshold.⁶⁶ Mostly, the literature has identified rule of law elements in an inarticulate way as, for example, 'fairly generalised' rule through law, a 'substantial amount' of legal predictability, or 'widespread' adherence to the principle that no one is above the law.⁶⁷ However, the question of thresholds still remains.

Consider for example the requirements of generality. In the modern day state, law has increasingly become detailed and, oftentimes, technical. This is due to the rise of the administrative welfare state, which has seen the proliferation of sub-governmental bodies and has called for more government interference resulting in specific regulations.⁶⁸ Moreover, as the executive power has progressively acquired law-making power,⁶⁹ next to those of the parliament, the requirement of generality has become increasingly concerned with questions of the scope and extent of delegation of law-making power to that branch of government. This brings with it the problem of discretionary powers:⁷⁰ legality requires laws to be general, but at the same time, modern-day society leaves law-making and its application to administrative agencies,⁷¹ who apply discretion in deciding how to apply the law in a specific case.⁷² However, not only does such discretionary power appear to run counter to the idea of law's generality, it also potentially counteracts law's predictability. What, then, should the minimum level of generality be? Maybe Raz offers the clearest solution. He recognises the importance of generality, while at the same time acknowledging that a legal system must also have more specific rules. Thus, the requirement of generality does not imply that all laws must be general in nature. Rather, it is the making of more particular rules that should be guided by more general ones.⁷³

In sum, it has been demonstrated that legal theory, like the rule of law in its national manifestations, recognises legality as the rule of law's central element. It has been shown that, in order to fulfil the rule of law's primary

65 See for exceptions for example Adriaan Bedner 'An Elementary Approach to the Rule of Law' 2 *Hague Journal on the Rule of Law* (2010), pp. 48-74 and the work undertaken by Randall Peerenboom.

66 For a notable exception combining both a conceptual and benchmark approach see Nicolas Hachez & Jan Wouters 'Promoting the Rule of Law: A Benchmark Approach' LCGGS Working Paper No. 105 (2013)

67 Michel Rosenfeld 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 *Southern California Law Review* (2001), pp. 1307-1351 at 1313.

68 Edward L. Rubin, 'Law and Legislation in the Administrative State' 89 *Columbia Law Review* (1989), pp. 369-426 at 395.

69 Rubin (1989), p. 391.

70 Eoin Carolan *The New Separation of Powers. A Theory for the Modern State* Oxford: Oxford University Press (2009), p. 119.

71 Brian Z. Tamanaha 'The History and Elements of the Rule of Law' *Singapore Journal of Legal Studies* (2012), pp. 232-247 at 242.

72 McCormick (1984), p. 68.

73 Raz (1979), pp. 215-216.

function of guiding the behaviour of citizens, scholars have formulated a number of requirements and qualifications for the validity of law. More particularly, it has been asserted that most of the requirements mentioned by Fuller have been confirmed by similar accounts of legality of other legal philosophers. Furthermore, it has been demonstrated that there is general agreement on the fact that most of the requirements can only be fulfilled to a certain degree and on the fact that not all of them need to be fully realised at the same time. Thus, it was shown that according to legal doctrine, it is enough to articulate legality's elements, in the understanding that they can occur in any combination in a particular society, at any given point in time. However, it was also demonstrated that the question of minimum thresholds, or, in other words, the question what the minimum conditions are for each particular requirement, has not been sufficiently answered by legal theory.

4. THE INSTITUTIONAL UNDERPINNINGS OF THE RULE OF LAW: EMPHASIS ON THE LEGAL SYSTEM AND JUDICIAL INDEPENDENCE

The focus of this section will be to demonstrate that in legal doctrine, the rule of law's core element of legality is underpinned by a form of the separation of powers, in ways similar to the national conceptions of the rule of law. More particularly, it will be asserted that since the requirements of legality address the three different branches of government, this common element of the rule of law thus presupposes some functional separation of governmental power. However, it will be demonstrated that legal scholars have restricted their analysis almost exclusively to the judicial branch. It will be shown that this is the consequence of the fact that the discussion on the rule of law concentrates on the question of the nature and validity of law, including the aforementioned requirements of legality. With this comes the belief that one of the further defining features of law is that it functions in an institutionalised legal system. It will be shown that, following this point of view, legal theory has emphasised the legal system and the norm-applying institutions within it.

From the above *exposé* of the rule of law's core principle of legality it has become clear that legality is understood as having both a systemic as well as an adjudicative dimension. Along the lines of the latter, legality is promoted by courts that enforce rights of individuals on the basis of past political decisions by the legislature and/or executive. This will be discussed in more detail in the next section. Along the lines of the former, legality, in its function as a power-restraining mechanism, is served by the existence of tools, judicial and non-judicial alike, that check undue governmental interference⁷⁴ Accordingly, legality's requirements are directed at the dif-

74 Dimitrios Kyritsis *Shared Authority. Courts and Legislatures in Legal Theory* Oxford: Hart Publishing (2015), p. 105.

ferent branches of government, and thus, imply some form of functional separation of power.

For example, clarity and stability are directed at the legislature as norm-creator, since these requirements are concerned with the form law should take. To the extent that the executive has rule-making power, the requirements of legality that determine the validity of law should also be taken into account.⁷⁵ As already demonstrated above, the requirement of generality is directed at both the legislature and the judiciary, as it is concerned with the subject that are addressed by the norm and the way the norm is subsequently applied by norm-applying institutions such as courts and tribunals. Furthermore, both the executive and the judiciary should heed Fuller's eighth requirement, which demands congruence between the law and official acts.⁷⁶ It not only requires that administrative power should adhere to the law, it also demands that the judiciary prevent abuse of the law through acts of government. Legality, thus, also requires some form of judicial review. On the basis of the foregoing, it is proven that the systemic dimension of legality is supported by the doctrine of the separation of powers, both through considerations pertaining to the proper division of government power – government power is divided on the basis of certain institutional arrangements, and through considerations pertaining to checks and balances – institutional mechanisms that monitor the exercise of government power in order to prevent abuse. In this way, the rule of law – in the form of the principle of legality – is underpinned by the separation of powers in the same way, and for the same reasons, as the notion is buttressed in the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law.

However, in light of the fact that in legal doctrine the rule of law debate is concentrated on the requirements for legality and the validity of law, it is not surprising that, for its institutional underpinnings, the discussion focuses mostly on the functioning of the system in which the law is applied: the legal system.⁷⁷ The court-centric emphasis of the debate,⁷⁸ in combination with attention being paid to the norm-creating institutions,⁷⁹ has come at the expense – and almost total exclusion – of the role of the executive.⁸⁰

75 Lautenbach (2013), p. 42.

76 Fuller (1969), p. 81.

77 After all, Finnis has argued that the rule of law is 'the name commonly given to a state of affairs in which a legal system is legally in good shape.' John Finnis *Natural Law and Natural Rights* Oxford: Clarendon Press (1980), p. 270. Further see Joseph Raz 'The Institutional Nature of Law' 38 *The Modern Law Review* (1975), pp. 489-503; Hart (2012). Also see Dicey (1959), pp. 195-196; Joseph Raz *The Concept of a Legal System* Oxford: Clarendon Press (1970).

78 Richard Bellamy (ed) *The Rule of Law and the Separation of Powers* Dartmouth: Ashgate (2010), p. xi.

79 For a good example of theoretical interest in the nature and purpose of legislative intent see Richard Ekins *The Nature of Legislative Intent* Oxford: Oxford University Press (2012).

80 On legal theory's neglect of the executive branch of government see Peter Cane 'Public Law in *The Concept of Law*' 33 *Oxford Journal of Legal Studies* (2013), pp. 649-674.

For, by understanding the rule of law as legality and by focussing on the question of what 'law' is and what its features consist of, legal scholars privilege the judicial perspective.⁸¹ More particularly, legal scholars are in agreement that the rule of law is supported by judicial independence, thereby echoing the emphasis put thereon in the national conceptions.⁸²

Judicial independence has been considered paramount historically, through the works of Locke and Montesquieu. According to the former, established laws with the right to appeal to independent judges are essential to a civilised society, since '[w]ant of a common judge with authority, puts all men in a state of nature.'⁸³ As already demonstrated above,⁸⁴ Montesquieu argued in favour of an independent judiciary branch because, if the judiciary power were not separate from the legislative and executive, the life and liberty of individuals would be exposed to arbitrary control or exposed to oppression.⁸⁵ Raz also considered 'independent courts' an element of the requirements of the rule of law.⁸⁶ After all, citizens can only be guided by the law if the courts apply it correctly and independently from the interests of both the government and the parties in the dispute. Furthermore, for the law to rule, it must be respected and followed, both by those in power as well as individuals. In many ways, the judiciary controls this aspect of the concept, in its role as 'guardian of the law' on the basis of its 'objectified position of neutrality'.⁸⁷ Since, without impartiality and independence of judges, adjudication could not exist.⁸⁸ Thus, judicial

81 Kyritsis (2015), p. 115; Hart (2012); Hans Kelsen *General Theory of Law and State* (transl. A. Wedberg) Clark, New Jersey: The Lawbook Exchange (1999); Hans Kelsen *Pure Theory of Law* New Jersey: The Lawbook Exchange (2002); Finnis (1980); Dworkin (1978); Geoffrey MacCormack "'Law" and "Legal System"' 42 *The Modern Law Review* (1979), pp. 285-290; Raz (1970); Jeremy Bentham *Of Laws in General* (H.L.A. Hart ed) London: The Athlone Press (1970); John Austin *The Province of Jurisprudence Determined* New York: The Noonday Press (1954).

82 Raz (1979), pp. 214-215.

83 Locke (1980), section 19.

84 See section 2.2.

85 Montesquieu (1777), Book II, Chapt. 3.

86 Raz (1979), p. 216.

87 Tamanaha (2012), p. 244. See, for the counter-argument Kyritsis, who writes that: 'Conversely, it is not necessarily the case that judicial enforcement is always preferable or even particularly effective. We should not forget that, despite their independence, courts are not external to the political regime. They have particular features, strengths and weaknesses, and in light of those they interact with the other state institutions in certain ways and not others. This does not mean that it is never warranted for them to take on the other branches of government. But it does mean that whether they should will vary. Although in some areas separation of powers will dictate that an issue be decided by a court of law – criminal charges are a good example –, in others it will encourage institutional cooperation, competition and checks and balances without need for judicial intervention.' Kyritsis (2015), p. 115.

88 Robert S. Summers 'Legal Institutions in Professor H.L.A. Hart's Concept of Law' 75 *Notre Dame Law Review* (2000), pp. 1807-1828 at 1814.

independence is a necessary element in order to uphold the integrity of the judicial process and the integrity of the law.⁸⁹

Furthermore, legal theory is in agreement on the fact that the separation of powers, and thus, also, judicial independence, requires formal organisation.⁹⁰ However, even though it cannot be effectively implemented 'merely as an agreed and solemnly declared desideratum',⁹¹ there is no commonly agreed-on institutional design.⁹² Considering the differences between common law and civil law systems, and the variations within these,⁹³ this is not surprising. It means that in relation to its institutional underpinnings, the rule of law allows for a great many institutional alternative arrangements. This conclusion is further reinforced by the multiple institutional semantics⁹⁴ of the concept of judicial independence:⁹⁵ it may refer to the

89 Anthony Bradley, Keith Ewing & Christopher Knight *Constitutional and Administrative Law* Harlow: Pearson Education (2014), p. 370.

90 Krygier (2001), p. 13404.

91 Summers (2000), p. 1814.

92 Krygier (2001), p. 13404.

93 In their article on judicial independence in comparative perspective, Helmke and Rosenbluth differentiate between two types of institutional explanations for judicial independence: historical legacy, as in common law systems, and a-historical delegative models, in which politicians have reasons to tie their own hands *vis-à-vis* an independent judiciary, commonly found in civil law systems. Accordingly, common law countries charge courts with developing and interpreting a body of case law that supplements statutory law, with trained judges who can think about and create the bridges between pieces of legislation. In civil law countries independence is ensured through intentional institutional walls against political intervention in judicial decisions. Gretchen Helmke & Frances Rosenbluth 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' 66 *Annual Review of Political Science* (2009), pp. 345-366 at 349.

94 Peter Russell 'Toward a General Theory of Judicial Independence' in Peter Russell & David O'Brien *Judicial Independence in the Age of Democracy* London: University Press of Virginia (2001), pp. 1-24 at 1.

95 There are a great number of studies on the concept of judicial independence. However, such studies are usually undertaken within the field of political science rather than legal theory, and focus on the concept itself in a given polity or on its development within the context of democratisation, rather than its exact relation with the rule of law. See for example Shimon Shetreet & Christopher Forsyth (eds) *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges* Dordrecht: Martinus Nijhoff (2012); Daniela Piana 'Beyond Judicial Independence: Rule of law and Judicial Accountabilities in Assessing Democratic Quality' in Leonardo Morlino & Gianluigi Palombella *Rule of Law and Democracy* Leiden: Brill Publishing (2010), pp. 65-89; Tomaz Wardynski & Magdalena Niziolek (eds) *Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law: Contemporary Challenges* Warsaw: LexisNexis (2009); Gretchen Helmke & Frances Rosenbluth 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' 12 *Annual Review of Political Science* (2009), pp. 345-366; Bernd Hayo & Stefan Voigt 'Explaining de facto Judicial Independence' 27 *International Review of Law and Economics* (2007), pp. 269-290; Markus Zimmer 'Judicial Independence in Central and Eastern Europe: The Institutional Context' 14 *Tulsa Journal of Comparative and International Law* (2006-07), pp. 53-87; John E. Finn 'The Rule of Law and Judicial Independence in Newly Democratic Regimes' 13 *The Good Society* (2004), pp. 12-16; Shimon Shetreet & Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* Dordrecht: Martinus Nijhoff (1985).

institutional conditions under which judges adjudicate; it can relate to the behavioural independence of individual judges; it might refer to the degree to which judges are autonomous within courts; or it may be associated with the degree to which judicial institutions are separated from the executive and legislative branches of government.⁹⁶ However, it is apparent that in order to be free from extraneous pressures and independent from all authority save that of the law, there are rules that need to be present across all legal systems. These include, amongst others, rules concerning the method of appointing judges, their security of tenure, and budget autonomy.⁹⁷ Thus, differences in relation to the organisation of the judiciary and the extent of its powers to review governmental acts are all compatible with the rule of law.

In sum, it was shown that the requirements of legality presuppose some form of a functional separation of powers, since they are directed at the three different branches of government. Furthermore, it was demonstrated that within the discussion on the separation of powers in legal theory, the debate revolves around the judiciary branch and the legal system. It was asserted that this can be explained by virtue of the fact that law necessarily belongs to a legal system, and that any discussion on legality and the nature and quality of law, will inevitably involve an exploration of its institutionalisation. More particularly, it was shown that there is a noticeable emphasis on the element of judicial independence. Individual behaviour can only be guided by law – the prime purpose of the rule of law next to the restraint of power – if independent courts correctly apply it. It follows from this that judicial independence is a crucial element for the law to be respected, and, thus, for the law to rule. It was demonstrated that in this respect, the doctrine of the separation of powers underpins the rule of law in much the same way as it is relied on in the three conceptualisations of the rule of law in Germany, France, and the United Kingdom.

5. THE SAFEGUARDING MECHANISMS OF THE RULE OF LAW: JUDICIAL REVIEW AND OTHER PROCEDURAL ELEMENTS

In the previous section mention was made of judicial review as a requirement which flows from legality, since the latter not only demands that the administration adheres to the law, but also commands the judiciary to prevent abuse of the law through its powers of review. Thus, legal theory is concerned with providing safeguards for the rule of law in ways similar to the three national conceptions, discussed in the previous chapter. It was also demonstrated that the judicial-centric focus of the rule of law-debate in legal theory is explained by the fact that if one wants to know about the content of the law, it is natural to turn to those institutions and the officials

96 Russell (2001), pp. 2-24.

97 Raz (1979), p. 216; Helmke & Rosenbluth (2009), p. 349.

within them whose job it is to interpret it.⁹⁸ From the outset, it should be made clear that the aim of this section is not to provide an in depth analysis of the areas of the debate on judicial review in both common and civil law systems – and all their variations – since this would go far beyond the ambit of the present study.⁹⁹ Rather, the purpose of this section is to show that in legal doctrine there is agreement on the fact that at least marginal judicial review of both executive action and legislation, is a necessary component for upholding the rule of law. It will be demonstrated that the doctrine of the separation of powers sets certain limits to review of the executive, preventing judicial scrutiny of certain more political acts of government. In relation to judicial review of legislation, it will be asserted that the judiciary's powers can be limited due to democratic concerns, even though it will be shown that formal legality and formal democracy are, in some ways, mutually reinforcing concepts. More particularly, it will be demonstrated that legal doctrine, just as the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, requires at least some form of judicial review of legislation in order to safeguard individual rights. As a final point, a number of review-related procedural rule of law elements, such as access to court, and fair and impartial hearings will be highlighted.

It merits attention at this point that, as demonstrated in section 2 of the present chapter, since 'the rule of law is preferable to that of any individual', the idea of rule on the basis of law follows the Aristotelian adage of 'government of law, not men'.¹⁰⁰ It can be recalled that at the core of the notion lies the conviction that law provides the most secure means of protection both from arbitrary government involvement and from other individuals.¹⁰¹ In this sense, according to Allan, the law is a bulwark between the governing and the governed, shielding the individual from hostile discrimination on

98 Dworkin (1986), p. 413.

99 For analyses of judicial review see Harry Woolf, Jeffrey Jowell *et al.* *De Smith's Judicial Review* London: Sweet & Maxwell (2014); Trevor R.S. Allan 'Judicial Deference and Judicial Review' 127 *Law Quarterly Review* (2011), pp. 96-117; Christopher Forsyth *et al.* *Effective Judicial Review: A Cornerstone of Good Governance* Oxford: Oxford University Press (2010); Jeremy Waldron 'The Core of the Case Against Judicial Review' 115 *The Yale Law Journal* (2006), pp. 1346-1406; Trevor R.S. Allan 'The Constitutional Foundation of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' 61 *Cambridge Law Journal* (2002), pp. 87-125; Mark Elliot *The Constitutional Foundations of Judicial Review* Oxford: Hart Publishing (2001); Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000); Paul Craig 'Ultra Vires and the Foundations of Judicial Review' 57 *The Cambridge Law Journal* (1998), pp. 63-90; John Laws 'Illegality, the Problem of Jurisdiction' in Michael Supperstone & James Goudie (eds) *Judicial Review* London: Butterworths (1997), 4.12-4.16; Christopher Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, Sovereignty of Parliament and Judicial Review' 55 *The Cambridge Law Journal* (1996), pp. 122-140.

100 Aristotle *Politics* (transl. by Benjamin Jowett) Kitchener: Batoche Books (1999), p. 76.

101 In his *Politics* Aristotle famously wrote that '[h]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.' Aristotle (1999), p. 77.

the part of those with political power.¹⁰² Legal liberty exists when citizens understand and follow the law. This is what Hayek meant when he wrote that when citizens obey the law, in the sense of general abstract rules laid down irrespective of their application to them, they are not subject to another man's will and are therefore free.¹⁰³ In line with the requirement of legality, actions of the executive branch of government should be justified in law. It might also be recalled that, in relation to the Anglo-Saxon rule of law, Dicey stressed that 'every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'¹⁰⁴ Thus, in order to ensure the rule of law's aims and purposes,¹⁰⁵ the judiciary has been tasked to review governmental acts that are deemed unlawful.

Judicial bodies ensure that public bodies do not misuse or abuse the powers invested in them. Judicial review thus plays a key role in ensuring that the executive only acts in accordance with promulgated laws – that public officials properly implement the instructions of the legislature – and that a society is therefore based on the rule of law.¹⁰⁶ Judicial review is not concerned with the end result of the decision made by the public body; it is merely concerned with determining whether or not the right procedures were followed in arriving at the decision.¹⁰⁷ Whereas the principle of legality requires that public activity be submitted to judicial control, the doctrine of the separation of powers prevents judicial review of each and every act of government. Fundamental political decisions, for example, are prevented from judicial scrutiny, as this belongs firmly to the sphere of executive action. However, the rise of the administrative state and the ensuing amount of legislation as well as the heightened involvement of the executive branch, has led to a more prominent role for courts, described by Cappelletti as 'the 'third giant' to control the mastodon legislator and the leviathan administrator'.¹⁰⁸ This rise to prominence has come accompanied by a renewed debate on the limits of judicial review.¹⁰⁹ The answer to the question about how far the powers of the judiciary should reach in

102 Trevor R.S. Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' 44 *The Cambridge Law Journal* (1985), pp. 111-143 at 113.

103 Hayek (1960), p. 153.

104 Dicey (1959). p. 202.

105 Mark Elliot 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 83-110 at 85-87.

106 See generally David Dyzenhaus 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 141-172.

107 John Laws 'Judicial Review and the Meaning of Laws' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 173-190, p. 173

108 Mauro Cappelletti *The Judicial Process in Comparative Perspective* Oxford: Clarendon Press (1989), p. 19.

109 See for example Trevor R.S. Allan 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' 60 *University of Toronto Law Journal* (2010), pp. 41-59.

relation to those of the executive depends on the specific form given to the separation of powers in a particular polity; conformity to the rule of law by ensuring judicial review of acts of the executive remains therefore one of degree.¹¹⁰ However, according to the influential writing of philosophers such as Bingham, Waldron, and Allan, the rule of law requires that the judiciary can review actions of public bodies at least in a marginal sense.¹¹¹ On the basis of the foregoing, it is evident that legal theory considers judicial review of executive action to be a *sine qua non* condition for upholding and guaranteeing the rule of law; it is one of the checks and balances of the separation of powers. This understanding of judicial review as a safeguard to the rule of law is in line with its function in the national legal systems.¹¹² As it was shown in the previous chapter, the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, require judicial review as a tool for upholding the rule of law

The link between the rule of law and judicial review of legislation, and, more specifically, statutory legislation,¹¹³ is, however, less tenable and raises democratic concerns. Parliamentary laws are rooted in a democratic legitimacy the judiciary, however independent, will always lack. To have unelected officials rule on laws made by representatives of the people is, from a democratic perspective, problematic. Judicial review of legislation thus sits at the heart of the juxtaposition between rule of law and democracy, for, as Forsyth has noted, ‘to shift the ultimate constitutional power from the hands of the elected representatives into [the judges’] own hands has to be offensive to the democratic heart.’¹¹⁴

Interestingly, democracy and legality are mutually reinforcing concepts. Since formal democracy informs the process through which laws are framed, this, in and of itself, contributes to the requirements of formal legality. In this way, formal democracy aids the rule of law’s purpose of control of power. *Vice versa*, for democracy to be effective, it relies on legality and the institutional underpinning of the separation of powers.¹¹⁵ To put it differently, without formal legality, democracy can be circumvented (officials can undercut the law), whereas without democracy, formal legality loses its legitimacy (the law has not been determined by legitimate means).¹¹⁶

110 Allan (1985), p. 113.

111 Tom Bingham *The Rule of Law* London: Penguin Books (2010), p. 61; Lautenbach (2013), p. 42; Waldron (2006), p. 1354; Allan (1985), p. 114.

112 See to this point also the comparative study on judicial review of executive action in many of the EU Member States, Susana Galera (ed) *Judicial Review. A Comparative Analysis inside the European Legal System* Strasbourg: Council of Europe Publishing (2010).

113 Waldron (2006), p. 1353; Raz (1979), p. 217.

114 Christopher Forsyth ‘Heat and Light: A Plea for Reconciliation’ in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 393–409 at 394.

115 John C. Reitz ‘Export of the Rule of Law’ 13 *Transnational Law & Contemporary Problems* (2003), pp. 429–486 at 443.

116 Tamanaha (2004), p. 99.

However, according to scholars such as Allan, whereas courts should loyally enforce the legitimate requirements of statutes, at the same time, they should defend and enforce the fundamental principles of law, especially those defining constitutional rights.¹¹⁷

There are a variety of practices that can be grouped under the heading of judicial review of legislation, each dealing with the tension between democratic principles and the rule of law in their own particular way, thereby shifting the balance towards the one or the other.¹¹⁸ Thus, in a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case, or modify its effects to make its application in conformity with human rights.¹¹⁹ By contrast, in a system of weaker judicial review, courts may scrutinise legislation for conformity with human rights, but they may not decline to apply it.¹²⁰ The type of judicial review will furthermore depend on the place of individual rights in the constitutional system (written or not); *a posteriori* review – which takes place in the context of a particular case, and *ex ante* review – whereby a specifically set up constitutional court conducts an abstract assessment of legislation in the final stages of its enactment; and the existence of specialised courts.¹²¹ Given the existing varieties, it would go beyond the scope of the present study to give a detailed account of the theoretical and practical implications of judicial review of legislation in all of them.¹²² The point here is merely to indicate that, according to the literature, irrespective of democratic concerns setting certain limits to the judiciary's powers of review, in order to fulfil the rule of law ideal, at least a weak form of judicial review of legislation is necessary. For this reason, legal theory confirms the existing practices of review in the three Member States discussed previously.

In conclusion to this section, it should be pointed out that, according to the literature, the rule of law demands a number of related additional requirements. The judiciary's task of judicial review and the application of the law brings with it questions of institutional access. This issue was highlighted by Dicey, when he stated that 'where there is no remedy, there is no right'.¹²³ Moreover, since in a complex and political society no system

117 Allan (2010), p. 41.

118 For the role of the principle of *ultra vires* in the bridging of the gap between democratic and rule of law related concerns (especially in the United Kingdom) see, amongst others, the work undertaken by Forsyth, Elliot, Craig, and Allan mentioned in this section, and particularly Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000).

119 Mauro Cappelletti & John Clarke Adams 'Judicial Review of Legislation: European Antecedents and Adaptations' 79 *Harvard Law Review* (1966), pp. 1207-1224 at 1222.

120 Waldron (2006), p. 1356.

121 *Ibid.*, pp. 1354-1359.

122 Generally, see Harry Woolf, Jeffrey Jowell *et al.* *De Smith's Judicial Review* London: Sweet & Maxwell (2014); Trevor R.S. Allan 'Judicial Deference and Judicial Review' 127 *Law Quarterly Review* (2011), pp. 96-117; Forsyth *et al.* (2010); Waldron (2006); Allan (2002).

123 Albert V. Dicey *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* London: Macmillan (1914), p. 487.

of law can be so perfectly drafted (or judge-made), as to leave no room for dispute, access to court as a provision for resolution of disputes is indispensable.¹²⁴ Judicial bodies stand as mediators between the government and its citizens, seeking to ensure that any powers claimed by the executive are properly authorised and that individuals can safely rely on the relevant laws in formulating their plans and deciding on the scope of their liberties.¹²⁵ Accordingly, accessibility of courts is of crucial importance to the rule of law in order to ensure that the rule of law's legality requirements can be effectuated. On a more practical note some further sub-requirements are distinguished in legal theory, such as the absence of long delays and excessive costs, since these may effectively turn law to a dead letter and frustrate one's ability to be guided by the law.¹²⁶

In addition to access to courts, in order for the judiciary to fulfil its function under the rule of law, it must apply minimum procedural principles of fairness and impartiality.¹²⁷ Principles, in the words of Hart, that are 'designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself.'¹²⁸ Thus, open and fair hearings, absence of bias and the like, are essential to the correct application of the law, and therefore part and parcel of the rule of law.¹²⁹ It should be recalled that it was already shown that the requirement of equality before the law is inherent in the requirement of generality, discussed above.¹³⁰

To this list of procedural rule of law elements – designed to ensure that the 'legal machinery' of enforcing the law should not deprive it of its ability to guide through distorted enforcement – Raz has included one further requirement, namely, that the discretion of the crime-preventing agencies should not be allowed to pervert the law.¹³¹ Due to the aforementioned court-centric focus of most legal scholars, the role and importance of other parties involved in the legal system have been largely ignored. However, not only judges can subvert the law, the actions of police and prosecuting authorities are equally a part of the legal system and corruptible. Prosecutors are as much under pressure in high profile cases as other officers of the court. Moreover, if the police were allowed to steer its crime prevention

124 Elliot (2000), p. 103; Fuller (1969), p. 56.

125 This point was stressed by Lord Diplock in the case *Black-Clawson Ltd. v Papierwerke A.G.* where he held that '[t]he acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says.' *Black-Clawson Ltd. v Papierwerke A.G.* [1975] A.C. 591, 613G.

126 Raz (1979), p. 217.

127 Wade & Forsyth (2009), p. 402.

128 Hart (2012), p. 160.

129 Raz (1979), p. 217.

130 See section 3.1.

131 Raz (1979), pp. 217-218.

efforts in a certain direction, or to only detect certain crimes or prosecute certain classes of people, that would certainly be against the idea of the rule of law.

In sum, it was demonstrated that, according to legal scholarship, at least marginal judicial review of executive action and of legislation is an essential element for safeguarding the rule of law. It was asserted that the legality requires that executive action should be justified in law and that the judiciary has subsequently be tasked with safeguarding the rule of law through judicial review of governmental acts that are deemed unlawful. It was furthermore shown that judicial review of executive action, as well as judicial review of legislation encounter limitations set by the doctrine of the separation of powers and democratic concerns, respectively. Furthermore, it was asserted that the element of judicial review has given rise to a number of related procedural rule of law elements, such as access to courts and principles of impartiality and fairness. Moreover, it was highlighted that individuals should be protected from distorted enforcement by the other forces in the legal system, such as the police and the prosecutor.

6. CONCLUSIONS

In this chapter it was examined whether, and to what extent, the rule of law's four common features found in the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, comport with the way the notion is understood in legal theory. It was shown that with regard to the rule of law's purpose, substance, institutional underpinning, and safeguarding mechanisms, the doctrine mirrors to a large extent the way the notion is understood at the national level. More particularly, it was established that the theoretical understanding of the rule of law allows for a number of elemental and institutional variations. It was shown that in legal theory, the rule of law's main purpose is to restrain power and to protect individual liberty, thereby allowing individuals to plan and shape their own lives, guided by the boundaries of the law.

The chapter continued by pointing out the fact that legal scholarship has focussed on the notion's core element of legality by enquiring into its requirements. It was demonstrated that for the principle to operate, not all of these requirements need to be fully realised all the time. Similarly, the way the rule of law is underpinned by the separation of power may differ, as long as, at a minimum, judicial independence is guaranteed. Finally, it was established that the element of judicial review is the mechanisms through which the rule of law is best safeguarded. More particularly, it was shown that legal theory identifies judicial review of executive action and of legislation, which, for the rule of law to function, should both exist at least in a marginal sense.

General Conclusions to Part I: the analytical framework for the case studies

In the first chapter of the thesis it was established that four common elements of the rule of law in the three most influential national traditions of *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, can be elucidated: a common purpose (restraint of power and protection of the individual); a core substance (the principle of legality); a common institutional underpinning through a functional understanding of the doctrine of the separation of powers (with emphasis on judicial independence); and a common safeguarding mechanism (a form of judicial review of both executive action and legislation). In the second chapter, these four elements were tested against legal theory in order to establish whether, and to what extent, legal doctrine considers these elements crucial for the existence of the rule of law concept. In that chapter it was demonstrated that these elements are indeed confirmed by the doctrine, albeit with a different emphasis. More particularly, it was shown that legal theory has fleshed out these criteria in more detail. Confirming restraint of power with a view to allowing individuals their freedom, guided by the parameters set by the law as the notion's purpose, legal scholars have long debated qualitative requirements for the validity of law, such as clarity, stability, generality, and prospectivity. It was asserted that the literature agrees that for the principle of legality to operate, not all requirements can be fully realised all the time, nor need they be. However, legal scholars have provided an insufficient answer to the question of a minimum threshold for each requirement.

In relation to the doctrine of the separation of powers, it was demonstrated that legal theory allows for national variations, as long as, at a minimum, there is a functional separation of powers, which guarantees judicial independence. Finally, it was established that the principle of legality and the separation of powers rely on the mechanism of judicial review in order to safeguard the rule of law. More particularly, it was shown that the judiciary's power is itself checked; judicial review of executive action finds its limitations in the separation of powers – not all executive action falls within the scope of judicial review, and judicial review of legislation can be limited on the basis of democratic concerns – to what extent can the judiciary have the last word over parliamentary legislation expressing the will of the peoples? It was shown that the doctrine confirms that the rule of law requires some form of judicial review of both but does not provide an institutional design: national variations are allowed.

On the basis of the foregoing analysis it is submitted that the concept of the rule of law is as much about the formal qualities that characterise the

norms as it is about procedural requirements for their impartial administration.¹ It calls for institutional underpinnings by way of separation of powers as a way of realising judicial independence, and safeguarding mechanisms based on judicial review. The rule of law is undermined when the institutions that are embodied with these safeguards are interfered with; clear norms are not sufficient when they are not properly administrated.

On the basis of the foregoing, three categories of elements that comprise the concept of the rule of law may be discerned: *formal*, *procedural*, and *institutional*. To the first category of *formal* law elements belong the aforementioned requirements connected to legality, concerned with the predictability and determinacy of the laws themselves: laws should be clear, stable, general, public, prospective, understandable, and non-contradictory, in order to facilitate predictability and security. To the second category of *procedural* requirements belong the elements that are concerned with the impartial administration of the law. This concerns the safeguarding mechanism of judicial review of both executive action and legislation, and issues such as due process, fairness, access to court, and enforcement. Procedural elements of the rule of law require that, however formally virtuous they may be, rules must be applied in a way that is procedurally just.² To the third category belong the *institutional* arrangements underpinning the rule of law: some form of the separation of powers with a particular emphasis on the legal system and judicial independence. In this category, also the position of other parties in the legal system, such as prosecutors, police, and lawyers, can be addressed.

<u>Formal requirements:</u> concerned with the predictability and determinacy of laws (legality)	<u>Procedural requirements:</u> concerned with the administration of the law	<u>Institutional requirements:</u> Safeguarding mechanisms underpinning the rule of law

For a framework such as that in the present study, a more detailed subdivision is not necessary. It was shown that in all three categories variations are possible. Moreover, considering the policy areas in the next part and the countries they cover, variations are apparent from the outset. A too detailed rule of law framework will be too rigid and not reflective of the different historical context and current developments of the society to which it is applied. The proposed framework will allow for minor variations while at the same time leaving space for a more detailed approach per category if such turns out to be the case. For these reasons, it enables the analysis to

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Waldron (2008), pp. 3-61 at 6-7.
Jeremy Waldron 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed) *Getting to the Rule of Law* New York: New York University Press (2011), pp. 3-31; Daniel B. Rodriguez, Matthew D. McCubbins & Barry R. Weingast 'The Rule of Law Unplugged' 59 *Emory Law Journal* (2010), pp. 1455-1494 at 1470-1471.

focus on two linked, but separate issues. First, it allows the present author to draw conclusions about the relative weight of the categories and their elements in relation to each other. Secondly, it makes it possible to establish whether or not elements are missing from the framework, thus indicating a divergent approach to the concept of the rule of law as it has been established in the previous chapters. Against this background, in the second part of this thesis, the focus turns towards the rule of law in the practice of the external relations of the EU, starting with its development cooperation policy.

PART II

1. INTRODUCTION

In the introduction, it was demonstrated that the importance of the strengthening of the rule of law has been acknowledged in the Treaty on European Union and at the policy level. Indeed, for the area of development cooperation, the EU has recognised the rule of law both as an 'indispensable element'¹ of, and a 'necessary prerequisite'² for, sustainable development; without this 'basic pillar of our policy',³ 'no lasting development progress is possible.'⁴ Surely, in light of this, one might have expected the EU to provide a clear conceptualisation in order to guide the principle's consolidation in developing countries. The present chapter purports to examine whether, and if so to what extent, the EU has fleshed out its rule of law definition in its development cooperation policy and subsequent practice. More particularly, the analytical framework established in chapters 1 and 2, which includes the formal, procedural, and institutional rule of law elements identified previously, will be tested against both the EU's development cooperation policy and its long-standing practice in this policy area.

To this end, the chapter begins by providing a brief introduction into the area of development cooperation. Following this, the EU's 'toolbox' for rule of law promotion in development cooperation will be explored in order to provide the background against which the analysis of the different elements can take place. The chapter continues by examining the three categories of rule of law elements for the purpose of ascertaining whether these elements are validated by the EU's policy framework and its practice. It will be argued that the formal element of legality and the procedural element of judicial review have largely remained underdeveloped. In contrast, it will be demonstrated that the procedural element of access to justice, and the

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- 1 Resolution of the European Parliament on the EU-Africa Strategy: a Boost for Development, (2017/2083(INI)), 24 October 2017, pnt. 16.
 - 2 Commission Communication on Towards a global partnership for sustainable development, COM(2002) 82 final, 13 February 2002, p. 15; Commission Communication on The European Union's role in promoting human rights and democratisation in third countries, COM(2001) 252 final, 8 May 2001, p. 4.
 - 3 Council Conclusions 'Increasing the Impact of EU Development Policy: an Agenda for Change' 3166th Foreign Affairs Council, 14 May 2012, pnt. 6.
 - 4 Commission Communication on From Cairo to Lisbon – the EU-Africa Strategic Partnership, COM(2007) 357 final, 27 June 2007, p. 4.

institutional element of judicial independence appear as core elements of the EU's rule of law definition. However, it will be asserted that this prominence has not resulted in detailed and clear guidance on the notion for its implementation at the national level in developing countries. On this basis, the chapter argues that the Union has merely developed a cursory conceptualisation of the 'rule of law' in the field of development cooperation.

Against this background, the chapter will then concentrate on the general findings that follow from the exploration of the rule of law elements in these three categories, with a view to establishing the weight attributed to each one in practice. It will be claimed that, in the absence of the formal element of legality, the EU's understanding of the rule of law mainly revolves around the institutional element of judicial reform. In fact, it will be asserted that the EU's institutional approach towards its rule of law definition is so pervasive as to have infiltrated also a number of its procedural elements. Having ascertained this, the chapter will continue by explaining this (seemingly monolithic) approach on the basis of the practical characteristics of the policy area itself and the influence of the notions of good governance and security sector reform on the area of development cooperation. The chapter will conclude by addressing some issues that arise from the EU's methodology in this policy area. It will be shown that in relation to some of the rule of law elements which will be identified below, the EU relies on various lists of indicators compiled by other organisations. More particularly, it will be asserted that without clear articulation of a comprehensive rule of law definition and the underlying elements, the Union's cherry-picking approach towards indicators has led to a blurring of conceptual boundaries. Thus, it will be demonstrated that, instead of bringing clarity, this methodology brings its own drawbacks in relation to the Union's rule of law definition.

Some remarks on methodology must be provided here. The EU's obligations set out in the Cotonou Agreement, the bilateral agreements, and the financial instruments underlying development cooperation, are implemented through successive programming cycles. The main output from the geographic and thematic programming process are multiannual and national country and regional programming documents in which the priority sectors and areas for EU support and the related financial allocations available for each partner country or region are identified. In these, the particular country's/region's needs and constraints are described,⁵ while making sure that EU support is in line with the EU's policies as established

5 From the most recent programming instructions see the Instructions for the Programming of the 11th European Development Fund (EDF) and the Development Cooperation Instrument (DCI) 2014-2020 of 15 May 2012, issued by the European External Action Service and the European Commission's EuropeAid.

in the European Consensus on Development⁶ and the Agenda for Change,⁷ and their successor, the New European Consensus on Development.⁸

For the purpose of this thesis, *i.e.* the examination of the external policy area of development cooperation in order to extract the EU's rule of law conceptualisation from the EU's legal and strategic framework regarding this policy area and its practice, the way in which the European Development Fund (EDF) and the financial instruments such as the Development Cooperation Instrument (DCI)⁹ and the European Instrument for Democracy & Human Rights (EIDHR)¹⁰ are implemented at the regional and national levels through the programming cycles, is relevant for the following two reasons. First, the streamlined programming procedure of allocation of funds as outlined in the legal framework,¹¹ as well as the complementary internationally agreed to international aid effectiveness agenda,¹² mentioned further below, means that the margin of discretion of the Commission in the implementation of the instruments is largely reduced.¹³ As a consequence, the policy guidelines are usually directly translated through the various programming steps into the multiannual and annual planning programmes, and should provide, in particular, measurable objectives and benchmarks. Accordingly, as these programme documents contain evidence of what is understood by the rule of law in the EU's practice in the field of development cooperation, these necessarily need to be taken into account.

Secondly, it may be argued that the determination in terms of procedure and, particularly, substance, reduces the scope of influence of the beneficiary countries, giving credence to the fact that the implementation of aid is done on the basis of EU driven conceptualisations of the underlying principles of

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- 6 Joint statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', OJ [2006] C46/1.
 - 7 Commission Communication on Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final, 13 October 2011.
 - 8 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ [2017] C210/1.
 - 9 Regulation (EU) No 233/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for development cooperation for the period 2014–2020, OJ [2014] L77/44.
 - 10 Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide, OJ [2014] L77/85.
 - 11 In general, programming takes place in three steps. To start the process, the Commission draws up a country or regional strategy paper (Article 11(2) DCI) followed by multiannual indicative programmes for geographic programmes and/or thematic programmes.
 - 12 The Commission's implementation of the aid effectiveness agenda is guided, to a large extent, by the European Court of Auditors' Special Report No 6 of 2007 on the effectiveness of technical assistance in the context of capacity development.
 - 13 Martina Spornbauer *EU Peacebuilding in Kosovo and Afghanistan. Legality and Accountability* The Hague: Brill (2014), p. 149.

human rights protection, democracy, and the rule of law. As the literature points out, the involvement of beneficiary countries in the programming and implementation levels amounts to little more than an attempt at providing a procedural framework for their involvement; it certainly does not lead to participatory rights.¹⁴ Even though local-ownership is highlighted in both the international¹⁵ and EU¹⁶ development frameworks, this has often been attacked for being donor-driven,¹⁷ and there is evidence that EU policy priorities supersede those of the beneficiary countries.¹⁸ Furthermore, whereas programming documents for geographic programmes under the DCI 'shall be based, to the extent possible, on a dialogue between the Union, the Member States and the partner country or region concerned' the parameters for such a relationship are not specified in the instrument.¹⁹ It is the Commission that shall 'provide a coherent framework for development cooperation between the Union and [a] partner country or region' since it alone draws up and adopts the country strategy papers,²⁰ and there is no prior process of formal approval by the beneficiary country. Cooperation under the EIDHR is even more one-sided, as '[s]trategy paper shall set out the Union's strategy for its assistance ... based on the Union's priorities'.²¹ Accordingly, and for the reasons outlined above, this thesis will rely on the legal and strategic frameworks as well as these programming documents in order to extricate the EU's definition of the rule of law in its development cooperation.

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- 14 Alisa Herrero, Anna Knoll, Cecilia Gregersen & Willy Kokolo 'Implementing the Agenda for Change. An Independent Analysis of the 11th EDF Programming' *European Centre for Development Policy Management Discussion Paper*, No. 180 (2015), pp. 7-8; Spornbauer (2014), p. 150.
 - 15 See, for example, the OECD's Busan Partnership for effective development cooperation of 2011, available at <http://www.oecd.org/dac/effectiveness/49650173.pdf>.
 - 16 Commission Communication on Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final, 13 October 2011, p. 5.
 - 17 See the work of Hartman, Buiter, and Easterly. Simon Hartmann 'The (Conceptual) Flaws of the new EU Development Agenda from a Political Economy Perspective, or Why Change is Problematic for a Donor Drive Development Policy' *ÖFSE Working Paper* No. 35 (2012); Simon Hartmann 'Good Governance and Ownership: A Mismatch in the New EU Development Policy Agenda' *ÖFSE Policy Note* No 3 (2012); Willem Buiter 'Country Ownership: A Term Whose Time has Gone Out' *Development in Practice* (2004) 17, pp. 647-652; William Easterly 'The Cartel of Good Intentions: The Problem of Bureaucracy in Foreign Aid' *Journal of Policy reform* (2002) 5, pp. 223-250.
 - 18 Herrero *et al.* (2015), p. xiii.
 - 19 Article 11(1) Regulation (EU) No 233/2014.
 - 20 Article 11(2) Regulation (EU) No 233/2014.
 - 21 Article 5(1) Regulation (EU) No 235/2014.

2. THE RULE OF LAW AND ITS RELATION TO EU DEVELOPMENT COOPERATION: EU POLICY AND THE TOOLBOX FOR RULE OF LAW PROMOTION

Before delving into the case study, it is imperative to clearly elucidate the relationship between the rule of law and the EU's development cooperation policy and the legal and practical framework within which this association is shaped. Therefore, by way of introduction to the subject matter, this section will provide the background against which the examination of the EU's conceptualisation of the rule of law in this particular external policy area will take place. It will be demonstrated that the EU's policy of development cooperation takes place within an international framework shaped in particular by the United Nations (UN) and the Organisation for Economic Cooperation and Development (OECD). It will be shown that this international framework not only establishes goals and sets out guidelines through which it influences development policies of donors, and thus also of the EU, it also acknowledges the necessity of the rule of law for development. More particularly, it will be demonstrated that this perception on the role of the rule of law for development cooperation has trickled down to the Union's own policy level. Following this, the focus will turn to the rule of law in the EU development cooperation's legal framework. From this perspective, the EU's most prominent cooperation framework, the Cotonou Agreement, will be examined, followed by the various other treaties and financial instruments through which the rule of law is advanced. It will be asserted that the promotion of the rule of law, through cooperation activities with the aim of strengthening and consolidation the notion, has come to occupy a central place as both an objective and condition of EU development cooperation. This overview of the legal 'toolbox' the EU has at its disposal for the rule of law is necessary in order to facilitate the reader's understanding of the analysis and discussion of the Union's conceptualisation of the rule of law in sections 3 and 4 of this chapter.

2.1 The policy framework

As with any international donor organisation, the EU's development cooperation policy takes place within the broad confines of the criteria for official development assistance established by the Development Assistance Committee (DAC) of the OECD,²² and of what has been agreed to within the UN

22 The DAC has established criteria for official development aid in order to be able to monitor the aid flows across the world. For the Financial period 2014-2020, the EU's aim is to ensure that at least 90% of its overall external assistance be counted as official development aid (ODA). See Article 1(3) of Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th EDF Development Fund. The EU also follows the DAC list of ODA recipients, available at: <http://www.oecd.org/dac/stats/documentupload/DAC%20List%20of%20ODA%20Recipients%202014%20final.pdf>.

development agenda:²³ the Millennium Declaration with the Millennium Development Goals (MDGs)²⁴ that expired at the end of 2015,²⁵ and its follow-up, the 2030 Agenda for Sustainable Development with the Sustainable Development Goals (SDGs).²⁶ The rule of law is introduced in both the Millennium Declaration and in the 2030 Agenda as a prerequisite for sustainable development including economic growth and the eradication and poverty.²⁷ Indeed, it is recognised that it is necessary 'to build peaceful, just and inclusive societies that provide equal access to justice and that are based on respect for human rights (including the right to development),

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- 23 For the EU position in the build-up to the adoption of the 2030 Agenda for Sustainable Development see Commission Communication on A decent life for all: ending poverty and giving the world a sustainable future, COM(2013) 92 final, 27 February 2013; Council Conclusions 'The Overarching post-2015 Agenda', General Affairs Council, Doc. 11559/13, 25 June 2013; Council Conclusions 'Financing poverty eradication and sustainable development beyond 2015', Foreign Affairs Doc. 17553/13, 12 December 2013; Commission Communication on A decent life for all: from vision to collective action', COM(2014) 335, 2 June 2014; Council Conclusions 'A transformative post-2015 Agenda', Doc. 16827/14, 16 December 2014; Commission Communication on A global partnership for poverty eradication and sustainable development after 2015, COM(2015) 44 final, 5 February 2015; Council Conclusions 'A new global partnership for poverty eradication and sustainable development after 2015', Doc. 9241/15, 26 May 2015.
- 24 General Assembly Resolution 55/2 'UN Millennium Declaration', A/55/L.2, 8 September 2000.
- 25 For a critical examination of the EU's contribution to the MDGs, see for example Mirjam van Reisen (ed) 'The EU's Contribution to the Millennium Development Goals. Poverty Eradication: From Rhetoric to Results?' Alliance2015 (2008).
- 26 General Assembly Resolution 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', A/70/L.1, 25 September 2015. It should be noted that the 2030 Agenda is accompanied by the Addis Ababa Action Agenda which sets out the global framework for financing development post-2015 (General Assembly Resolution 69/313 'Addis Ababa Action Agenda global framework for financing development post-2015', A/69/L.82, 27 July 2015) and complemented by the Sendai Framework on Disaster Risk Reduction 2015-2030 (General Assembly Resolution 69/283 'Sendai Framework on Disaster Risk Reduction 2015-2030', A/69/L.67, 3 June 2015) and the legally binding Paris Agreement on Climate Change (UNTS Regist. No. I-54113, 12 December 2015).
- 27 UN Millennium Declaration, pnts. 9 and 24; 2030 Agenda for Sustainable Development, pnts. 8 and 9. It has been much criticised that, in contrast to the Millennium Declaration, the eight MDGs do not refer to the rule of law. This has, to some extent, been amended by the SDGs. The 16th goal is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' Within this broad goal, target 16.3 is to 'promote the rule of law at the national and international levels, and ensure equal access to justice for all.' While the inclusion of the rule of law in the Development Goals is deemed to be a step forward, the formulation of this 16th goal in relation to the target seems to be contradictory, since it places the rule of law and access to justice the wrong way around. From a conceptual perspective, access to justice is the narrower concept, the promotion of which can contribute to the overall strengthening of the broader concept of the rule of law. For further criticism see Julinda Beqiraj & Lawrence McNamara 'The Rule of Law and Access to Justice in the post-2015 Development Agenda' *Bingham Centre Working Paper* No. 4 (2014); United Nations Development program 'Rule of Law and Development – Integrating the Rule of Law in the post-2015 Development Framework, Issue brief (2013).

on effective rule of law and good governance at all levels and on transparent, effective and accountable institutions.’²⁸ This international framework influences the broader composition EU’s development cooperation policy in general. While the EU itself is not a member of the UN,²⁹ all its Member States are, and the two organisations have a close working relationship.³⁰ As the EU’s High Representative Mogherini declared at a Security Council meeting on 9 May 2017, ‘[t]he European way is also the United Nations’ way. This explains why all our actions, all our initiatives are always taken in full coordination and partnership with the UN.’³¹ The EU has firmly anchored its own development policy to Agenda 2030; the June 2017 New European Consensus on Development is the Union’s response to the 2030 Agenda and frames its implementation for the EU and its Member States.³² Thus, irrespective of the voluntary character of the 2030 Agenda, the EU has adopted a blueprint which aligns its development policy with the broader international framework. More particularly, the international framework has implications for the allocation of aid,³³ such as a commitment to the use of specific indicators, and principles such as the promotion of national ownership, and a result-oriented focus. Accordingly, the international aid

28 2030 Agenda for Sustainable Development, pnt. 35.

29 Regulated by Resolution A/65/276, the EU’s participation in the work of the UN has been upgraded in 2011 from observer status to observer with enhanced status on the basis of which the Union is allowed to present common positions, make interventions, present proposals and participate in the general debate each September. General Assembly Resolution 65/276 ‘Participation of the European Union in the work of the United Nations’, A/65/L.64/Rev.1, 3 May 2011.

30 The 2016 Global Strategy for the European Union’s Foreign and Security Policy espouses the EU’s commitment to supporting the work of the UN: ‘Guided by the values on which it is founded, the EU is committed to a global order based on international law, including the principles of the UN Charter... This commitment translates into an aspiration to transform rather than simply preserve the existing system. The EU will strive for a strong UN as the bedrock of the multilateral rules-based order, and develop globally coordinated responses with international and regional organisations, states and non-state actors.’ For more specific cooperation goals for the period September 2017 – September 2018 see the ‘EU priorities at the United Nations and the 72nd United Nations General Assembly’ adopted by the Council on 17 July 2017, Doc. 11332/17.

31 Statement by High Representative Frederica Mogherini at the United Nations Security Council: Cooperation between the UN and the EU, 9 May 2017, available at: <http://eu-un.europa.eu/statement-hrvp-mogherini-united-nations-security-council-cooperation-un-eu/>.

32 New European Consensus on Development ‘Our World, Our Dignity, Our Future’ (2017).

33 The OECD Paris Declaration of 2005, followed by the Accra Agenda for Action of 2008 and the Busan Partnership for effective development cooperation of 2012, and the follow-up Addis Ababa Action Agenda of 2015 provide the blueprint for both the strengthening of the delivery of assistance by donors as well as improving the utilisation of assistance by partner countries.

effectiveness agenda establishes the global framework for the delivery of assistance to which the European Union must also subscribe.³⁴

At the level of EU Treaty law, the rule of law has been closely linked to development cooperation since the inclusion of the policy³⁵ in the Treaty with the Maastricht revision.³⁶ First as an objective of development cooperation mentioned in the Treaty Article on the policy itself (Article 177(2) EC; ex 130u EEC), subsequently, since the Lisbon Treaty, as a horizontal objective of the whole of the EU's external action, including development (Article 21 TEU). In the EU's policy framework the significance of the rule of law, not only as an objective but also as a condition for development cooperation, can be traced far back to early concerns over grave infringements of human rights. Fuelled by the persistent occurrences of human rights violations both internally (the authoritarian regimes in Greece, Spain, and Portugal), and in the wider world,³⁷ human rights and democracy considerations gradually became elements of the EU's external policy.³⁸ As practice showed that EU assistance did not lead to the desired results in a number of developing

34 The Busan Partnership for Effective Development Cooperation, endorsed in November 2011 by the development partners attending the fourth high-level forum on aid effectiveness, sets a set of common principles for achieving the following four goals: ownership of development priorities by developing countries; focus on results; inclusive development partnerships; transparency and accountability.

35 Article 4(4) TFEU specifies the competence of the EU to take measures in the field of development cooperation. It is a parallel competence that does not affect the ability of the Member States to implement their own cooperation policies. Nonetheless, Article 210 TFEU obligates both parties to coordinate their policies.

36 Prior to the Treaty of Maastricht, development cooperation activities were based on Article 308 EC (ex Article 235 EEC; now Article 352 TFEU) as the policy developed as a by-product of the EU's two other express external policies, *i.e.* the common commercial policy and association, and as a supplement to the development cooperation policies of the Member States. See Article 1 of the Implementing Convention on the Association of the Overseas Countries and Territories with the Community, 25 March 1957, 298 UNTS 3. For an analysis of the Court's case law delineating development from the other two policy areas see for example Marise Cremona 'External Relations and External Competence: The Emergence of Integrated Policy' in Paul Craig & Grainne de Burca (eds) *The Evolution of EU Law* Oxford: Oxford University Press (2011), pp. 217-268; Morten Broberg & Rasmussen Holdgaard 'EU External Action in the Field of Development Cooperation Policy' 6 *Swedish Institute for European Policy Studies* (2014).

37 As an example, in the 70s, aid to Uganda on the basis of Lomé I was suspended in the basis of human rights violations committed by the government of Idi Amin. In legal terms, this suspension was problematic, considering the already promised development aid, the principle of *pacta sunt servanda*, and the lack of a suspension clause in the agreement. All aid was scrutinised by the Commission, but a substantial amount was to continue to flow provided it was used to benefit the needs of the population, not that of the government. However, trade relations continued and payments under the STABEX funds were made. See Elena Fierro *The EU's Approach to Human Rights Conditionality in Practice* The Hague: Martinus Nijhoff (2003), pp. 43-47.

38 By way of comparison, see the Council's 1975 statement on political cooperation in which the Member States observed that, while EU assistance was predicated on the existence of a democratic government, the principle of non-intervention in the internal affairs of states would be observed.

countries in political turmoil with dire human rights records,³⁹ conditionality was introduced in development cooperation policy by linking human rights concerns to aid.⁴⁰ After *de facto* application in practice, this idea was introduced at the policy level in a 1986 'Statement on human rights' by the EU Foreign Ministers who stated that:

Expressions of concern at violations of such rights cannot be considered interference in the domestic affairs of a State ... Respect for human rights is an important element in relations between third countries and the Europe of the Twelve ... The Foreign Ministers affirm that in the development of their relations with non-member States as well as in the administration of aid the European Community and its Member States will continue to promote fundamental rights so that individuals and peoples will actually enjoy to the full their economic, social and cultural rights and their civil and political rights.⁴¹

An examination of various statements, Council resolutions and Commission communications shows that almost simultaneously with concerns regarding human rights, respect for democracy and the rule of law were introduced. Accordingly, the 1991 Commission Communication on human rights, democracy and development cooperation policy discusses the rule of law, albeit under the heading of the objective of human rights protection. 'Where relations with developing countries are concerned, the Community will give priority to fundamental human rights ... The rule of law, which requires that governments guarantee the enjoyment of human rights, primarily through an independent judiciary, is a particularly significant

39 As pointed out in a number of EU declarations in the first half of the 90s, for example the European Council's 'Declaration on Human Rights' (Annex V of the Presidency Conclusions, European Council Luxembourg, 28-29 June 1991) or the Resolution of the Council and of the Member States meeting in the Council on Human rights, Democracy and Development of 28 November 1991. Also see Commission Communication on Human rights, democracy and development cooperation policy, SEC(91) 61 final, 25 March 1991. For literature on how the EU responded to human rights violations in countries that were profiting from development aid in the context of Lomé I, see generally Karin Arts 'Implementing the Right to Development. An Analysis of European Community Development and Human Rights Policies' in Peter Baehr, Lalaine Sadiwa & Jacqueline Smith (eds) *Yearbook on Human Rights in Developing Countries 1996* The Hague: Kluwer Law International (1996), pp. 37-71; Laura Garnick & Carol Cosgrove Twitchett 'Human Rights and a Successor to the Lomé Convention' 6 *International Relations* (1979), pp. 540-557.

40 Up till the 70s, the European Community's policy was based on the belief that development was a precondition of respect for human rights rather than *vice versa*. Lorand Bartels 'The Application of Human Rights Conditionality in the EU's Trade Agreements and Other Trade Arrangements with Third Countries' *European Parliament Policy Department External Policies* (2008), p. 2.

41 Statement on Human Rights by the Foreign Ministers of the European Community, meeting in the framework of European political cooperation and of the Council, 21 July 1986, *EC Bull* no. 7/8, at 2.4.4. Also see the European Council 'Declaration on Human Rights' of 29 June 1991, Annex V of the Presidency Conclusions, European Council Luxembourg, 28-29 June 1991.

indicator.⁴² Following this, the Council and the Member States, while stating that respect for human rights, the rule of law, and the existence of democratic institutions are the basis for equitable development, formulated concrete guidelines and procedures for an external policy based on the aforementioned values.⁴³ Whereas a more extensive description is given of measures in relation to human rights and democracy, regarding the rule of law the account is rather limited. Nonetheless conditionality is introduced through active support for 'the strengthening of the rule of law, including the strengthening of the judiciary, the administration of justice, crime prevention and the treatment of offenders', with the possibility of increased assistance to developing countries in which substantive positive changes have taken place.⁴⁴

It is clear from the EU's policy framework on development cooperation that this connection is further emphasised. The Commission's Communication on development of 2000 identifies the rule of law, together with good governance, as one of six priority areas for activities for development aid,⁴⁵ and describes the principle as a 'key element in ensuring social peace and stability as well as economic growth'⁴⁶ – all essential requirements for development. The three subsequent strategic documents on development cooperation, the 2006 European Consensus on Development,⁴⁷ 2011 Agenda for Change,⁴⁸ and the 2017 New European Consensus on Development⁴⁹ in which the EU has identified its prime concerns for the policy, equally highlight the indispensability of the rule of law.⁵⁰ Indeed, according to the Commission in its Green Paper on 'increasing the impact of EU development policy' without, amongst others, the rule of law, 'the effect of aid programmes will have a limited effect and ensuring high impact cooperation will always be extremely difficult.'⁵¹

42 Commission Communication on Human rights, democracy and development cooperation policy, SEC(91) 61 final, 25 March 1991, p. 6.

43 Resolution of the Council and of the Member States meeting in the Council on human rights, democracy and development, 28 November 1991, Bull EC 11-1991, 2.3.1.

44 *Ibid.*, para. 4.

45 Commission Communication on The European Community's Development Policy, COM(2000) 212, 26 April 2000, p. 27.

46 *Ibid.*, p. 27.

47 Joint statement of the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy: 'The European Consensus', OJ [2006] C46/1.

48 Commission Communication on Increasing the impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final, 13 October 2011.

49 New European Consensus on Development 'Our World, Our Dignity, Our Future' (2017).

50 See for example the New European Consensus on Development (2017), p. 32; COM(2011) 637 final, p. 5.

51 European Commission Green Paper 'EU development policy in support of inclusive growth and sustainable development – Increasing the impact of EU development policy' COM(2010) 629 final, 10 November 2010, p. 7.

2.2 The EU's toolbox for rule of law promotion in development cooperation

The EU's toolbox for rule of law promotion in the area of development cooperation is broad in range and includes measures that can be of a legislative or non-legislative nature. The EU's main instrument for developmental activities is the EU-ACP mixed Agreement,⁵² signed in 2000 in Cotonou,⁵³ which forms the legal framework for relations with 79 African, Caribbean, and Pacific (ACP) states, including 39 of the world's 49 least developed countries.⁵⁴ The rule of law is manifest in the Agreement in a number of ways. First, it is one of the three essential elements of the agreement (Article 9 Cotonou),⁵⁵ next to respect for human rights and democratic principles, with good governance as a so-called fundamental element of the Agreement, the violation of which can give rise to the consultation procedure of Article 96 Cotonou. Secondly, the rule of law is one of the topics of political dialogue (Article 8 Cotonou), and, thirdly, its development and strengthening is a crosscutting issue across all areas of cooperation (Article 33(1)(c) Cotonou). Next to the Cotonou Agreement, development takes place on the basis of the full panoply of bilateral and multilateral policy framing

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- 52 The Cotonou agreement builds on four previous Lomé Conventions. Over the years, each new association agreement has widened both the number of developing countries covered and the scope of the EU's cooperation with them. The first Lomé Convention entered into force in 1975 (Lomé I Convention, OJ [1976] L25/2), the second in 1981 (Lomé II Convention, OJ [1980] L347/1), the third 1986 (Lomé III Convention, OJ [1986] L86/3), and the fourth in 1990 (Lomé IV Convention, OJ [1991] L229/3. The Lomé IV Convention was revised and signed on Mauritius in 1995 (Lomé IVbis), OJ [1998] L156/3.
- 53 In contrast to the much shorter lifespan of the Lomé Conventions of five years, the Cotonou Agreement has been concluded for 20 years. It has been revised twice, in 2005 and 2020. Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (Cotonou Agreement), OJ[2000] L317/3, revised in 2005, OJ[2005] L209/27, and 2010, OJ[2010] L287/04.
- 54 The wave of decolonisation of the 50s and 60s created a new geopolitical situation to which the then-existing regime under Part IV of the Treaty (Articles 131-136a EEC) could no longer apply. Arguably, the main difference between the Treaty's provisions of Part IV and the international agreements was that the former regulated the Union's relationship with 'dependent' countries, whereas the latter was negotiated between equally sovereign states. Morten Broberg & Rasmussen Holdgaard 'EU External Action in the Field of Development Cooperation Policy' 6 *Swedish Institute for European Policy Studies* (2014), p. 12. On the relationship between the EU and its former colonies see for example Karin Arts *Integrating Human Rights into Development Cooperation: The Case of the Lomé Convention* The Hague: Kluwer Law International (2000), p. 99; Enzo Grilli *The European Community and the Developing Countries* Cambridge: Cambridge University Press (1993), p. 15.
- 55 An essential elements clause declares the principles mentioned therein to be 'essential to the accomplishment of the object or purpose of the Treaty', Article 30(3)(b) Vienna Convention on the Law of Treaties (VCLT), Vienna 23 May 1969. According to Article 60 VCLT the violation of a provision essential to the accomplishment of the object or purpose of the treaty constitutes a material breach that may justify the termination or suspension of the Treaty.

agreements with countries and regions of Latin America, Asia, Central Asia, and the Middle East, as well as various forms of regional cooperation.⁵⁶ Respect for the rule of law is both an essential element and one of the aims of cooperation of a small number of these agreements.⁵⁷

The development cooperation policy is further shaped by the European Development Fund (EDF) and a number of external financial assistance instruments, including, for the purposes of the present chapter, the Development Cooperation Instrument (DCI),⁵⁸ and the Instrument for the Promotion of Democracy and Human Rights Worldwide (EIDHR).⁵⁹ The EDF supports the implementation of the Cotonou Partnership Agreement and is the main instrument for providing support to the ACP countries. Even though it falls outside the remit of the EU budget, its in-country implementation is regulated by the Commission.⁶⁰ According to Regulation 2015/323 on the financial regulation applicable to the 11th EDF, budget support is provided to the ACP states in order to promote democracy, human rights and the rule of law, to support sustainable and inclusive economic growth and to eradicate poverty.⁶¹ Any decision to provide financial support shall be based on the budget support policies agreed to by the EU and a clear set of eligibility criteria. According to Article 39 of the Regulation, one of the key determinants of such a decision shall be an assessment of the commitment, record and progress of the ACP states with regard to democracy, human rights and the rule of law.

56 See for example Commission Communication on Barcelona Process: Union for the Mediterranean, COM(2008) 319 final, 20 May 2008; Interregional Framework Cooperation Agreement between the European Community and its Member States, of the one part, and the Southern Common Market and its Party States, of the other part (EU-MERCOSUR), OJ[1996] L69/4; Commission Communication on A new partnership with South East Asia, COM(2003) 399 final, 9 July 2003. Furthermore, the EU has concluded international agreements with countries of the Southern Mediterranean, Eastern Europe, and the Caucasus.

57 See for example the Agreement establishing an association between the EC and the Republic of Chile, OJ [2002] L352/3; the Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, OJ [1999] L311/3; the Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part, OJ[2012] L134/4.

Exceptionally, the Partnership and Cooperation Agreements with the countries of Central Asia, Kazakhstan, the Kyrgyz Republic, Tajikistan, Turkmenistan, and Uzbekistan, include the development and/or strengthening of the rule of law as one of the aims of cooperation, without however, having inserted respect for the principle in the essential elements clause. See for example the Partnership and Cooperation Agreement establishing a partnership between the European Communities and their Member States, of the one part, and the Republic of Uzbekistan, of the other part, OJ [1999], L229/3.

58 Regulation (EU) No 233/2014.

59 Regulation (EU) No 235/2014.

60 Article 3 Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund, OJ[2015] L58/1.

61 Article 39 Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund, OJ[2015] L58/17.

The so-called 'backbone'⁶² of financial cooperation with developing countries other than ACP states,⁶³ the DCI, states in its preamble that the promotion of the rule of law is 'essential for the development of partner countries' and should be a mainstreaming issue in the Union's development policy, particularly in programming and in agreements with partner countries.⁶⁴ Accordingly, following the language of the Lisbon Treaty, next to the primary objective of the reduction and eradication of poverty, cooperation under the Regulation shall contribute to consolidating and supporting the rule of law, as well as democracy, human rights, good governance, and the relevant principles of international law.⁶⁵ Furthermore, Article 5 stipulates that, in line with the European Consensus and the subsequent agreed modifications thereto, geographic programmes of cooperation under the DCI shall cover, amongst others, human rights, democracy, and the rule of law.⁶⁶

Assistance under the EIDHR is designed to address global, regional, national, and local human rights, democratisation, and rule of law issues in partnership with civil society organisations. The Regulation's objective of the 'development and consolidation of democracy and the rule of law and of respect for all human rights and fundamental freedoms' is set within the framework of the European Consensus, the Agenda for Change, and the EU Strategic Framework and Action Plan on Human Rights and Democracy, adopted by the Council on 25 June 2012.⁶⁷ According to Article 2, the scope of assistance has essentially four aims, further divided into specific aims. Particularly relevant for the present purposes is the first objective,⁶⁸ namely the enhancement of democracy and the process of democratisation, *inter alia* through the reinforcement of the rule of law, promoting the independence

62 Commission Strategy Document for Regional Programming for Asia 2007-2013, 31 May 2007, p. 8.

63 According to Article 1 of the DCI Regulation, geographic programmes on the basis of the DCI shall be aimed at developing countries that are included in the list of recipients of ODA, except for signatories of the EU-ACP Agreement that are eligible for EDF funding, and countries covered by the European Neighbourhood Instrument (Regulation (EU) No 232/2014) or the Instrument for Pre-accession Assistance (Regulation (EU) No 231/2014). ACP countries may, however, be included under the thematic programmes, see Article 1(1)(b) Regulation (EU) No 233/2014.

64 Consideration 7 Preamble Regulation (EU) No 233/2014.

65 Article 2(1)(b)(ii) Regulation (EU) No 233/2014. Cf. Article 3(7) Regulation (EU) No 233/2014.

66 Article 5(3)(a)(i) Regulation (EU) No 233/2014.

67 Consideration 7 Preamble Regulation (EU) No 235/2014.

68 Next to the other objectives of the promotion and protection of human rights and fundamental freedoms as proclaimed in the UN Universal Declaration of Human Rights and other international and regional instruments, as well as the enhancement of electoral processes and institutions, the third objective of the strengthening of the international framework for the protection of human rights, justice, gender equality, and democracy, also refers to the rule of law. This objective, however, is concerned with the support for other international and regional instruments concerning the rule of law, and is, as such, not relevant for the present examination of the EU's own definition of the rule of law.

of the judiciary and of the legislature, supporting and evaluating legal and institutional reforms and their implementation.⁶⁹

3. RULE OF LAW ELEMENTS IN THE EU'S PRACTICE OF DEVELOPMENT COOPERATION

In this part of the chapter the EU's practice in development cooperation will be tested against the analytical framework on the rule of law, established in Part I of the thesis. In chapter 1 and 2, it was demonstrated that the element of legality is recognised as the core substance of the rule of law by both the national conceptions of the rule of law and legal theory. In order to fulfil the rule of law's primary function of guiding the behaviour of citizens, and, thus, providing predictability and security, it was shown in chapter 2 that various scholars have steadily debated the qualifications for the validity of law, such as generality, clarity, and stability, its non-retroactive and non-contradictory nature, as well as its promulgation. Following this, it was argued that legality encapsulates all those requirements that are concerned with the *formal* qualities that characterise norms; in other words, all those elements that are concerned with the predictability and determinacy of the laws themselves.

Furthermore, it was also demonstrated that next to formal elements, procedural elements play an important role in any definition of the rule of law. For, however formally virtuous laws might be, for the rule of law to exist, rules must be applied and enforced in a way that is procedurally just.⁷⁰ Thus, after it was concluded in chapter 1 on the concept in the three most prominent legal systems of the EU that judiciary organs have been tasked with safeguarding the rule of law through judicial review of governmental acts that are deemed unlawful, it was shown in chapter 2, that legal theory enriches the understanding of the rule of law element of judicial review to give rise to a number of related *procedural* rule of law elements, such as the principles of impartiality and fairness, and access to court. Furthermore, chapters 1 and 2 have one argument in common, namely the claim that variations in organisation of these elements can occur. Therefore, even though the intensity of judicial review of legislation may vary depending on historical, societal, and political differences, at the very minimum, the rule of law requires weak judicial review whereby courts may scrutinise legislation for conformity with human rights.⁷¹ Additionally, not only the manner of application of the law was highlighted, also the element of enforcement of the law was brought to the fore. Consequently,

69 Article 1(a)(ii) Regulation (EU) No 235/2014.

70 See the contribution of both Jeremy Waldron 'The Rule of Law and the Importance of Procedure' and Robin West 'The Limits of Process' in James E. Fleming (ed) *Getting to the Rule of Law* New York: New York University Press (2011).

71 See chapter 2, section 5.

it was argued at the end of Part I that all the aforementioned elements that are concerned with the impartial administration, application, and enforcement of the law, are part of the category of *procedural* rule of law elements.

Finally, it was shown in the first chapter that a state functioning under the rule of law requires some form of the separation of powers accompanied by a system of checks and balances. From the examination of the national rule of law traditions, it became apparent that there are many ways through which the separation of the judicial, legislative, and executive branches of government can be achieved; the form depends mostly on historical circumstances. Subsequently, in chapter 2, on the rule of law in legal theory, it was asserted that since the requirements of legality address the three different branches of government, it presupposes some functional separation of governmental powers. However, it was further asserted that legal scholars have restricted their discussion almost exclusively to the position and role of the judicial branch, and more particularly, to the notion of judicial independence. Against this backdrop, it was argued at the end of Part I, that the third category of the analytical framework should consist of the institutional elements underpinning the rule of law. This section will follow the structure outlined in the analytical framework, therefore, section 3.1 will focus on *formal* elements, section 3.2 on *procedural* elements, and section 3.3 on *institutional* rule of law elements.

3.1 Formal elements of the rule of law

It is the analysis of the EU's practice in its development cooperation policy in relation to the principle of legality and its requirements that the present section is concerned with. The main argument advanced here is that, in contrast to legality's pivotal position in the national and theoretical conceptualisations of the rule of law,⁷² the importance of legality for the Union's definition of the rule of law is negligible. It will be argued that the analysis of the legal framework and of the development policy related documents shows the emphasis put by the EU on the *procedural* and *institutional* aspects of the rule of law over *formal* ones. To this end, the section is divided into three subsections. Subsection one will focus on fleshing out the definition of the rule of law in the specific context of the Cotonou Partnership Agreement and the place of legality therein. Since, as shown in the introductory chapter, the Cotonou Agreement is the most elaborate and advanced legal framework of the EU's development cooperation policy, it is a fitting start to the analysis. It will be shown that the definition of the rule of law provided in the Agreement, and in the EU's explanatory documents thereof, is partial to conceptual confusion and neglect. More particularly, the Agreement

72 One only needs to recall Fuller's and Raz's extensive exposés on the matter, as analysed in chapter 2.

accords legality very little importance. Subsection two will then proceed by testing the emerging picture against the broader legal framework of development cooperation. The argument is that this framework confirms the ACP's preference for a rule of law definition in terms of *procedural* and *institutional* elements and that the principle of legality appears to be largely absent. Subsection three tests this tentative conclusion against the benchmarks relating to the rule of law at the programming level. This analysis confirms that on the one hand, a transparent legal framework is deemed to be an important aspect underlying the rule of law. However, on the other hand, the benchmarks indicate that the EU's cooperation programmes are confronted with situations in which general as well as more specific laws are absent. Development aid is thus primarily concerned with the primary step of the adoption of laws rather than with the specific requirements pertaining to the quality of laws.

3.1.1 *The lack of legality in the definition of the rule of law as an essential element in the Cotonou Agreement*

The EU's main legal framework for development cooperation, the Cotonou Agreement,⁷³ places the rule of law at the centre of cooperation by including the notion as one of the three essential element of the agreement.⁷⁴ In addition to this, it also sets up a detailed process of political dialogue around the essential elements.⁷⁵ The purpose of the dialogue is two-fold; on the one hand it is to pre-empt situations in which a party to the agreement might deem it justified to activate the non-execution clause,⁷⁶ on the other hand the dialogue is meant to facilitate the joint development and assessment of 'specific benchmarks or targets with regard to human rights, democratic principles and the rule of law within the parameters of internationally agreed standards and norms.'⁷⁷ Annex VII of the Agreement, setting out the objectives and procedures of the Dialogue, provides no further definition of the rule of law, leaving the question open which rule of law related 'internationally agreed standards and norms' should be taken into account. The list of Conventions mentioned in the Preamble provides no help on the

73 Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part, signed in Cotonou on 23 June 2000 (Cotonou Agreement), OJ[2000] L317/3, revised in 2005, OJ[2005] L209/27, and 2010, OJ[2010] L287/04.

74 Article 9 Cotonou Agreement.

75 See Article 8 and Annex VII Cotonou Agreement.

76 Article 96 Cotonou Agreement.

77 Articles 8(4) and 2(2) Annex VII Cotonou Agreement.

topic either.⁷⁸ Whereas these Conventions quite clearly give the framework for human rights, only a few of them make references to the rule of law, and none of them provide a standard or definition. Moreover, reporting on these political dialogues is not public and information and research on its content is limited – particularly in the case of the rule of law.⁷⁹ Thus, the issue of the EU's definition of the rule of law applicable to the political dialogue with the ACP countries remains, in the words of a study requested on the topic by the European Parliament, 'somewhat of a black box'.⁸⁰

Some limited guidance can be found in the essential elements clause itself and some further Articles in the EU-ACP Agreement.⁸¹ Article 9 states that: 'The structure of government and the prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.' In this formulation it is not difficult to recognise such *procedural* rule of law elements as accessible justice and more *institutional* elements like the separation of powers in combination with judicial independence. This *procedural* and *institutional* approach towards the rule of law is reinforced further on in the Agreement. According to the cross-cutting theme of institutional development and capacity building, cooperation should

78 The 7th and 8th consideration of the Preamble provide an overview of the following Conventions: the Charter of the United Nations, the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees, the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, and the African Charter on Human and Peoples' Rights and the American Convention on Human Rights.

79 The existing studies in this context focus mainly on the promotion of human rights. See for example Jean Bossuyt, Camilla Rocca & Brecht Lein 'Political Dialogue on Human Rights under Article 8 of the Cotonou Convention' study requested by the European Parliament's Committee on Development, EXPO/B/DEVE/2013/31 (2014); Clara Portela 'Political Dialogue and Human Right in the Framework of the Cotonou Agreement' *Research Collection School of Social Sciences* (2007); Jan Wouters *et al.* 'EU Human Rights Dialogues – Current Situation, Outstanding Issues and Resources' *Leuven Centre for Global Governance Studies, policy brief* No. 1 (2007).

80 Bossuyt, Rocca & Lein (2014), p. 17. The European Parliament has, on more than one occasion, called for 'specific quantifiable indices and benchmarks in order to measure the effectiveness' of political dialogues in order to 'avoid any repeated failures'. European Parliament resolution on the Annual Report on Human Rights in the World 2009 and the European Union's policy in the matter, (2010/2202(INI)), 16 December 2010, paras. 21, 58.

81 The European Parliament has called for more clarity on the standards applicable in essential elements clauses, see, for example, European Parliament resolution on the human rights and democracy clause in European Union agreements (2005/2057(INI)), 14 February 2006, pnt. 12.

pay systematic attention to institutional aspects and in this context, 'shall support the effort of the ACP States to develop and strengthen structures, institutions, and procedures' that help to 'develop and strengthen the rule of law; and improve access to justice, while guaranteeing the professionalism and independence of judicial systems.'⁸² It is clear that the rule of law in the context of the agreement leans heavily towards the separation of powers and is geared towards the proper functioning and accessibility of the legal system, without considerations for requirements concerning the validity of law itself. Evidently, what seems to be lacking from these definitions of the rule of law provided in the Cotonou Agreement is a reference to legality; the formal element of the rule of law that concerns the quality of norms.⁸³

The lack of *formal* rule of law elements in the Cotonou Agreement's legal framework is also evident in the Commission's single Communication specifically related to the EU-ACP relations and the rule of law.⁸⁴ Aimed at creating a 'shared, practical and operational understanding'⁸⁵ of the elements of the essential elements clause,⁸⁶ including the rule of law, the Communication refrained from providing a list of internationally agreed standards the EU could commit to. Instead, the following definition of the rule of law is provided:

The primacy of the law is a fundamental principle of any democratic system seeking to foster and promote rights, whether civil and political or economic, social and cultural. This entails means of recourse enabling individual citizens to defend their rights. The principle of placing limitations on the power of the State is best served by a representative government drawing its authority from the sovereignty of the people. The principle must shape the structure of the State and the prerogatives of the various powers.⁸⁷

82 Article 33 Cotonou Agreement.

83 The argument could be made that equality before the law is of course an inherent element of the requirement of law's generality, one of Fuller's normative requirements. However, the focus of the definition of the rule of law provided in Article 9, is squarely on the institutional and procedural aspects of the rule of law – an independent court that applies the law equally to the citizens before it, irrespective of status or political position.

84 Commission Communication on Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(1998) 146 final, 12 march 1998.

85 *Ibid.*, pp. 2-3.

86 The Communication was written in the context of the Cotonou Agreement's precursor, the Lomé IVbis Convention. Since the essential elements have remained the same in the Cotonou Agreement and the Commission has not provided an updated Communication in relation to the latter Agreement, it is submitted that the Communication remains valid for the Cotonou Agreement's essential elements.

87 Commission Communication on Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(1998) 146 final, 12 march 1998, p. 4.

Interestingly, at first sight, this definition seems to be more about the protection of human rights and democracy or democratic representation as the political constellation of choice, rather than the rule of law. According to this definition, state power finds its limitations in democracy, instead of the general principle of legality through which state action is confined to what is prescribed by law. What it does demonstrate in relation to the rule of law, however, is suggestive of the same *institutional* approach also seen in the Agreement. It touches on states being able to effectively provide access to courts for individuals in order to defend their various rights and limitations of state power through the separation of power, including a system of checks and balances. Again, there is little to nothing on the quality of law itself.

The examples, provided in the Communication's section on the rule of law and what the concept requires at a practical level, further confirm the Commission's chosen approach. In relation to the rule of law, the EU's development policy should provide, amongst others, an independent judiciary, accessible means of judicial recourse, a prison system respecting the human persons within it, and a police force at the service of the law.⁸⁸ None of these include a reference to the requirements of legality – the conditions for the validity of law – or even to legality in its general, positive, understanding, that of the requirement that law functions as a precondition for the exercise of any administrative power. The main focus of the examples provided is *institutional*, on the legal system in its broad sense, including the judiciary, the police, and prisons, as well as *procedural*, with the demand for effective access to justice.

In sum, it can be deduced from the foregoing analysis that the principle of legality and its requirements as the rule of law's *formal* elements do not seem to be included in the EU's understanding of the rule of law in the EU-ACP relations and in this respect the Cotonou Agreement leaves much to be desired. These findings give rise to two further questions: first, to what extent do other relevant agreements underlying the Union's broader development policy and EU secondary legislation confirm this conclusion, and secondly, descending along the lines of the EU's implementation of its development policy at regional and country level, do the related documents bring any clarity to this convoluted picture?

3.1.2 *The lack of legality in the broader development context: confirmation of the emerging picture?*

As mentioned previously,⁸⁹ the rule of law does not put in a frequent appearance as an essential element of cooperation agreements. When it

88 *Ibid.*, pp. 4-5.

89 In section 2.2.

does,⁹⁰ it is usually also advanced as an objective of cooperation, although there are agreements where it is mentioned as the latter, but it is not included as a component of the essential elements clause.⁹¹ Examples of agreements where the notion is included as both an essential element and as an objective are, amongst others, the EC-South Africa Agreement on Trade, Development and Cooperation,⁹² the Political Dialogue and Cooperation Agreement with various countries in Latin America,⁹³ and the EU-Korea Framework Agreement.⁹⁴

Whereas guidance has been provided for the (framework of) interpretation of human rights, and to a lesser extent democracy / democratic principles, in the essential elements clauses since the formal inception of the clause in 1995,⁹⁵ guidance for explication of the notion rule of law in these clauses is far less prevalent.⁹⁶ In contrast to the Cotonou Agreement with its elaborate essential elements clause – in fact it is the most detailed essential elements clause of all of the EU's external agreements⁹⁷ – the other clauses make mention of the rule of law without putting flesh on the notion's bones.

90 There is a slight dissimilarity in how the rule of law is referenced as an essential element. Whereas the Lomé IVbis Convention and the Cotonou Agreement both emphasise 'respect for the rule of law', most other essential elements clauses make mention of 'respect for the principle of the rule of law'. Only in the EU-South Africa Agreement on Trade, Development and Cooperation 'respect of the principles of the rule of law' constitutes an essential element of the cooperation.

91 See for example the Partnership and Cooperation Agreements with Uzbekistan and Tajikistan. In the former, the rule of law is mentioned as an explicit objective of cooperation (Article 1), while both refer to the rule of law in the title on cooperation on matters relating to democracy and human rights (Article 68 and 66, respectively).

92 Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, OJ [1999] L311/3.

93 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part, OJ [2014] L111/6.

94 Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2013] L20/2.

95 See Commission Communication on The inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(1995) 216 final, 23 May 1995 as well as Commission Communication on the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond, COM(1995) 567, 22 November 1995.

96 The Communication 'from Rome to Maastricht and beyond' provides the following meagre indication of an EU rule of law definition by way of priority areas of activity in relation to the notion: 'promoting and consolidating the rule of law by supporting and strengthening the independence of the judiciary (exercise of justice, treatment of offenders, crime prevention), supporting the activities of parliaments and other democratically elected bodies, and supporting institutional and legislative reforms.' Commission Communication on the European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond, COM(95) 567, 22 November 1995, pnt. 34.

97 Nicolas Hachez 'Essential Elements Clauses in EU Trade Agreements Making Trade Work in a Way that Helps Human Rights?' *Leuven Centre for Global Governance Studies Working Paper* No. 158 (2015), pp. 10-11.

This is left to the political dialogue,⁹⁸ and, to some extent at least, to the provisions on cooperation in the body of the agreement. Thus, the EU-Korea Framework Agreement mentions the rule of law in relation to its activities in the area of justice, freedom, and security. In their cooperation in this area, 'the Parties shall attach particular importance to the promotion of the rule of law, including the independence of the judiciary, access to justice, and the right to a fair trial.'⁹⁹ By emphasising access to justice and judicial independence, the agreements speak about *institutional* and *procedural* elements. Thus, similar to the Cotonou Agreement, the emphasis is on these elements, rather than on legality.

Cooperation provisions in other agreements further corroborate this argument. For example, the EU-Iraq Partnership and Cooperation Agreement, mirrors the same commitments regarding the rule of law as mentioned in the EU-Korea Framework Agreement, and adds that '[t]he Parties will cooperate to further develop the functioning of institutions in areas of law enforcement and the administration of justice including capacity building.'¹⁰⁰ The EU's Cooperation Agreement with Latin America states that in the field of human rights, democracy, and good governance, areas of cooperation will be strengthening of the rule of law and reinforcing the independence and efficiency of judicial systems.¹⁰¹

Moreover, not only is the formal element of legality absent from the Agreements, it is also lacking in the explanation on the rule of law provided by the EU's development funding instruments and the EDF. Both the EU's main funding instrument, the DCI, and the EDF clearly emphasise the importance of the rule of law for the EU's development cooperation activities. Thus, under the Regulation, '[r]espect for human rights, fundamental freedoms, the promotion of the *rule of law*, democratic principles ... are essential for the development of partner countries, and those issues should be mainstreamed in the Union's development policy, particularly

98 For example, see the Association Agreement with Chile in which it is stated in Article 12(2) that: 'The main objective of the political dialogue between the Parties is the promotion, dissemination, further development and common defence of democratic values, such as the respect for human rights, the freedom of the individual and the principles of the rule of law as the foundation of a democratic society.' Agreement establishing an association between the European Community and its Member States, of the one part, and the Republic of Chile, of the other part, OJ [2002] L352/3.

99 Article 30 of the EU-Korea Framework Agreement, OJ [2013] L20/2.

100 Article 102 of the EU-Iraq Partnership and Cooperation Agreement, OJ [2012] L204/20.

101 Article 8 of the EU-Latin America Political Dialogue and Cooperation Agreement, OJ [2014] L111/6.

in the programming and in agreements with partner countries.’¹⁰² In order to do this, consolidating and supporting the rule of law is made an objective of cooperation,¹⁰³ specifically in geographic programmes of the DCI.¹⁰⁴ In the area of cooperation of human rights, democracy, and good governance, the Union wishes to ensure the ‘strengthening of the rule of law and the independence of judicial and protection systems and ensuring unhindered and equal access of justice for all.’¹⁰⁵ In the sections on specific areas of regional cooperation the rule of law is mentioned in combination with ‘well-functioning institutions’,¹⁰⁶ the ‘transparency of the judicial process’,¹⁰⁷ and ‘justice and security sector reform’,¹⁰⁸ which means that the

102 Consideration 7 Preamble of Regulation (EU) No 233/2014 [italics added]. Whether or not the rule of law is a ‘mainstreaming’ issue is contentious. According to the 2006 Consensus on Development, building on the Commission Communication on The European Union’s role on promoting human rights and democratisation in third countries (COM(2001) 252 final), some issues require a mainstreaming approach because they ‘touch on general principles applicable to all initiatives and demand a multisectoral response.’ The following cross-cutting issues for mainstreaming are indicated in the Consensus: the promotion of human rights, gender equality, democracy, good governance, children’s rights and indigenous peoples, environmental sustainability and combating HIV / AIDS. European Consensus in Development, pnts. 100-101. The 2006 DCI identified the same cross-cutting issues while stating that in addition, ‘particular attention shall be given to strengthening the rule of law, improving access to justice and supporting civil society, as well as promoting dialogue, participation and reconciliation, and institution-building.’ Obviously, this is a way to bypass the clearly exhaustive list of cross-cutting issues in the Consensus and to highlight the importance of the principle of the rule of law for development cooperation, Article 3(3) Regulation 1905/2006.

Against this background, the revised 2014 DCI proclaims in its preamble the promotion of the rule of law as a cross-cutting issue that is to be mainstreamed. However, Article 3 refers back to the cross-cutting issues as defined in the European Consensus, while adding three other issues such as conflict prevention and climate change. To this list of cross-cutting issues, the Regulation then adds a number of previously unidentified issues: ‘[t]he cross-cutting issues referred to in the first subparagraph shall be understood to encompass the following dimensions, to which specific attention shall be given where circumstances so require: non-discrimination, ... the rule of law, capacity building for parliaments and civil society, and the promotion of dialogue, participation and reconciliation, as well as institution building, including at local and regional level.’ Article 3(3) Regulation (EU) No 233/2014.

On the importance of the European Consensus of Development for the scope of EU development cooperation see the *Philippines Partnership and Cooperation Framework Agreement* Case. Case C-377/12 *Commission v Council*, EU:C:2014:1903, 11 June 2014. For commentary see for example Broberg & Holdgaard (2014), pp. 43-47.

103 Article 1(2)(b)(ii) 11th EDF implementation Regulation (EU) 2015/322. Article 2(1)(ii) Regulation (EU) No 233/2014. Whereas more than twice as often mention is made of the rule of law in the revised 2014 DCI as opposed to the previous 2006 DCI, substantively, nothing has been added.

104 Article 5(3)(a)(i) Regulation (EU) No 233/2014.

105 Annex I A(I)(a)(ii) Regulation (EU) No 233/2014.

106 Annex I B(IV)(c) Regulation (EU) No 233/2014.

107 Annex I B(V)(a) Regulation (EU) No 233/2014.

108 Annex I B(III)(1)(f) Regulation (EU) No 233/2014.

emphasis is again on *institutional* and *procedural* aspects of the rule of law rather than on *formal* ones.

The definition of the rule of law provided in the financing instrument for democracy and human rights worldwide (EIDHR) concentrates on the same *institutional* and *procedural* elements mentioned above, while at the same time slightly shifting its focus towards the rule of law's role for the protection of human rights. Accordingly, the scope of the Regulation covers the strengthening of the rule of law, including the independence of the judiciary, access to justice, and legal and institutional reforms. However, in addition, it includes the independence of the legislature, as well as support for national human rights institutions.¹⁰⁹ Similarly, one of the previous versions of the EIDHR Regulation mentions support for humane prison systems, for constitutional and legislative reform, and for initiatives to abolish the death penalty.¹¹⁰

This enumeration reflects the Council's view that the three notions of democracy, human rights and the rule of law are mutually reinforcing,¹¹¹ and that democratic control and the separation of powers are essential to sustain an independent judiciary and the rule of law, which in turn are required for effective protection of human rights.¹¹² None of this, however, influences the above discussion on the lack of legality as an element of the rule of law in the EU's definition of the notion. The question that remains is whether, and if so to what extent, this conclusion is validated by an analysis of the benchmarks the EU employs in the context of the programming cycles of the European Development Fund (EDF) and its funding instruments, such as the DCI.

3.1.3 *Legality as a benchmark in development cooperation: further confirmation of the lack of formal elements in the EU's rule of law definition*

What picture emerges of the formal element of the rule of law in the programming documents related to the European Development Funds and the other funding instruments? A baffling one. On the one hand, in contrast to the above discussion, indications can be found that attest to the fact that some of legality's requirements are, at least to some extent, considered to

109 Article 2(1)(a)(ii) Regulation (EU) No 235/2014.

110 Article 2(2)(a) Regulation 975/1999 of 29 April 1999 laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms. Interestingly, the Regulation's direct precursor, Regulation 1889/2006, is much more limited in its scope regarding the rule of law. Thus, according to Article 2(1)(a)(ii), strengthening of the rule of law pertains to promoting the independence of the judiciary, encouraging and evaluating legal and institutional reforms, and promoting access to justice.

111 Council Conclusions 'Democracy Support in the EU's External Relations', 2974th External Relations Council, Doc. 16081/09, 18 November 2009.

112 Consideration 11 Preamble Regulation (EU) No 235/2014.

be part of the rule of law. However, on the other hand, direct references to legality are almost entirely absent from the examined documents used in the programming of country and regional development aid.

According to one of the early general frameworks for country strategy papers (CSPs), analysis in the CSPs should consider the political situation in a particular country, including information on the rule of law.¹¹³ Regarding the latter, a non-exhaustive list is provided including an independent and effective judiciary, a transparent legal framework, equality of all citizens before the law, police and public administration subject to the law, and enforcement of contractual obligations.¹¹⁴ In relation to the elements of the rule of law identified in the previous two sections, the definition under these instruments has been widened to include the performance of the police and public administration. However, a novel element has been added, that of a 'transparent legal framework'. Notwithstanding the absence of further elaboration in the framework, it is plain that the establishment of an appropriate and effective legal framework is a prerequisite for an environment in which development aid can be effective.¹¹⁵ A transparent legal framework is characterised by clear and accessible rules and by efficient procedures for their application, creating predictability and openness, helping guard against arbitrary decisions or actions. Therefore, this element has clear overlap with the requirements of legality, such as clear, stable, general, and promulgated laws. Unfortunately, later programming guides do not include an analysis of this issue,¹¹⁶ and, thus, provide no further confirmation on this rule of law element.

Examination of the various reports of the programming cycles under the EDF and the funding instruments, such as the DCI, shows that hardly any attention is paid to the formal elements of the rule of law other than a few very general references to 'improving the legal and regulatory

113 Commission Staff Working Paper on Community Co-Operation: Framework for Country Strategy Papers, SEC(2000) 1049.

114 *Ibid.*, p. 6.

115 See for example the Commission Green Paper on EU development policy in support of inclusive growth and sustainable development – Increasing the impact of EU development policy, COM(2010) 629 final, 10 November 2010, pp. 8-9; Commission Communication on A decent life for all, COM(2013) 92 final, 27 February 2013, p. 13.

116 One of the few exceptions to this is the 2006 Programming Fiche on 'Rule of law – the parliaments' meant to guide strategy papers. A definition of the rule of law is provided, which includes 'legality' – without further explication. In the EDF context, another example is provided by the Working document from the ACP-EU Joint Parliamentary Assembly on the 'Respect for the Rule of Law and the Role of an Impartial and Independent Judiciary' of 10 April 2013. In it, the Assembly gives its thoughts on factors influencing the respect for the rule of law and they make a reference to the World Bank and OECD definition of the rule of law: 'Institutions such as the World Bank or the OECD identify a fair, impartial, and accessible justice system and a representative government as key elements of the rule of law: an independent, efficient, and accessible judicial and legal systems, with a government that applies fair and equitable laws equally, consistently, coherently, and prospectively to its entire people.' In the last sentence, some of legality's requirements seem to make an appearance, even if the phrasing is a bit unclear.

framework'.¹¹⁷ In many cases the discussion in the reports is more about the absence of laws and the need for the adoption of specific laws¹¹⁸ or their general revision,¹¹⁹ or revision in order to make them compatible with international treaties.¹²⁰ In Malawi the situation was so dire that one of the rule of law related activities 'responding to a major need' was the 'starting up of printing of Malawi laws'.¹²¹ In the latest round of National Indicative Programmes (2014-2020) relating to the 11th EDF and Multiannual Indicative Programmes (2014-2020) under the DCI, there is even less.¹²² Moreover, against the background of the discussion of the notion of legality in the Commission Communication in relation to the essential elements of the Cotonou agreement in the previous section, it is noteworthy that legality very rarely appears in relation to the rule of law.

3.1.4 Conclusions

The picture that emerges from the analysis presented above regarding the principle of legality as a core element of the rule of law is perplexing. Whereas it was shown in chapter 1 that the concepts of the *Rechtsstaat*, *état de droit* and the Anglo-Saxon rule of law consider legality as their central element, guiding their national concept's practical application on the quality of law and legislation, it is clear that in the EU's rule of law definition in development cooperation, the *formal* element of legality is not included.

117 Malawi Joint Annual Report 2008, p. 22. See also the Report from the Commission on The implementation of measures intended to promote observance of human rights and democratic principles in external relation for 1996-1999, COM(2000) 726 final 14 November 2000, p. 12; and its 1995 counterpart Commission Report on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995), COM(1996) 672 final, 17 January 1996, pp. 8-9.

118 See for example the Regional Multiannual Indicative Programme of Central Asia 2014-2020, which includes as one of the rule of law related focal areas: 'support to development of the legal framework: Constitutional Law and/or the Administrative Law and/or Criminal Law', pp. 4-5.

119 See for example the Viet Nam Multiannual Indicative Programme 2014-2020, p. 9.

120 See for example the Bolivia Multiannual Indicative Programme 2014-2020, p. 3; Botswana Joint Annual Report 2008, p. 26; Belize Joint Annual Report 2008, p. 30; Mozambique Joint Annual Report 2006, p. 30; Suriname Joint Annual Report 2005, p. 7; Malawi Joint Annual Report 2002, pp. 37-38. See further the first Action Plan (2008-2010) for the implementation of the Africa -EU Strategic Partnership, as endorsed by the Africa-EU Ministerial Troika, 31 October 2007, p. 11.

121 Malawi Joint Annual Report 2008, p. 19. Also see the support programme for the rule of law in the Democratic Republic of Congo, which has, amongst others, as its objective, the publication and distribution of major legal texts, see Commission Staff Working Document Accompanying the Communication on 'Governance in the European Consensus on Development: towards a harmonized approach with the European Union' SEC(2006) 1020, 30 August 2006, p. 5.

122 An example is the Bolivia Multiannual Indicative Programme 2014-2020, in which some aspects of the quality of legislation are mentioned in passing in relation to the sectoral focus areas of justice sector reform; Bolivia Multiannual Indicative Programme 2014-2020, p. 3.

Despite some occasional haphazard references throughout various development policy related documents, legality, or sub-elements thereof, does not feature in the different agreements, reports, strategy papers, NIP's and MIP's. Instead, careful scrutiny has shown that the EU has adopted an interpretation of the rule of law, both in its relations with the ACP countries as well as in the broader development cooperation context, that leans heavily on *procedural* and *institutional* elements, such as access to justice and judicial independence, respectively. The next sections will continue with an exploration of these in relation to the EU's definition of the rule of law in development cooperation.

3.2 Procedural elements of the rule of law

In the present section, the focus will be on the *procedural* elements of the rule of law. Three arguments will be presented here. First, it will be shown that in contrast to the weight accorded to the element of judicial review in both the national rule of law traditions and legal theory, in development cooperation this element is mostly absent. Moreover, it will be demonstrated that the Union has refrained from providing a blueprint on how to best organise judicial review, instead concentrating on the outcome of the process, *i.e.* a legislature that takes constitutional human rights into account and an executive bound by the law. Secondly, it will be asserted that the procedural element of access to court is interpreted broadly and is, thus, better caught by the idea of access to justice. It will be demonstrated that the centrality of this element in the present category is apparent from the examination of the strategic documents and the legal framework. However, it will be argued that whereas the element of accessible justice is omnipresent, the concomitant elements of fair trial and due process have not received similar attention. Thirdly, the focus will turn to the enforcement of the rule of law. It will be argued that the EU focuses mainly on two issues: the efficiency of enforcement in general, and the human rights aspects of enforcement by the police and in the prison system. More specifically, it will be asserted that the EU's definition of this rule of law element is not advanced beyond a general call for improvement and compliance with human rights standards.

3.2.1 *The absent element of judicial review*

In chapters 1 and 2 it was established that judicial review is an essential element of the rule of law since it is one of the means through which abuse of the law by the legislative and executive branches of government can be prevented. More particularly, it was argued that, on the one hand, at least marginal judicial review of both executive action and legislation is a necessary component for upholding the rule of law. On the other hand, it was demonstrated that the doctrine of the separation of powers sets limits to review of the executive, for reasons of political discretion. In relation to judicial review of legislation, it was asserted that the judiciary's powers can

be limited due to democratic concerns – the law being an expression of the will of the peoples through their elected representatives. Following this, it was established that underlying this argumentation is an acknowledgement of the many different ways through which judicial review can be organised.

Against this background, it is remarkable to see that judicial review, as a procedural element of the EU's definition of the rule of law in development cooperation, has not been fleshed out in detail. Whereas the strategic and legal frameworks on development cooperation stress the importance of the existence of the judiciary, its accessibility, and, more specifically, the necessity of judicial independence, the *role* and *powers* of the judiciary bodies seem to occupy only a very marginal space. The Cotonou Agreement alludes to judicial control by virtue of the fact that it mentions in its definition of the rule of law as an essential element 'an executive that is fully subject to the law'.¹²³ However, it makes no mention of any form of judicial review of legislation. Neither the 2014 DCI nor the EIDHR Regulation go in their description of the scope of rule of law cooperation beyond institutional reforms, judicial independence, and access to justice.¹²⁴

The 'Programming Fiche on the Rule of law – The judicial system within the broader justice sector context' provides another good example of this approach whereby some elements pertaining to judicial review are mentioned, but the notion itself is left out. It gives the following definition of the rule of law:

The rule of law implies legality, regularity and consistency in the enforcement of the democratic order. It requires that the process of law-making be transparent and itself guided by law. All exercise of public authority must be regulated by and consistent with the constitution and the law. An independent judiciary to which all persons have free recourse must control the interpretation and application of laws. The rule of law is violated if arbitrary decisions are taken by public authorities.¹²⁵

From this definition, it is understood that the rule of law demands that law-making and the exercise of public authority are checked for their consistency with the constitution and the law by the judiciary. Thus, it can be inferred that judicial review is a necessary requirement for the rule of law to be upheld. However, the triteness of the statement is telling. The definition supplies very little context for any deduction of how the EU understands judicial review to function: it provides nothing on the operation of constitutional or administrative courts and it fails to present a blueprint of the (minimum) level of control of the constitutionality of parliamentary laws. In

123 Article 9(2) Cotonou Agreement.

124 Cf. Annex I(A)(I) of Regulation (EU) No 233/2014 and Article 2(1)(a)(ii) of Regulation (EU) No 235/2014.

125 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law – The judicial system within the broader justice sector context (2009), p. 1.

fact, it can be questioned whether the EU has even considered the *procedural* workings of this aspect of the rule of law at all. In the same paragraph in the Programming Fiche there is an attempt to make the rule of law more 'operational', by providing the elements a country must possess when it 'operates under the rule of law':

[A] legislature that enacts laws which respect the constitution and human rights; and independent judiciary; effective and accessible legal services; a legal system guaranteeing equality before the law; a prison system respecting human dignity; a police force at the service of the law; an effective executive which is capable of enforcing the law and establishing the social and economic conditions necessary for life in society, and which is itself subject to the law.¹²⁶

Whereas these elements are undoubtedly valid components of any rule of law definition, they are mostly portrayed as separate building blocks; the focus is on each of these elements separately. However, for the rule of law to be truly operational, it would not be beyond expectation to assume that attention must be paid to such elements as judicial review, which function at the interplay between these separate elements. Needless to say, for the rule of law to function, a country needs to possess a legislature, which respects the constitution and human rights. However, it also needs to have a judiciary capable of controlling, and thereby ensuring, that the legislature adheres to this commandment. Similarly, the executive should be subject to the law, for it is this that prevents the abuse of power. However, the scrutiny of these restraints falls to the judiciary. Moreover, demanding judiciary independence will not achieve the automatic effect of effective judicial review, as both are very different issues, requiring a different approach. Nonetheless, this is informative of the EU's conceptualisation of the rule of law in that it suggests that the Union has adopted an approach whereby it has drawn up a (non-exhaustive) list of separate rule of law components, while, at the same time, mainly focussing on *institutional* (i.e. an independent judiciary and a competent police force) and some *procedural* (i.e. access to justice) elements.

Interestingly, this approach whereby the focus is on separate elements is also reflected in practice. None of the reports or indicative programmes discuss judicial review *per se*. Some elements are mentioned, whereby the main focus is on reforming the Constitution in order to comply with international human rights standards, such as in the most recent Bolivia Multiannual Indicative Programme.¹²⁷ In contrast to the appeal made in the aforementioned Programming Fiche on the rule of law, which states that the EU's response strategy 'should approach the reforms in the judicial system in a holistic way', it appears that a compartmentalised, element-specific,

126 Programming Fiche on Rule of Law – The judicial system within the broader justice sector context (2009), p. 1.

127 Bolivia Multiannual Indicative Programme 2014-2020, p. 3.

approach is applied in practice. This means that the so-called silo-effect,¹²⁸ whereby there is a lack of cross-sectoral synergy and support, even applies within a sector, namely the sector of rule of law reform. Instead of focussing on the judiciary's function in relation to the rule of law, *i.e.* judicial review, the separate elements, as outlined above, are addressed.

This approach is exacerbated by the institutional lens through which most rule of law strengthening efforts are regarded. For example, in its analysis of the judicial sector in South Sudan, the Action Fiche provides a description of the various applicable laws to the sector, as well as an overview of the arrangement of the judicial sector, referring to such elements as the three-tiered court system, the lack of resources, infrastructure and trained judges.¹²⁹ Apart from the element of access to justice, discussed hereafter, the functioning (other than in terms of effectiveness/case backlog) and role of the judiciary in upholding the rule of law are not fleshed out at all. Other reports and strategy papers reflect a similar pattern.¹³⁰ Already briefly touched upon, the focus will next turn to the procedural element of access to justice.

3.2.2 *The omnipresent element of access to justice*

3.2.2.1 *The EU's broad interpretation of access to justice*

On the basis of the examination of the policy documents underlying the various aspects of the EU's development cooperation the conclusion must be drawn that the element of access to justice is widely mentioned. From the 1998 Commission Communication on the definition of the rule of law in the context of the ACP countries¹³¹ already mentioned in section 3.1, to the European Parliament's Resolution on the post-2015 development framework¹³² and the Council Conclusions on the same topic,¹³³ all highlight the

128 The 'silo-effect' is a long-recognised problem in, *inter alia*, the field of development cooperation whereby reform efforts are approach in a sectoral manner without regard for possible synergies with other sectors. The EU has acknowledged the risks and problems associated with the silo-effect in its development cooperation policy, see for example the Action Fiche for Strengthening the Rule of Law, Access to Justice and Democratic Governance in South Sudan (2013), p. 5. For an analysis in relation to the UNDP see Joao Sobreiro Sigora, Corina Nassif Avellar & Cristal Carneiro Ribeiro (eds) *International Empowerment in the International Legal System: Towards Development through Freedom* Brasília: Art Letras (2012), pp. 43-44.

129 Action Fiche for Strengthening the Rule of Law, Access to Justice and Democratic Governance in South Sudan (2013), pp. 3-4.

130 Possible explanations for this approach will be discussed in the General findings in section 4.

131 Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998.

132 European Parliament Resolution on the EU and the global development framework after 2015, (2014/2143(INI)), 17 November 2014, pnt. 29.

133 Council Conclusions 'A new global partnership for poverty eradication and sustainable development after 2015', Doc. 9241/15, 26 May 2015.

importance of accessible means of legal redress. It is mentioned in various development related contexts such as governance¹³⁴ and sustainable change in transitional societies.¹³⁵ This emphasis can be explained by the EU's concomitant external objective of human rights protection. For, access to justice offers as its main purpose 'means of recourse enabling individual citizens to defend their rights'¹³⁶ in conjunction with the emancipation of marginalised and vulnerable groups such as women, children, and minorities.¹³⁷

It is noteworthy that the EU emphasises the broad understanding of 'access to justice' over mere 'access to court'. Indeed, the statements stress the importance of individuals' right to legal recourse to both state and non-state institutions; to the legal institutions, but also to more traditional and religious justice systems. Indeed, at the strategic level, there are copious references to 'access to justice',¹³⁸ in various forms: 'effective and accessible means of legal recourse',¹³⁹ 'effective access to legal redress',¹⁴⁰ 'access for all to an independent justice system',¹⁴¹ or 'better access for citizens to security and justice services'.¹⁴² In fact, access to justice has risen to such prominence that it has become a focal point of the international community's agenda on development for the coming years: the UN 2030 Agenda for Sustainable Development identifies 'access to justice for all' as one of

134 See for example Commission Staff Working Paper on Supporting Democratic Governance through the Governance Initiative: A Review and the Way Forward, SEC(2009) 58, 19 January 2009, pp. 3-4; Commission Communication on Governance in the European Consensus on Development – Towards a Harmonised Approach within the European Union, COM(2006) 421 final, 30 October 2006, p. 5.

135 Joint Communication of the Commission and the High Representative on EU Support for Sustainable Change in Transition Societies, JOIN(2012) 27 final, 3 October 2012, p. 5.

136 Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998, p. 4. The same reasoning is acknowledged in the EIDHR Communications, which frequently state that an accessible independent judiciary and the rule of law are required for effective protection of human rights. See Commission Communication on Thematic Programme for the Promotion of democracy and human rights worldwide under the future Financial Perspectives (2007-2013), COM(2006) 23, 25 January 2006, p. 4; Commission Communication on The implementation of measures intended to promote observance of human rights and democratic principles in external relations for 1996-1999, COM(2000) 726 final, 14 November 2000, p. 12.

137 See for example the Annual Action Plan 2015 and the attached Action Document for strengthening government capacities for sustainable development in Afghanistan, p. 11.

138 See for example the European Consensus on Development (2006), pnt 86.

139 Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998, p. 4.

140 Commission Staff Working Document Accompanying the Communication on Governance in the European Consensus on Development, SEC(2006) 1020, p. 5.

141 Commission Communication on Governance in the European Consensus on Development – Towards a harmonized approach within the European Union, COM(2006) 421 final, 30 August 2006, p. 5.

142 Joint Communication of the Commission and the High Representative on EU support for sustainable change in transition societies, JOIN(2012) 27 final, 3 October 2012, pp. 7-8.

its development goals for the coming decades.¹⁴³ Also at the EU level, next to its inclusion in the New European Consensus on Development,¹⁴⁴ the Council has recognised its particular importance and called it an 'essential means of implementation of the [UN] agenda and an important objective in itself'.¹⁴⁵ Moreover, access to justice has particularly come to the fore as a corollary of the EU's recent introduction of the so-called 'rights based approach' to development, through which the Union strengthens its efforts to assist its partner countries in implementing their human rights obligations.¹⁴⁶ This means, 'promoting in particular the right to universal and non-discriminatory access to basic services ... justice and the rule of law, and with a focus on poor and vulnerable groups'.¹⁴⁷ However, it is interesting to note that with this heightened attention for access to justice, a concomitant stressing of the rule of law related issue of a fair trial has not materialised with the same level of intensity. Scattered references to 'fair judgements'¹⁴⁸

143 See Sustainable Development Goal No. 16.3.

144 New European Consensus on Development (2017), pnt. 63.

145 Council Conclusions 'A new global partnership for poverty eradication and sustainable development after 2015', pnt. 11.

146 In a 'Tool-Box' explaining the rights based approach in more detail, the Commission has highlighted that the intrinsic rationale behind the approach 'is to move development cooperation beyond voluntary cooperation and into the mandatory realm of law.' Ideally, according to the same document, this means that justice reform programmes avoid focusing exclusively on capacity-building within the judiciary without taking into account the access of the end-users to the justice system. Commission Staff Working Document on Tool-Box – A Rights-based Approach, Encompassing All Human Rights for EU Development Cooperation, SWD(2014) 152 final, 30 April 2014, p. 6. Also see Council Conclusions 'Action Plan on human Rights and Democracy 2015-2019' Doc. 10897/15, 20 July 2015; Council Conclusions 'A rights-based approach to development cooperation, encompassing all human rights', Foreign Affairs Council, 19 May 2014; EU Strategic Framework and Action Plan on Human Rights and Democracy, Doc. 11855/12, 25 June 2012, p. 2.

147 Council Conclusions 'Increasing the Impact of EU Development Policy: an Agenda for Change' 3166th Foreign Affairs Council, 14 May 2012, pnt. 7.

The importance of access to justice for vulnerable groups is highlighted in many reports, such as in the Action Document for the support to institutional strengthening in the framework of the new constitution in Zimbabwe in which the difficult position of women and their justice accessibility plight is highlighted: 'Women in Zimbabwe attained majority status in 1982 after the passing of the Legal Age of Majority act. Although they have equal access to the justice system on paper, in reality access is different as it depends on the individual's financial capacity and women have lesser access to resources than men. Although the legal framework on gender-based violence (GBV) is relatively strong, GBV levels are very high in Zimbabwe with 68% of women having experienced some form of GBV in their lifetime and 46% of men admitting to perpetrating some form of violence against women in their lifetime. Women are reluctant to report GBV for the following reasons: fear of isolation from their families, cultural norms which condone domestic violence, religion, limited knowledge of the law, delays in the legal system and economic dependence on male partners.' Action Document for the Support to Institutional Strengthening in the Framework of the New Constitution, Annex of the Commission Decision in the field of governance in favour of Zimbabwe (2015), p. 3.

148 See for example the Viet Nam Multiannual Indicative Programme 2014-2020, p. 11.

and 'due process'¹⁴⁹ can certainly be found through the various documents, however, this appears to come more as an afterthought than as a focal point of rule of law promotion.¹⁵⁰

As already briefly touched upon in the discussion on the rule of law's element of legality in the context of the Cotonou Agreement above, ensuring access to justice is not only a policy concern, it is also a legal obligation. According to Article 9 Cotonou, the essential element rule of law shall entail in particular 'effective and accessible means of legal redress.' More particularly, Article 33 adds to this by setting the improvement of access to justice as a specific objective of development cooperation in the EU-ACP context. Similar obligations are found in some of the other agreements.¹⁵¹ Likewise, both the Development Cooperation Instrument and the EIDHR Regulation present access to justice as a specific objective of cooperation.¹⁵²

Having established the importance of access to justice as an element of the rule of law both as a policy objective and as a legal obligation, the question remains what the EU understands by this notion. From the above-mentioned references two components of access to justice are apparent: access

149 The Governance Handbook briefly discusses the 'observation of due process' by way of three guiding questions: Are parties treated equally?; Are there rules and procedures for ensuring that a fair hearing of the issue will take place?; Will the public be able to observe court proceedings in accordance with international norms? 'Handbook on Promoting Good Governance in EC Development and Cooperation' EuropeAid (2004), p. 61. See also See for example Commission Communication on A decent life for all: from vision to collective action, COM(2014) 335, 2 June 2014, p. 11.

150 Interestingly, the EU-Korea Framework Agreement and the EU-Iraq PCA are a bit more forthcoming on this aspect and at least mention the right to a fair trial in conjunction with the independence of the judiciary and access to justice (Article 30 of the EU-Korea Framework Agreement and Article 102 of the Partnership and Cooperation Agreement). This is, however, done in the context of the cooperation in the area of justice, freedom and security, wherein the EU has undertaken work towards achieving minimum standards of procedural rights, particularly in criminal proceedings. See the Stockholm Programme and the Council's Roadmap for strengthening procedural rights in criminal proceedings. European Council 'The Stockholm Programme – An open and secure Europe serving and protecting citizens' OJ[2010] C115/1; Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ[2009] C295/1.

151 See for example Article 102 of the EU-Iraq Partnership and Cooperation Agreement or Article 30 on cooperation in the field of the rule of law of the EU-South Korea Framework Agreement.

152 EU cooperation activities in the geographic programmes of the DCI comprise 'ensuring unhindered and equal access to justice for all', see Annex I section A(I)(a)(ii) of Regulation (EU) No 233/2014. In the previous version of the DCI, Regulation 1905/2006, access to justice was presented in the body of the Regulation, together with the rule of law, see Article 3(3) on mainstreaming issues and Article 5(2)(f) on geographic programmes. According to Article 2(1)(a)(ii) of Regulation (EU) No 235/2014, EU assistance shall focus, *inter alia* on the promoting access to justice.

to justice should be both effective and available to all in equal measure.¹⁵³ This bifurcated approach is supported, *inter alia*, by reference document No. 15 of the Tools and Method Series on 'Support to Justice and the Rule of Law'.¹⁵⁴ In that report, it is pointed out that access to justice can be taken apart in order to distinguish three core objectives: empowerment of rights holders to access and utilise state and non-state institutions for claiming a right, obtaining redress, or settling a dispute; empowering rights holders to effectively demand necessary reforms of those institutions they consider relevant; and, strengthening the capacity of relevant institutions to deliver justice.¹⁵⁵ A similar two- or three-pronged approach is often reflected in the programming documents. For example, in the 2013 Action Fiche on the rule of law and access to justice in South Sudan, the objective of cooperation is, *inter alia*, capacity building of both the courts and the customary courts, including the training of staff, as well as the increase of public awareness and understanding of their rights of access to justice.¹⁵⁶

Moreover, this focus on both the procedural/institutional side as well as on the emancipatory service-delivery aspect of access for all individuals, is reflected in the fourth of five guiding working principles through which the Commission has proposed to implement the 'rights based approach' of development cooperation, that of 'accountability and access to the rule of law'.¹⁵⁷ Indeed, since it is the responsibility of the state to 'respect, protect and fulfil human rights', it is therefore essential 'that accessible transparent, and effective mechanisms of accountability exist'. This principle, thus, demands that 'legal services are accessible to target groups in terms of procedures, training programmes and paralegal advisory service.' However, stressing the importance of the emancipatory component, 'for accountability to be effective, it also needs to be demanded.'¹⁵⁸

153 See for example Commission Staff Working Document Accompanying the Commission Communication on Governance in the European Consensus on Development: towards a harmonized approach with the European Union, SEC(2006) 1020 final, 30 August 2006, p. 5 and the Programming Guide for Strategy Papers on 'The Rule of Law – The judicial system within the broader justice sector context' (2009), p. 1, in which both elements are clearly discernible.

154 Tools and Methods Series Reference Document No. 15 on 'Support of Justice and the Rule of Law' EuropeAid (2013).

Launched by EuropeAid in 2007, the 'Tools and Methods series' aims to structure the presentation of the methodological documents produced at the various thematic units. Such reference documents are intended to give operational guidance on the implementation of European aid and present best practices.

155 Reference Document No. 15 on 'Support of Justice and the Rule of Law', p. 14.

156 Action Fiche for Strengthening the Rule of Law, Access to Justice and Democratic Governance in South Sudan, Annex I (2013), p. 10.

157 Commission Staff Working Document on Tool-Box – A rights-based approach, encompassing all human rights for EU Development Cooperation, SWD(2014) 152 final, 30 April 2014.

158 *Ibid.*, pp. 18-19.

According to the Reference document on ‘Support of Justice and the Rule of Law’ and the Indicator Guidance Note on Rule of Law & Justice,¹⁵⁹ the following issues should *inter alia* be considered regarding the accessibility of the judiciary: the length and cost of proceedings, fees to obtain access to court, access to information, availability of free legal assistance, quality of free legal assistance to the most vulnerable, availability of interpreters, the role of civil society and oversight bodies, alternative dispute resolution, traditional justice mechanisms, and religious authorities.¹⁶⁰ Thus, it appears that increasingly attention is paid to the primary justice needs and perspectives of vulnerable people or marginalized groups and the obstacles they encounter in seeking justice.¹⁶¹ Accordingly, it appears that on the issue of access to justice, the documents have adopted a service-delivery perspective focused on the practical implementation of this element of the rule of law; ensuring that people living in poverty are empowered to utilise reform of those (non-)state institutions that are most relevant for them in obtaining justice.¹⁶²

3.2.2.2 *The EU’s nuanced interpretation of access to justice*

In the previous section, it was shown that the EU has adopted a broad interpretation of ‘access to justice’ over its narrower counterpart ‘access to court’. Moreover, in this section it is argued that in relation to this rule of law element, the Union has also demonstrated a more nuanced interpretation when it comes to the inclusion of traditional, customary, or religious justice mechanisms.¹⁶³ Next to ensuring access to justice for indigenous people, which is an obligation following from the UN Declaration on the

159 Sector Indicator Guidance for Programming – Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), pp. 14-18.

160 Reference Document No. 15 on ‘Support of Justice and the Rule of Law’, p. 14; Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), pp. 14-18 at 16. Cf. the section on the Reinforcement of the Rule of Law and the Administration of Justice in the ‘Handbook on Promoting Good Governance in EC Development and Cooperation’ EuropeAid (2004), pp. 57-62 at 59.

161 Cf. for example the Multiannual Indicative Programme of Kyrgyz Republic 2014-2020, p. 20; Multiannual Indicative Programme for the Philippines 2014-2020, p. 22; Action Fiche for strengthening the rule of law, access to justice and democratic governance in South Sudan (2013), p. 11; Multiannual Indicative Programme Nepal 2014-2020, p. 9; Programme Indicatif National Mauritanie 2014-2020, p. 39; National Indicative Programme Sierra Leone 2014-2020, p. 21.

162 Reference Document No. 15 on ‘Support of Justice and the Rule of Law’, p. 13.

163 These justice systems are not uniform and have their own particularities. Where traditional and customary justice systems are often informal, carried out orally, and undocumented, religious justice can be part of both formal and informal justice systems, is often hierarchical, well structured, and well documented. For more on these distinctions see Reference document No. 15 ‘Support to Justice and the Rule of Law (2012), pp. 41-43.

Rights of Indigenous Peoples,¹⁶⁴ the EU's understanding of this element also clearly encompasses the more traditional/religious/customary means through which access to justice can be guaranteed. Against the background of the national rule of law traditions discussed in chapter 1, these mechanisms form a new aspect of this rule of law element, not, to this extent, found in the three developed countries discussed. Furthermore, the EU has displayed a rather nuanced approach towards these more local means of ensuring access to justice which often seemingly clash with some of the other identified rule of law elements.

Traditional/religious/customary laws' prescriptions may collide with internationally agreed standards, particularly when it comes to gender equality. Moreover, the rules of procedure and/or normative principles underlying this judicial approach are difficult to access, rarely codified, strongly influenced by socio-cultural factors and mores and therefore not predictable and verifiable. What is more, jurisdiction is often given to traditional leaders who have other administrative and/or executive functions within the community¹⁶⁵ – the mixing of which is obviously inconsistent with the rule of law's element of separation of powers. According to the Programming Fiche on the Rule of Law – The judicial system, this situation 'will only change in the long term and should be approached in a balanced way.'¹⁶⁶ This exactly puts the finger on a salient point. The rule of law requires access to justice (broadly interpreted) but at the same time also predictable and verifiable procedures and the dispersion of justice in accordance with human rights,¹⁶⁷ while respecting the separation of powers, and, more particularly, judicial independence. This dichotomy is only reconcilable in the long term with development aid targeted at both elements, whereby the emphasis should gradually shift from the provision of traditional, customary, non-state forms of access to justice in least developed and low-income countries to more regulated access through the state judicial system in more developed upper middle-income countries.¹⁶⁸

164 The UN Declaration on the Rights of Indigenous Peoples adopted by General Assembly Resolution 61/295 on 13 September 2007 states in Article 34 that indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and legal systems or customs, in accordance with human rights standards.

165 Tools and Methods Series Reference Document No. 9 on 'Support for Justice Reform in ACP Countries' EuropeAid (2010), p. 16.

166 Programming Guide for Strategy Papers on 'The Rule of Law – The judicial system within the broader justice sector context' (2009), p. 2.

167 On the connection between the application of human/fundamental rights and the justice sector see for example the Programming Guide for Strategy Papers 'Democracy and Human Rights' (2006), p. 3.

168 In recent years, the Commission has started to fund studies concerning informal justice systems and the advantages and disadvantages of legal pluralism. See Reference Document No. 15 on 'Support of Justice and the Rule of Law' (2012), p. 43. Generally, see Brian Z. Tamanaha, Caroline Sage & Michael Woolcock (eds) *Legal Pluralism and Development: Scholars and Practitioners in Dialogue* Cambridge: Cambridge University Press (2012).

From one of the reviews of its past experiences which offers guidance for the Union's future development cooperation programmes it is apparent that the EU is very much aware of the obstacles that these forms of access to justice pose to the rule of law.¹⁶⁹ Furthermore, the exploration of the programming documents across the various multiannual financial frameworks confirms that the EU in its development cooperation policy has in fact adopted, under both the EDF and the DCI, a dual approach whereby traditional forms are supported alongside initiatives to strengthening state-provided access to justice. To give just two examples, the 2015 Action Plan for Laos allocates a substantial amount of aid in order to address the gap that at the village level most citizens do not have alternatives to customary justice solutions in combination with an attempt to implement domestic human rights obligations.¹⁷⁰ The assistance programme has a two-pronged approach, whereby, on the one hand, technical assistance is provided to the ministry and educational institutions responsible for placing law students in village and district mediation, and legal advice structures and the raising of legal awareness among the population through the support of mediation units and law students is supported on the other hand.¹⁷¹ Similarly, the National Indicative Programme 2014-2020 for Fiji provides that a clear understanding of the role of specific public offices, such as the judiciary and the legal aid commission 'are paramount in ensuring that law and justice prevail and citizens fully exercise their rights and responsibilities.' Accordingly, 'EU support to Access to Justice will help ensure that the Fijian public is aware of its rights and can action them through the relevant state mechanisms.'¹⁷² Consequently, the expected result of this objective is the improvement of access to justice for all citizens, including those having difficulties in accessing justice, whereby access is defined as having access to state-regulated Legal Aid Commission services.

3.2.3 *Enforcement of the rule of law*

Next, the focus turns to the subsequent issue of enforcement. While its presence is not as ubiquitous as access to justice, enforcement merits some attention as a separate rule of law element. The examination shows that two main issues are highlighted: first, efficiency of enforcement in general and, secondly, the human rights aspects of enforcement by the police and the prison system. For example, the Commission Communication on the rule

169 Reference Document No. 15 on 'Support of Justice and the Rule of Law', pp. 41-42.

170 Annex 1 of the Commission Implementing Decision on the Annual Action Programme 2015 Part 2 and Annual Action Programme 2016 Part 1 for Lao People's Democratic Republic – Action document for 'Citizen engagement for good governance, accountability and rule of law'.

171 Annex 1 of the Commission Implementing Decision on the Annual Action Programme 2015 Part 2 and Annual Action Programme 2016 Part 1 for Lao People's Democratic Republic, p. 13.

172 Fiji National Indicative Programme for the period 2014-2020, p. 11.

of law as an essential element in the context of the ACP countries provides the following rule of law examples in relation to this issue: a prison system respecting the human person; a policy force at the service of the law; and an effective executive enforcing the law.¹⁷³

Furthermore, in the programme guide for strategy papers on the rule of law – the judicial system, a number of ‘entry-point’ questions in relation to enforcement of court decisions and the penitentiary are provided that can be used in order to analyse that part of the rule of law in any given country. These are concerned with, amongst others, the fair and effective enforcement of court judgments, whether or not the level of enforcement is independent from external forces, to what extent a probation system is in place, whether alternative sentences to detention exist and function properly, and whether imprisonment is used for discriminatory purposes or detention conditions comply with international standards.¹⁷⁴

However, examination of the many programming documents shows that, even though enforcement clearly fulfils an important function in relation to the rule of law, the programmes and action plans do not go much further than stress the need for general improvement¹⁷⁵ and compliance with human rights standards.¹⁷⁶ The same holds for detention conditions. Regardless of the fact that this is an issue that is high on the agenda and, moreover, a specific objective of cooperation in a number of countries,¹⁷⁷ the EU more often than not stops at simply stressing the necessity of better conditions.¹⁷⁸ Next to this, many reports stress the need for capacity building of the various parties involved in the justice sector, first and foremost the police force.¹⁷⁹ This however, is the *institutional* side of the element of enforcement and the justice sector in general, which is, *inter alia*, the subject of examination in the next section.

173 Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998, p. 4. Also see Commission Communication on ‘The European Union’s role in promoting human rights and democratisation in third countries’ COM(2001) 252 final, 8 May 2001, p. 10.

174 Programming Guide for Strategy Papers ‘Rule of law – the judicial system within the broader justice sector’ (2009), p. 4. Cf. the Governance Handbook (2004).

175 See for example the Multiannual Indicative Programme Pakistan 2014–2020, p. 28; Multiannual Indicative Programme for Viet Nam 2014–2020, p. 21.

176 See for example the Multiannual Indicative Programme for the Philippines 2014–2020, p. 22.

177 See for example specific objective 4 ‘improvement detention conditions (prisoners receive better educational and working opportunities in prisons) of focal sector 1 on the rule of law in the Multiannual Indicative Programme of the Kyrgyz Republic 2014–2020, p. 20; National Indicative Programme of Malawi 2014–2020, p. 36; Programme Indicatif National 2014–2020 Congo, p. 38.

178 See for example the National Indicative Programme Jamaica 2014–2020, p. 13.

179 See for example the Joint Annual Report of Belize of 2003 in which it is stressed on p. 7 that the police department has been making ‘improvements to combat crime, including recruiting of additional police, upgrading of police stations and substations, the construction of new stations, and the upgrading of the vehicle fleet.’

3.2.4 Conclusions

This section focussed on procedural elements of the rule of law. It was demonstrated that the element of judicial review, in contrast to its central position as one of the elements through which the rule of law is safeguarded, has not been attributed the same importance in the EU's rule of law definition in development cooperation. Furthermore, it can be concluded that, as a 'fundamental principle of the rule of law',¹⁸⁰ many of the EU's development programmes are geared towards access to justice. Its importance is recognised both at the strategic level, in the legal framework, and at the level of implementation. It was shown that access to justice is interpreted broadly because of the EU's concomitant external objective of the protection of human rights, since, the more accessible state and non-state institutions are for legal redress, the more justice delivery and the protection of human rights can be supported. It was, however, also pointed out that access to justice via traditional, religious, and/or customary means often has an inherent dichotomy whereby access to justice has to be weighed against obscure, unclear, and sometimes unknown procedures – endangering *inter alia* the rule of law related principle of predictability. Finally, in relation to the element of enforcement, it was argued that while enforcement is accorded an important role in the justice system, as an element of the rule of law it has not been fleshed out in detail. More particularly, it was demonstrated the EU's definition does not stretch beyond a general call for the improvement of effective enforcement in combination with the need for more compliance with human rights standards. In the following section, the focus will turn to the *institutional* elements of the rule of law.

3.3 Institutional elements of the rule of law

This section will focus on the analysis of the EU's practice in order to verify the third category of institutional elements of the analytical framework established in chapters 1 and 2. It will be argued that the analysis of the relevant strategic documents, as well as of the legal framework, demonstrates that the EU has adopted a noticeably institutional understanding of the rule of law. More particularly, it will be demonstrated that the Union equates its definition of the rule of law with that of rule of law *reform* and capacity building of the justice sector. It will be asserted that this institutional approach is reflected both in the legal framework and in the EU's strategic documents underlying its development cooperation policy. Moreover, it will be shown that the separation of powers, the notion by which means the power of government is detained and the rule of law buttressed in the national legal orders, it is barely touched upon at the strategic level, even though its importance is emphasised in the legal framework, notably in the

180 Fiji National Indicative Programme for the period 2014-2020, p. 15.

Cotonou Agreement. Instead, it will be demonstrated that one of its main elements, namely judicial independence, is at the forefront at all levels (legal, strategic, as well as practical). Subsequently, turning to the notion of judicial independence, it will be demonstrated that it is unsatisfactorily and incompletely defined, for reasons that will be explained below.

3.3.1 *The ubiquitous institutional understanding of the rule of law: rule of law as institutional reform*

From the outset, it can be established that, from the moment the rule of law made its appearance in EU development cooperation, the Union's rule of law definition has been heavily geared towards institutional elements, by way of reform and capacity building of the justice sector. To give three examples, the Commission, discussing the prospects for closer partnership with Latin America in 1995, identified, as one of its priorities in the relationship, the consolidation of the rule of law 'by increasing the efficiency and role of the legislative, judicial, police and human rights *institutions*.'¹⁸¹ Similarly, one of the early Communications on the EU's external dimension of its human rights policy proposed the promotion of the rule of law by supporting and strengthening the independence of the judiciary, supporting the activities of parliaments, and supporting *institutional* and legislative reforms.¹⁸² What is more, the rule of law's first appearance as an essential element – in the Lomé IVbis Convention of 1995 – was accompanied by the support for *institutional* reform measures 'with a view to democratization and the rule of law' as a specific objective of cooperation.¹⁸³ An objective that is reiterated in the Cotonou Agreement,¹⁸⁴ and a number of other external agreements,¹⁸⁵ as shown above in section 3.1. Similar institutional-

181 Commission Communication on The European Union and Latin America – The present situation and prospects for closer partnership 1996-2000, COM(1995) 495 final, 23 October 1995, p. 14 [emphasis added].

182 Commission Communication on 'The European Union and the external dimension of human rights policy: from Rome to Maastricht and beyond' COM(1995) 567, 22 November 1995, p. 10 [emphasis added].

183 Articles 5 and 224(m) Lomé IVbis Convention.

184 Article 33(1)(c) Cotonou Agreement provides that '[c]ooperation shall pay systemic attention to *institutional* aspects and in this context, shall support the efforts of the ACP States to develop and strengthen structures, *institutions* and procedures that help to develop and strengthen the rule of law; and improve access to justice, while guaranteeing the professionalism and independence of the judicial systems.' [emphasis added].

185 See for example the Association Agreement with Chile in which in the general objectives of Article 16(1)(a) it is stated that the parties shall establish close cooperation aimed at strengthening the institutional capacity to underpin the rule of law; Agreement establishing an association between the EC and the Republic of Chile, OJ [2002] L352/3. Cf. Article 53 of the EU-Mongolia Framework Agreement, which also discusses the improvement of the legal and institutional framework, and the reinforcement of the judiciary system; Framework Agreement on Partnership and Cooperation between the European Union and its Member States, of the one part, and Mongolia, of the other part, OJ[2012] L134/4.

based definitions of the rule of law can also be found in the Development Cooperation Instrument¹⁸⁶ and the EIDHR Regulation.¹⁸⁷

This institutional focus is reflected in the four strategic policy documents underlying the EU's overall development policy. Thus, the 2000 Communication on EU development policy presents six priority areas for development aid, the sixth of which reads: '*Institutional capacity-building, good governance and the rule of law.*'¹⁸⁸ Likewise, the 2006 European Consensus on Development states that reform of the judicial system is 'essential to building country-driven reform programmes ... and an *institutional* environment that upholds human rights, democratic principles and the rule of law.'¹⁸⁹ The Agenda for Change echoed the same sentiments and provides that EU action should focus on the functioning of institutions, the rule of law and judicial systems.¹⁹⁰ The institutional focus is reiterated in the New Consensus on Development in which the rule of law is explicitly tied to judicial reform and institutional capacity building.¹⁹¹ The institutional emphasis' wide geographical spread is also apparent as can be surmised from the EU's regional cooperation programmes. From Latin America, already mentioned above,¹⁹² to Central Asia,¹⁹³ Asia,¹⁹⁴ and the regions on the African continent.¹⁹⁵

Moreover, defining the rule of law by way of institutional reform of the legal system constitutes the pivotal point of a number of different policies in their nexus with development cooperation. To briefly touch upon some of the areas of intersection, it appears in relation to conflict prevention whereby EU instruments should be geared more toward support for 'the building of stable institutions and the rule of law' in order to strengthen

186 See Article 5(2)(f) Regulation 1905/2006 and Article 3(3) and Annex I(B)(IV)(c) on cooperation with Central Asia of Regulation (EU) No 233/2014.

187 See Article 2(1)(a)(ii) of Regulation (EU) No 235/2014.

188 Commission Communication on The European Community's development Policy, COM(2000) 212 final, 26 April 2000, p. 27. See also the Joint Statement by the Council and the Commission on the European Community's Development Policy of 10 November 2000, pnt. 13 [emphasis added].

189 European Consensus on Development (2006), pnt. 86 [emphasis added].

190 Agenda for Change, COM(2011) 637, 13 October 2011, p. 6.

191 New European Consensus on Development (2017), p. 32.

192 See for more examples the Multiannual Regional Indicative Programme for Latin America 2014-2020, p. 3; Regional Strategy Paper and Programming document for Latin America 2007-2013, p. 13.

193 See Strategy Paper 2002-2006 & Indicative Programme 2002-2004 for Central Asia, pp. 6 and 18; Regional Strategy for Assistance to Central Asia for the period 2007-2013; Regional Multiannual Indicative Programme Central Asia 2014-2020.

194 See for example the Regional Programming for Asia 2007-2013, p. 6.

195 See for example the Council Conclusions on the Horn of Africa of 14 November 2011; the Regional Action Plan on the Horn of Africa 2015-2020; Joint Communication of the Commission and the High Representative on The Strategic Framework for the Great Lakes Region, JOIN(2013) 23 final, 19 June 2013

the efforts deployed to prevent conflict.¹⁹⁶ Also, on the crossroads of governance and development cooperation, the strengthening of rule of law institutions spearheads the EU's aid efforts. Accordingly, the Council recommends that the EU should address governance issues 'as a practical concept' which relates to the functioning of political, administrative, economic and social systems built on the rule of law, with particular attention paid to institutions and a professional and independent judiciary system.¹⁹⁷ Similarly, in the security-development nexus the institutional elements of the EU's rule of law definition take up a central position. For example, after establishing the connection between security and development,¹⁹⁸ the 2003 European Security Strategy stresses the importance of strong state institutions for the rule of law and social order in relation to development and secure environments.¹⁹⁹ In the same vein, institutional rule of law reform

196 Commission Communication on Conflict prevention, COM(2001) 211, 11 April 2001, p. 29. See also the Commission's checklist for the root causes of conflict of 2000, which, under the heading of the rule of law, checks *inter alia* how strong the judicial system is, available at: http://www.ceipaz.org/images/contenido/European%20Commission%20Check-list%20for%20Root%20Causes%20of%20Conflict_ENG.pdf.

197 Council Conclusions 'Governance in the context of development cooperation', Doc. 14773/03, 13 November 2003. See also Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, p. 7; and the Commission's Report on The EU support for democratic governance, with a focus on the governance initiative, COM(2013) 403 final, 11 June 2013.

198 According to the Commission 'there can be no development without peace and security; and no peace and security without development', Commission Communication on Policy Coherence for Development – Accelerating progress towards attaining the Millennium Development Goals, COM(2005) 134 final, 12 April 2005, p. 4. Security 'is the first condition for development' (European Security Strategy (2003), p. 13) and 'key to regional stability, poverty reduction and conflict prevention', Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, p. 7. Moreover, '[r]eforming the security sector in post-conflict environments is critical to the consolidation of peace and for promoting poverty reduction. Only where legitimate State authority is expanded through the rule of law and good governance will countries be prevented from relapsing into conflict and losing development achievements', Statement on behalf of the European Union by Pedro Serrano, delegation of the EU to the United Nations, New York, 29 June 2010.

In turn, development is recognised as a precondition for peace and security. For these reasons, 'the EU will continue to work to ensure that international security concerns are dealt with in synergy with support to development and good governance so as to achieve a coherent policy mix' (Council Conclusions, 2622nd External Relations Council, Doc. 12724/04, 22-23 November 2004, p. 27). The fragility of developing, conflict-prone states is to be addressed 'through governance reforms, the rule of law, anti-corruption measures and the building of viable state institution' (European Consensus on Development (2006), pnt. 20).

199 European Security Strategy (2003), p. 4.

is highlighted in relation to situations of fragility²⁰⁰ and in transitional societies.²⁰¹

The EU provides a multifaceted rationale for its institutional understanding of the rule of law. According to the Union, '[i]t is generally recognised that the lack of institutional capacity and institutional control of the use of public funds are a fundamental obstacle to sustainable development.'²⁰² Furthermore, from the perspective of the effectiveness of the EU's own development policy, the Union invests 'in the building of impartial institutions bound by the rule of law to ensure that the reforms undertaken are also implemented in practice.'²⁰³ Moreover, in the context of the protection of human rights, the EU intends to step up 'the creation and development of an independent judiciary, thus making a sustainable contribution to the establishment of structures based on the rule of law and international human rights standards.'²⁰⁴ Additionally, in relation to the security-development nexus, abuse of power, weak institutions, and conflict corrode states from within, often bringing about the collapse of state institutions.²⁰⁵ Failed states have insufficient operation and strategic capacities in the wider security, law enforcement, and judicial sectors to control the territory, to ensure human security, to prevent and respond to security threats, and to enforce the law.²⁰⁶ Therefore, supporting the rule of law and its institutions in order to fight threats and handle terrorism and organised crime in a more efficient and specialised manner in order to ensure state control, is, according to the EU, one of the best means of creating stability.²⁰⁷

On the basis of the foregoing, it can be argued that the EU, for a large part, defines the rule of law by its institutional attributes. The reform of rule of law related institutions, particularly the judiciary, is seen not as a means of strengthening the *formal* and *procedural* elements of the rule of law, but as a measurable element in itself. In a way, the rule of law is equated to

200 See for example Commission Communication on Towards an EU response to situations of fragility – engaging in difficult environments for sustainable development, stability and peace, COM(2007) 643 final, 25 October 2007, p. 5 and the subsequent Council Conclusions 'An EU response to situations of fragility', 2831st External Relation Council, 19-20 November 2007.

201 Joint Communication by the Commission and the High Representative on EU support for sustainable change in transition societies, JOIN(2012) 27 final, 3 October 2012.

202 Commission Communication on The European Community's Development Policy, COM(2000) 212, 26 April 2000, p. 24. Also see European Parliament Report with recommendation to the Commission on EU donor coordination on development aid, 15 November 2013 (2013/2057(INL)), pnt. 8.

203 Joint Communication of the Commission and the High Representative on EU Support for Sustainable Change in Transition Societies, JOIN(2012) 27 final, 3 October 2012, p. 5.

204 'The EU and Central Asia: Strategy for a New Partnership' adopted by the Council, Doc. 10113/07, 31 May 2007, p. 7.

205 European Security Strategy (2003), p. 9.

206 EU External Action Service Strategy for Security and Development in the Sahel (2011), p. 3.

207 EU Strategy for Security and Development in the Sahel (2011), p. 7.

legal reform, judicial reform, and to the reform of specific institutions of the justice sector such as the police. Furthermore, within this general rule of law related institutional focus, the elements of judicial independence and, to a lesser extent, the separation of powers, are very much put on the foreground of the EU's institutionally motivated rule of law definition.

3.3.2 *The lack of specificity in the element of the separation of powers*

At the strategic level, the EU barely touches upon the separation of powers *per se*, instead adducing the one element thereof, the importance of judicial independence.²⁰⁸ However, some rudimentary indications of the necessity of the separation of powers for the rule of law can be pinpointed in the policy's legal framework. In its definition of the rule of law as an essential element of cooperation, the Cotonou Agreement provides that the structure of government and the prerogatives of the different powers shall be founded on the rule of law, 'which shall entail in particular ... an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law'.²⁰⁹ Subsequently, in the Commissions clarification of the essential elements, it stated that the rule of law must shape the structure of the State and the prerogatives of the various powers.²¹⁰ At a minimum, this separation of powers curbs the power of the state and relates specifically to legislative and judiciary independence from the executive and the effective exercise of the three powers.²¹¹ Based on this narrow definition, cooperation activities under the EDF can thus cover in principle a number of issues in order to ensure that the rule of law is underpinned by the separation of powers. The EIDHR and DCI Regulations offer less on the separation of powers focussing instead on judicial independence, with the DCI allowing for the strengthening of the rule of law and judicial independence under the geographic programmes,²¹² and, similarly, the EIDHR Regulation

208 For example, where the EU's three strategic documents on its development cooperation – the 2000 Communication, the European Consensus on Development, and the Agenda for Change – highlight the importance of the rule of law for sustainable development with an emphasis on the strengthening of institutions and access to justice, nothing is included on the separation of powers.

209 Article 9 Cotonou Agreement. See also Article 33(1)(c) which provides that the cooperation on the Cotonou Agreement shall pay systematic attention to institutional aspects and shall support the ACP states in their efforts to develop and strengthen structures, institutions and procedures that help to, *inter alia*, develop and strengthen the rule of law while guaranteeing the professionalism and independence of the judicial system.

210 Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998, p. 4.

211 *Ibid.*, p. 6.

212 See Annex I, under A(I)(a)ii) Regulation (EU) No 233/2014.

authorising the promotion of the independence of the judiciary and of the legislature.²¹³

From this analysis, it would seem that the element of the separation of powers in the EU's definition of the rule of law has taken the same approach as highlighted in chapters 1 and 2. It should be recalled that it was asserted in chapter 1 that all three national rule of law traditions require a form of separation of powers in order to ensure that the government is bound by the law. However, it was concluded that, for historic reasons, national particularities in the institutional arrangements of the separation of the judicial, legislative, and executive branches occur, allowing for a variety of ways through which the principle can be shaped. Subsequently, in chapter 2, it was argued that, even though legal theory's exposition on the rule of law attests to the importance of the separation of powers underpinning the notion in ways similar to the national conceptions, legal scholars have restricted their analysis almost exclusively to the role and function of the judicial branch, and, more particularly, the notion of judicial independence. While the importance of the separation of powers is undisputed, it is judicial independence that the legal and policy frameworks mainly focus on. In the light of the fact that the EU has followed the same approach, the analysis will now turn to the Union's practice, in order to establish whether the notion has been fleshed out in more detail.

From the examination of the relevant documents it is clear that, as a start, the focus has been heavily on institutional capacity building of the justice sector as a whole – courts, judges, prosecutors, police, and detention centres, rather than on the separation of powers. For, properly functioning institutions need to be in existence before the interrelationships between the three branches and the mechanisms of checks and balances come into play. This much is also acknowledged in the various reports. For example, in the Joint Annual Report on Angola of 2003 it is pointed out that the machinery of the judicial sector needs to be sufficiently up to standard if it is to apply the body of laws that are being reformed and modernised.²¹⁴ However, most reports and country strategy papers paint a picture of under-resourced institutions and a lack of basic facilities and services in the justice sector. For example, the 2005 Antigua Joint Annual Report discusses the unsatisfactory conditions under which the police have operated over the years, such as the lack of physical stations, cars, and a trained police force.²¹⁵ The 2005

213 Article 2(1)(a)(ii) Regulation (EU) No 235/2014. The promotion of the independence of the legislature is an addition to the scope of rule of law cooperation activities in relation to preceding EIDHR Regulation 1889/2006.

214 Angola Joint Annual Report (2003), p. 9. See also the Belize Joint Annual Report (2003), p. 7.

215 Antigua Joint Annual Report (2005), p. 8; Ghana Joint Annual Report (2003), p. 6; Caribbean Regional Strategy Paper and Indicative Programme 2008-2013, p. 15. See also for example the Bangladesh Country Strategy Paper 2007-2013, p. 3, in which the problems of performance of the police is discussed in light of the fact that they are 'under-resourced in terms of pay, manpower and forensic training.'

Mozambique Joint Annual Report points to the problems related to overcrowded prisons and low maintenance.²¹⁶ In relation to the judiciary itself, both the lack of general²¹⁷ as well as specialised courts²¹⁸ and of trained staff is highlighted across. For example, the judicial system in Suriname is described as being in jeopardy in 2005 in light of the continuing difficulties in processing criminal cases due to a shortage of judges,²¹⁹ and the fact that the President of the Court of Justice and the Attorney General had still not been appointed for the past year.²²⁰ The Sierra Leone Report of the same year talks of weaknesses of the judiciary, in terms of logistics, mobility, basic infrastructure, and training as a 'major and overriding challenge'.²²¹

Against this background of under-resourced judicial institutions, the separation of powers is limited to a discussion on the existence, or absence, of judicial independence. For example, the Botswana Report of 2004 links the separation of the three branches to the functioning of the legal system and the effective independence of the ombudsman.²²² Similarly, the 2007 Mozambique Report provides that '[t]he independence of high-level institutions that check on executive and legislative powers has been up-held significantly with far-reaching decision of the Constitutional Council and also from the Administrative court that were duly respected and implemented. These developments clearly indicate that the consolidation process of the rule of law at top level is progressing.'²²³ A number of reports offer an account of the respect and implementation by the government of politically sensitive court judgments in order to demonstrate the country's compliance with the separation of powers and the rule of law.²²⁴ In contrast, it is stated in the 9th EDF country strategy paper on Gambia, and reiterated by a

216 Mozambique Joint Annual Report (2005), p. 8.

217 See for example the Belize Joint Annual Report (2008), p. 30, in which the problems related to the brief residence of the Court of Appeal is discussed. See also the Gambia Joint Annual Report (2008), p. 4, which underlines the difficulties of deconcentrated courts to the regions, as well as the Haiti Joint Annual Report (2006), p. 2.

218 See for example the Botswana Joint Annual Report (2008), p. 26, which highlights the need for a small claims court.

219 See also for example the Sierra Leone Joint Annual Report (2005), p. 4 in which it is stated that notwithstanding the improved court infrastructure, 'insufficient numbers of judges, magistrates, public defenders, and prosecutors continue to result in huge backlogs.'

220 Suriname Joint Annual report (2005), p. 7.

221 Sierra Leone Joint Annual Report (2005), p. 3; Sierra Leone Joint Annual Report (2006), p. 4.

222 The Report provides that '[g]overnment, civil service and judiciary are effectively separated. The legal system functions well. The Office of the Ombudsman demonstrates independence effectiveness. [sic]' Botswana Joint Annual Report (2004), p. 9.

223 Mozambique Joint Annual Report (2007), p. 3.

224 See for example the 2006 Botswana Joint Annual Report in which the case of the ethnic minority group of the Basarwa (San) and the governments immediate implementation of the ruling is described in order to demonstrate the existence of the rule of law. The historic Court case of the Basarwa against the government is available at: <http://www.saflii.org/bw/cases/BWHC/2006/1.html>.

number of other reports,²²⁵ that even though it is laid down in the Constitution, in the exercise of their judicial functions the courts, judges, and other holders of judicial office shall be independent and shall be subject only to the Constitution and law, the judiciary is subject to the pressures of the executive.²²⁶ The fact that this interference by the executive is unwarranted is confirmed by a number of other reports.²²⁷

Considering the EU's relative lack of emphasis on the separation of powers *per se*, in particular in relation to the role of the executive, it is rather surprising that in the consultation procedure under Article 96 of the Cotonou Convention (ex Article 366a of the Lomé IVbis Convention), the lack of a 'genuine separation of powers'²²⁸ is often presented as one of the lacunae that need to be addressed by a country in order to end the procedure. It is difficult to isolate the individual criteria on the basis of which consultations are opened or concluded, since the EU institutions do not need to specify the reasons for opening of the procedure, as mention of a violation of the essential elements clause in general is enough to trigger it. However, the frequency with which the separation of powers is mentioned in the Council Conclusions and Decisions concerning the opening an/or conclusions of consultations is noteworthy and testifies to the fact that the EU considers the separation of powers an element of its rule of law definition, although its approach is somewhat intermittent and non-specific.²²⁹ Thus, the EU, while recognising the importance of the separation of powers for the rule of law, does not itself offer a detailed blueprint on specific sub-elements that should be included in the notion, other than guarantees for judicial independence. This leaves the final question on the definition of the notion of judicial independence as a focal point of the institutional elements of the rule of law, to be answered.

225 See for example the Uganda National Indicative Programme 2014-2020, p. 13.

226 Gambia Country Strategy Paper 2002-2007, p. 7.

227 See for example the Ghana Country Strategy Paper 2002-2007, p. 11 and the Botswana Country Strategy Paper 2002-2007, p. 4.

228 See for example the Explanatory Memorandum attached to the Commission's Proposal for a Council Decision concerning the conclusion of consultations with the Republic of Guinea-Bissau under Article 366a of the fourth ACP-EU Convention, COM(1999) 491 final, 12 November 1999, p. 3.

229 See for example the Council Decision 2001/510/EC of 25 June 2001 concluding consultations with Côte d'Ivoire under Article 96 of the ACP-EU Partnership Agreement (OJ[2001] L183/38), in which, in relation to the coup d'état in Côte d'Ivoire of 1999, the Union addresses the importance of an independent judiciary 'ensured not only by the non-involvement of the executive in its operation, but also by the neutrality of the court bodies.' Further see the Council Conclusions 'Consultation with the ACP side concerning Zimbabwe pursuant to Article 96 of the Cotonou Agreement of 11 January 2002', 2409th General Affairs Council, Doc. 5243/02, 18-19 February 2002; Council Decision 2007/642/EC of 1 October 2007 on the conclusion of consultation with the Republic of the Fiji Islands under Article 96 of the ACP-EU Partnership Agreement and Article 37 of the Development Cooperation Instrument, OJ[2007] L260/15.

3.3.3 *The bias towards the element of judicial independence and the problems associated with the ambiguous concept of judicial accountability*

As argued in chapter 2, the particular importance of judicial independence follows from the principle of legality, which presupposes that governments and public officials must act in accordance with the law and within the limits set by the law.²³⁰ Moreover, at the 56th session of the UN Commission on Human Rights, the EU Presidency reiterated that the independence of the judiciary and the legal profession are 'fundamental prerequisites for the protection of human rights.'²³¹ Furthermore, as demonstrated above, judicial independence fulfils a pivotal role for the separation of powers to function effectively. For these reasons, judicial independence certainly is the central institutional rule of law element, similar to the pivotal role allotted to access to justice in the category of procedural rule of law elements. Its ubiquitous presence is apparent from both the policy and the legal framework. As a result, most, if not all, multiannual and/or national indicative programmes refer to some form of judicial independence, or a sub-element of it, as an objective of cooperation.²³² Often, judicial independence is mentioned as the single objective of rule of law reform, as, for example, the European Parliament has systematically done in its Annual Report on Human Rights and Democracy in the World.²³³ Closer examination, however, reveals an EU approach that is haphazard and one-sided in its understanding of the notion of judicial independence.

To start with, the EU has provided guidance for programming in the area of judicial independence. In the EU's Sector Indicator Guidance for Programming, the specific objective of 'ensured judicial independence and integrity' is split into five components: 1. Tenure and mode of appointment (guaranteed tenure, mode of selection and role of the executive in the appointment); 2. Discipline (protection of judges from arbitrary removal or punishment and disciplinary action); 3. Respect of decision (protection of courts from undue criticism and pressures); 4. Public perception of judicial independence (belief of the population that judges are able to make decisions free from direct or indirect interference by politicians); 5. Bribes

230 EU Annual Report on Human Rights 1998-1999, adopted by the Council in October 1999, at pnt. 39; Report from the Commission on The Implementation of measures intended to promote observance of human rights and democratic principles in external relations for 1996-1999, COM(2000) 726 final, 14 November 2000, pp.12-13.

231 Statement of the EU Presidency at the 56th UN Commission on Human Rights Resolution 'Independence and impartiality of the judiciary, jurors and assessors and the independence of lawyers', E/CN.4/RES/2000/42.

232 See for example the Philippines Multiannual Indicative Programme 2014-2020, p. 5.

233 See for example European Parliament Report on the Annual Report on Human Rights and Democracy in the World 2016 and the European Union's Policy on the Matter, (2017/2122(INI)), 27 November 2017, pnt. 36; European Parliament Report on the Annual Report on Human Rights and Democracy in the World 2014 and the European Union's Policy on the Matter, (2015/2229(INI)), 30 November 2015, pnt. 137.

to judges, prosecutors, or court personnel (belief of the population that people can avoid conviction or receive a more lenient sentence through bribery).²³⁴ Evidently, at first sight, the first four indicators relate to judicial independence, whereas the last one relates to integrity. The provided indicators on independence are concerned with, on the one hand, the objective independence of the individual judge (professionalism and protection), and, on the other hand, the subjective independence of the judiciary (how is the judiciary perceived by the population). However, whereas it would be expected that at a minimum a number of indicators would be included on the objective independence of the *judiciary as a whole*, these are absent.

From the footnote included in the guidance note, it is apparent that this enumeration stems from the United Nations Rule of Law Indicators;²³⁵ an instrument drawn up in order to monitor changes in the performance and fundamental characteristics of criminal justice institutions in conflict and post-conflict situations.²³⁶ Indeed, this UN list provides four out of the five components under the similar title of 'integrity and independence'²³⁷ (the third component, respect of decision is not included). This particular 'basket', however, is part of a structural set-up in which the indicators are grouped under three institutions (police, judicial system, and prisons), with four dimensions each (performance; integrity, transparency and accountability; treatment of vulnerable groups; and capacity). Thus, the particular indicators relating to judicial independence fall within the dimension of integrity, transparency and accountability, under the broader heading of the judicial system. According to the EU's Guidance Note, however, the Union has split judicial independence from the enhanced transparency and accountability of court operations, as evidenced by a number of other indicators provided in the Note, such as public access to criminal trials, publicly available reports on court spending, and the possibility of investigation of misconduct. It appears, therefore, that where the UN indicators see judicial independence as part of the larger question of accountability of court operations, the EU, on the face of it, seems to have taken a more binary approach, distinguishing between judicial independence (of individual judges) and the accountable operation of the judiciary.

As already stated at the start of this section, the argument here is that the Union's conceptualisation of judicial independence is far from clear; a

234 Sector Indicator Guidance for Programming – Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), pp. 15-16.

235 *Ibid.*, pp. 16-18. The United Nations Rule of Law Indicators are available at: http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf.

236 *Ibid.*, p. v.

237 The specific indicators are further backed up by other standards, such as the Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985) and the Universal Charter of the Judge (from the International Association of Judges), available at www.iaj-ium.org. See the United Nations Rule of Law Indicators – Implementation Guide and Project Tools (2011), pp. 69-73.

structured approach whereby a distinction is made between judicial independence of the judiciary as a whole in combination with safeguards for the independence of individual judges is absent. It is apparent from the analysis of various other guidance notes that the EU has failed to adopt a clear definition of judicial independence with a corresponding set of indicators, instead proffering different sub-elements of judicial independence on the basis of a host of different indicators throughout its programming guides. For example, the 2009 Programming Fiche on 'Rule of Law – The judicial system within the broader justice sector context' briefly mentions judicial independence in combination with the separation of powers. It discusses the necessity of a clear constitutional, legal and administrative framework of independence describing the competencies of institutions and actors in the administration of justice and the respective jurisdictions between them, as well as judicial impartiality.²³⁸ Further on in the guide, wage structures, systems for recruitment and promotion, and initial and ongoing training of judicial staff – all elements that may contribute to independence – are also considered, but only in the context of national institutional reform strategies. The Programming Fiche provides an extensive list of 'useful links for further information', such as the indicators drawn up by the UN Special Rapporteur on the Independence of Judges and Lawyers,²³⁹ the UN Basic Principles on the Independence of the Judiciary,²⁴⁰ the International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors of the International Commission of Jurists,²⁴¹ and the Bangalore Principles of Judicial Conduct.²⁴² To this list, the EU's Good Governance Handbook²⁴³ adds the indicators of the Guidance for promoting judicial independence and impartiality of USAID.²⁴⁴ However, many national and

238 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law – The judicial system within the broader justice sector context' (2009), p. 3.

239 The indicators and reports are available at: <http://www.ohchr.org/EN/Issues/Judiciary/Pages/Annual.aspx>.

240 These principles, formulated in 1985 to assist Member States in their task of securing and promoting the independence of the judiciary, are available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

241 This 'practitioners guide' of (2007) aims to 'provide practical insight on the use of international principles on the independence and accountability of judges, lawyers and prosecutors.' It is available at: <http://icj2.wpengine.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>.

242 Available at: http://www.unodc.org/pdf/crime/corruption/judicial_group/Bangalore_principles.pdf.

243 The Handbook includes a reference to judicial independence in the context of the efficiency of the system of justice, See Governance Handbook on Promoting Good Governance in EC Development and Co-operation (2004), pp. 59-62.

244 Available at: http://pdf.usaid.gov/pdf_docs/pnacm007.pdf.

multiannual indicative programmes²⁴⁵ make use of the indicators of the World Bank's World Governance Indicator Reports.²⁴⁶

It goes beyond the scope of this thesis to analyse the overlaps and differences between these various indicators and their underlying conceptualisations of judicial independence. Nonetheless, against the background of the Union's approach on the matter, three issues are noteworthy. First, the programming documents demonstrate precious little of an EU conceptualisation of judicial independence, rarely going beyond simply mentioning the need for judicial independence as such without further explanation. For example, a number of country strategy papers allude to judicial independence – often the lack thereof – in the context of an overview of their political situation, with no further clarification or even factual description of the country's current state of play in that area.²⁴⁷ Some reports discuss the objective criteria for the independence of individual judges, including such issues as the nomination, removal, sanctions, promotion, and salary,²⁴⁸ while a large number of others merely focus on proper training for judges, prosecutors, and lawyers.²⁴⁹ This means that it is hard to identify a discernible emphasis on any of the diverse aspects of judicial independence. It is remarkable, however, that neither the earlier reports and papers nor the more recent ones go into judicial independence of the judiciary as a whole. Any discussion on the organisation of the autonomy of the judiciary, of the funding of judicial institutions, or of the independent management of court systems seems to be absent. Thus, while there is a lot of focus on judicial independence, the EU's conceptualisation of it seems to be limited to some elements of the independence of judges. Secondly, the programming documents connected to the 2014-2020 multiannual financial cycle, seem to make very limited use of any of the suggested indicators and their underlying ideas on judicial independence.²⁵⁰ Independence is often mentioned as an expected result, but rarely attributed specific indicators from the ones shown above on the basis of which the EU's conceptualisation could be

²⁴⁵ See for example the Lesotho National Indicative Programme 2014-2020, p. 25.

²⁴⁶ The Worldwide Governance Indicator Project reports aggregate and individual governance indicators for 215 economies since 1996. It includes six dimensions of governance: Voice and accountability; Political stability and absence of violence; Government effectiveness; Regulatory quality; Rule of law; and Control of corruption. These aggregate indicators combine the views of a large number of citizens, enterprise, and expert survey respondents in industrial and developing countries, and are drawn from thirty individual data sources produced by a variety of institutions, think tanks, NGO's, international organisations, and private sector firms. The rule of law related indicators are available at: <http://info.worldbank.org/governance/wgi/index.aspx#home>.

²⁴⁷ See for example Timor-Leste Country Strategy Paper 2008-2013, p. 10; Indonesia Country Strategy Paper 2007-2013, p. 6; Pakistan Country Strategy Paper 2007-2013, p. 7.

²⁴⁸ See for example the Congo Kinshasa Joint Annual Report (2007), p. 11.

²⁴⁹ See for example Liberia Joint Annual Report (2007); Malawi Joint Annual Report (2002), p. 38; Rwanda Joint Annual Report (2007), p. 11; Zambia Country Strategy Paper and National Indicative Programme 2008-2013, p. 40.

²⁵⁰ Apart from the aforementioned World Governance Indicators.

gleaned.²⁵¹ Thirdly, it seems that, in contrast to the EU's binary approach explained above, judicial independence is actually seen in terms of the accountability and transparency of the institutions of the broader justice sector.²⁵² This approach, however, is not without its pitfalls.

Judicial independence and judicial accountability, although intertwined and mutually reinforcing, are not the same. As shown in chapter 2, judicial independence stems from the need for impartial adjudication in all cases with a judge who is unaffected by differences of power between litigating parties. Subsequently, the citizens' ability to have confidence in impartial adjudication proves the certainty that their rights will be protected. Judicial accountability, conversely, has to do with 'the responsibility to demonstrate to society the use to which judicial independence has been put.'²⁵³ In the context of good governance, accountability of institutional action has increasingly come to the forefront,²⁵⁴ with, for example, the Cotonou Agreement specifying good governance as the 'transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development.'²⁵⁵ Accordingly, it entails 'clear decision-making procedures at the level of public authorities, transparent and accountable institutions.'²⁵⁶ However, a number of judiciaries in developing countries still have great difficulty establishing the independence of the judiciary as a whole as well as of individual judges from control of the executives, legislatures, political parties, and/or non-governmental elites, as shown previously in the section on the separation of powers. In such circumstances, the demand for judicial accountability can muddle the reform efforts for independence. Whereas the reasons for this demand are quite obvious – the zest for judicial independence has come hand in hand with the fear of too much independence; inscrutable procedures and the roles of courts in invalidating new laws and policies have led to questions about the accountability of institutions in the judicial

251 For an exception see the Bolivia MIP in which judicial independence as an expected result is linked to the subjective indicator of the citizen's perception of the judicial system measured by the % of citizens who trust they will have a fair trial. Bolivia Multiannual Indicative Programme 2014-2020, p. 18.

252 See for example Lesotho National Indicative Programme 2014-2020, p. 25; Zimbabwe National Indicative Programme 2014-2020, p. 19; Ghana National Indicative Programme 2014-2020, p. 30; Nigeria National Indicative Programme 2014-2020, p. 32; Afghanistan Multiannual Indicative Programme 2014-2020, p. 22; Niger Programme Indicatif National 2014-2020, p. 30.

253 European Network of Councils for the Judiciary, Independence and Accountability of the Judiciary – ENCJ Report 2013-2014, 13 July 2014, p. 13.

254 In support of this see Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, and Commission Communication on Governance in the European Consensus on Development – Towards a harmonised approach within the European Union, COM(2006) 421 final, 30 August 2006.

255 Article 9(3) Cotonou Agreement.

256 Article 9(3) Cotonou Agreement.

sector²⁵⁷ – it is necessary to keep a conceptual boundary between the two. For, even though transparency and accountability certainly add positively to the subjective views on the institutions by the populace and the judiciary itself,²⁵⁸ and, thus, to subjective independence, '[e]xcellent performance cannot, of course, ... replace formal safeguards.'²⁵⁹ Therefore, even if it is undoubtedly important for institutions to behave in an accountable and transparent manner, part of the definition of judicial independence and the rule of law *per se* it is not. Furthermore, and adding to the already existing conceptual opacity, there is a tendency to assume agreement on the meaning of the term accountability, as with independence itself – which, as a concept, is far more developed – so that it is rarely explicitly defined.²⁶⁰

Yet, this is exactly what the EU does seem to promote. Against the background of strengthened conditionality of the EU's values, including the rule of law, put forward by the Agenda for Change and the Budget for Europe 2020 Communications,²⁶¹ the lack of a clear conceptualisation of judicial independence, especially in combination with the outlined approach towards the ambiguous concept of judicial accountability, is problematic from the perspective of legal certainty. However, while legally problematic, this approach could be explained on the basis of its practical expediency in the context of development cooperation policy. After all, 'due to the inherently different operating contexts across countries', it is, according to EuropeAid, 'not possible to provide an exhaustive list of sector indicators which cover every possible situation in a meaningful way.'²⁶² Thus, offering a handful of sub-elements of the rule of law's element of judicial independence might be a convenient way to cover the diversity of all possible existing national situations. However, while national requirements play a role

257 Linn Hammergren 'Judicial Independence and Judicial Accountability: The Shifting Balance in Reform Goals' Office of Democracy and Governance USAID *Guidance of Promoting Judicial Independence and Impartiality* (2002), pp. 149-157 at 149.

258 The ENCJ Report 2013-2014 distinguishes between three indicators of subjective independence: independence as seen by society in general; independence as perceived by court users; and independence as perceived by judges.

259 European Network of Councils for the Judiciary, *Independence and Accountability of the Judiciary* – ENCJ Report 2013-2014, 13 July 2014, p. 9.

260 The ENCJ 2013-2014 Report on Independence and Accountability of the Judiciary is an exception with its practical approach towards both concepts.

261 See Commission Staff Working Paper on A Budget for Europe 2020: the current system of funding, the challenges ahead, the results of stakeholders consultation and different options on the main horizontal and sectoral issues, SEC(2011) 868 final, 29 June 2011, p. 205. According to Article 3(2) of Council Regulation (EU) 2015/322 of 2 March 2015 on the implementation of the 11th European Development Fund, '[t]he Union will adapt its assistance through dynamic, result-oriented and country-specific measures ... according to the country's situation and commitment and progress with regard to issues such as good governance, human rights, democracy, rule of law and its ability to conduct reforms and to meet the demands and needs of its peoples.

262 Sector Indicator Guidance for Programming – Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), p. 1

and as a matter of course need to be considered,²⁶³ this does not negate the fact that at least a minimum definition could have been considered nor the more obvious fact that at the strategic level the EU's definition of judicial independence is incomplete, haphazard, and unclear.

3.3.4 *Conclusions*

This section explored the question to what extent the EU's legal framework and practice confirmed the institutional rule of law elements established in the previous chapters. It was demonstrated that the EU has identified the rule of law in terms of reform of rule of law institutions, thereby establishing such reform as a measurable element in itself. In other words, this section has shown that the Union conceptualises the rule of law by way of the strengthening of rule of law related institutions. Following this, it was asserted that the Union indeed recognises the significance of the separation of powers and, more specifically, of judicial independence – verifying those elements of the framework. However, it was furthermore argued that for both notions the attempt at conceptualisation has been haphazard and incomplete. In relation to the separation of powers it was demonstrated that while the EU's legal framework would allow for detailed guidelines on the way the three powers of government are balanced and checked against each other, very little direction is provided by way of more specific requirement. Furthermore, it was asserted that the exception to this is the judiciary branch and the element of judicial independence. The omnipresent nature of this rule of law component has, however, not led to a detailed blueprint outlining the minimum level of judicial independence expected. Instead it was shown that the EU has opted for an approach that leans heavily on certain aspects of judicial independence, such as requirements for the independence of individual judges, much to the detriment of others, such as certain preconditions in order to safeguard the independence of the judiciary as a whole.

263 The Reference Document on 'Support to Justice and the Rule of Law' goes as far as stating that '[t]he final goal for initiatives carried out according to this strategy should always be capacity development and sustainable results. This cannot be donor (supply) driven, and it cannot be based on donor objectives. Further, it cannot be based purely on a gaps analysis, which identifies interventions through focus on the weaknesses in national systems and capacities, without taking full advantage of existing strengths and the advantages of their mobilisation. Instead, the assistance process must start with a determination of what the partner country requires in the way of services, whether it is feasible to deliver these services, how this can be achieved, what the partner country can do by itself, what the partner country cannot do by itself, and why this is the case.' However, the importance of clear definitions of what is required by the donor is apparent from the fact that 'there may be a difference between what national counterparts want and what they really need.' 'Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 54.

3.4 Interim conclusions

This part of the chapter tested the analytical framework of rule of law elements, as established in Part I of the thesis, against the EU's legal framework and practice in the area of development cooperation. For each of the three categories the question was examined whether, and if so to what extent, the elements established previously were reflected in practice. It was shown that the formal element of legality, which lies at the heart of the rule of law debate of legal scholars, does not occupy a similar place in the conceptualisation of the rule of law in the EU's development cooperation policy. Furthermore, it was asserted that the procedural element of judicial review, one of the central elements in the national traditions through which the rule of law is safeguarded, has not been fleshed out in a corresponding manner in development cooperation. In contrast, it was demonstrated that the centrality of the element of access to justice has been recognised at the strategic level, in the legal framework, and at the level of implementation. However, it was also highlighted that access to justice via traditional, religious or customary means often contravenes rule of law related principles, such as clarity and predictability. In relation to the procedural element of enforcement, it was argued that, even though it is an acknowledged means through which the rule of law is applied in practice, it has not been fleshed out in sufficient detail. Lastly, it was demonstrated that the EU in its development cooperation policy perceives the rule of law mainly in terms of institutional elements. This means that the rule of law is conceptualised by way of reform of rule of law related institutions such as courts, policy, and detention centres. Furthermore, it was shown that judicial independence, as the main component of the separation of powers, has been acknowledged as a central element through which the rule of law is buttressed, as it has been recognised in both the national traditions and in legal theory.

4. GENERAL FINDINGS

Having tested the theoretical rule of law framework and its three categories of formal, procedural, and institutional rule of law elements against the legal and policy framework of the EU's development cooperation, in this section the general findings will be discussed. More particularly, these are the findings that transcend the categories of the analytical framework, as the individual elements have been analysed in the previous section. The general findings are concerned with the relative weight of the three categories examined as well as the overall picture of the definition of the rule of law in this policy area. It will be argued that the EU applies a rule of law definition in its development cooperation policy in which procedural and institutional elements are given precedence over formal ones. More particularly, it will be shown that whereas it is apparent from the legal and strategic framework that such procedural elements as judicial review and enforcement are

part and parcel of the Union's rule of law concept, the examination of the programming documents indicates that a rather institutional understanding permeates these elements. In fact, it will be demonstrated that the institutional element of judicial reform strongly underpins both the procedural and institutional elements making up the EU's understanding of the rule of law in this policy area.

The chapter will continue by offering two explanations for this. First, it will be demonstrated that the international framework of development cooperation within which the EU's policy is situated, emphasises an institutional rule of law approach, mostly for reasons of a practical nature having to do with the effective distribution of development aid. Secondly, the prominence accorded to the institutional understanding of the rule of law can be further explained by the impact of two related policy areas, namely good governance and security sector reform. It will be argued that the rise of both areas has, for reasons explained below, turned the focus of the EU's development cooperation policy to issues of institutional capacity-building and reform of the justice sector. The section will finish by pointing out some definitional problems related to the Union's indiscriminate use of indicator lists used and produced by other organisations. It will be asserted that although the use of indicators is standard methodology in a development policy based, the haphazard way the EU has made use of these indicator lists betrays a lack of a comprehensive definition of several rule of law elements discussed throughout this chapter.

4.1 The EU's conceptualisation of the rule of law in development cooperation: a strong institutional understanding

The above analysis has made it clear that the notion of the rule of law is attributed a central place in the EU's development cooperation policy. At the strategic level, *i.e.* in the various Council Conclusions, Commission Communications, Declarations, and Staff Working Papers related to EU development cooperation, the rule of law is emphasised as a value that needs to be 'strengthened', 'consolidated', and 'spread'.²⁶⁴ However, it was also shown that neither the New European Consensus on Development nor the previous Consensus on Development and its Agenda for Change elaborate on the notion, and many Regional or Country Strategy Paper do not go much beyond statements such as '[m]uch remains to be done ... to pave the way for a genuine rule of law.'²⁶⁵ Thus, the many programming documents were examined in order to be able to extract the EU's rule of law definition from practice.

Turning to the EU's definition of the rule of law in relation to the three categories of the framework which was tested against the Union's development cooperation policy, it is apparent from the examination undertaken

264 Commission Communication on Europe and Asia: A Strategic Framework for Enhanced Partnerships, COM(2001) 469 final, 4 September 2001, p. 28.

265 West Africa Regional Strategy Paper 2008-2013, p. 12.

in section 3, that more weight is attributed to rule of law elements of the second and third categories, *i.e.* elements that are *procedural* and *institutional* in nature. In relation to the first category of *formal* rule of law elements, it was shown that the distinct lack of legality as part of the rule of law in the legal framework and the funding instruments underpinning the development cooperation policy, is, unsurprisingly, mirrored in the programming documents. With some exceptions,²⁶⁶ legality, or requirements related to the transparency of the legal framework and/or the quality of laws, rarely appear in the rule of law related benchmarks.

In relation to the three *procedural* rule of law elements identified in section 3.2, judicial review, access to justice, and enforcement, the following two general findings can be observed. Firstly, the element of access to justice runs as a red thread throughout the reports. As demonstrated, this emphasis can be explained by the fact that promoting access to justice is a specific objective of the EU-ACP cooperation as well as the financing instruments,²⁶⁷ in combination with the Commission's introduction of the rights based approach in the development cooperation policy, which, in the context of the support given to the justice systems, stresses the facilitation of access to justice for all end-users of that same system.²⁶⁸ As asserted in section 3.2.2, the EU has adopted a broad understanding of access to justice that goes beyond access to court to also include access via more traditional, religious and/or customary means. More particularly, in the light of the fact that these means oftentimes may run counter to such rule of law elements as the separation of powers, predictability, and judicial independence, it was shown that the Union has demonstrated a conceptualisation that takes these concerns on board.²⁶⁹ Since its paramount goal is access to justice for even the most impoverished, disadvantaged, and remotely located, the programming documents show that it facilitates the non-state forms of access in various developing countries, while at the same time ensuring that, over time, the emphasis shifts towards more regulated forms.

Secondly, in relation to the other two elements, judicial review and enforcement, the EU's conceptualisation of either element has something in common. Even though both elements are clearly *procedural* in nature – having to do with the impartial administration of the law – the EU views both elements through a noticeably *institutional* lens. In relation to judicial review, it was asserted that, instead of focussing on the role and powers of the judiciary and how these are improved/set up in order to prevent abuse of power by the other two branches, the Union fails to articulate how the judiciary is to check and control, and within what limits, the legislature and

266 See section 3.1.3.

267 Annex I section A(I)(a)(ii) Regulation (EU) No 233/2014; Article 2(1)(a)(ii) Regulation (EU) No 235/2014.

268 Council Conclusions 'Action Plan on human Rights and Democracy 2015-2019' Doc. 10897/15, 20 July 2015, pp. 8, 22.

269 See section 3.2.2.2.

the executive. As was argued in the relevant section,²⁷⁰ such an articulation would have to clearly set out ideas on the separation of powers, the interplay and the balance of powers between the three branches, as well as the specific powers and functions of the judiciary. However, it was shown that the EU's ideas on this rule of law element do not seem to go beyond the mention of judicial independence and a focus on various elements related to judicial reform more generally, such as infrastructure and the training of individual judges. Similarly, in relation to the element of enforcement, which should deal with the efficiency and human rights aspects of the implementation and execution of judgments, it was demonstrated that, while the Union conceptualises this element in its strategic documents in terms of, amongst others, fair enforcement of courts judgments and an effective probation system,²⁷¹ the programming documents mostly stress the need for capacity building. This means that enforcement is looked at in terms of *inter alia* the existence of police cars, computers, and the state of prison buildings, rather than the efficacious operation of enforcement and the institutions involved in terms of human rights.

In relation to the *institutional* rule of law elements, it was argued that in the context of development cooperation, the EU's rule of law definition has been heavily geared towards institutional reform of the justice sector, *i.e.* improving the capacity and quality of the actors involved in the judicial process. So much so, that, as evidenced by the findings above, also the *procedural* elements of judicial review and enforcement are, to a large extent, conceptualised in terms of the strengthening of the institutional capacity of *inter alia* courts and the police force. In fact, it was asserted that institutional reform of the judiciary has become a particular rule of law related goal in itself, *i.e.* rule of law reform as judicial reform.

Interestingly, the examination in section 3.3 highlighted that regardless of this ubiquitous institutional understanding of the rule of law, neither the element of the separation of powers nor the element of judicial independence have been clearly articulated. In fact, in relation to the former, it was demonstrated that, even though some references in the legal framework pertain to the necessity of the separation of powers as a means of strengthening the rule of law,²⁷² many of the programming documents show a continued emphasis on institutional capacity building across the years.²⁷³ This is largely due to the less-than developed and under-resourced state of the judiciary in the countries examined, which require the building of institutions from the ground up. However, such challenges have very little to do with the consolidation of a functioning separation of powers. Where the documents do touch upon some form of balancing between the legislature, executive, and the judiciary, the focus shifts to the question of judicial

270 Section 3.2.1.

271 See section 3.2.3.

272 Article 9 Cotonou Agreement.

273 See section 3.3.2.

independence. However, as was demonstrated by the analysis undertaken in section 3.3.3, the EU has failed to outline a comprehensive definition of the notion, omitting elements concerned with the judiciary as a whole (not just individual judges), the organisation, the funding or the independent management of the judiciary.

In the light of the foregoing, the emerging picture of the rule of law in development cooperation is one that includes the *procedural* elements of access to justice and, to a lesser extent, enforcement. However, it is apparent that the Union's conceptualisation of the rule of law leans heavily on the *institutional* components of judicial reform and judicial independence. More particularly, it was asserted that, while the legal framework and strategy documents put forward both *institutional* and *procedural* of rule of law related elements, in fact, the element of judicial reform was shown to permeate these at the more practical level of implementation.

4.2 The EU's institutional understanding of the rule of law in development cooperation explained

From the above examination of the three categories of rule of law elements, it is apparent that the EU applies a rule of law definition in its development cooperation policy in which procedural and institutional elements are given precedence over formal ones. Furthermore, within this definition, the *formal* element of legality – the focal point of the rule of law in the national rule of law traditions and for legal scholars – is only touched upon in passing. One of the explanations for this discrepancy could be that in situation of fragility in developing countries there are more pressing issues than the quality of laws. In the least developed and low-income countries other rule of law concerns are much more immediate, such as the accessibility of any form of justice, particularly for women, children, and minorities, the existence of sufficiently trained judges, and detention conditions in accordance with human rights.²⁷⁴ In such circumstances the focus will first and foremost be on capacity building for strong institutions rather than on formal elements.²⁷⁵ There are two further reasons to shed light on why specifically the rule of law's institutional understanding, *i.e.* the focus on reform of the judicial system and the actors within it, has been accorded such a prominent role. The first reason pertains to the influence of the overall international framework within which the EU's development cooperation policy has taken shape. The second one is concerned with the rise of two areas, closely connected to development cooperation, namely good governance and security.

274 New Consensus on Development (2017), p. 35; Commission Communication on Towards an EU response to situations of fragility – engaging in difficult environments for sustainable development, stability and peace, COM(2007) 643 final, 25 October 2007, pp. 8-9.

275 Joint Communication of the Commission and High Representative on A Strategic Approach to Resilience in the EU's External Action, JOIN(2017) 21 final, 7 June 2017, p. 3; New Consensus on Development (2017), p. 32.

4.2.1 *The path dependency of the broader field of development cooperation on the EU's approach towards to the rule of law*

As explained in section 2 of the present chapter, the EU's development cooperation policy takes place within the confines of internationally agreed to commitments in the UN and OECD context. The rule of law is found as a sub-target of sustainable development goal 16, which is to promote 'peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive *institutions* at all levels.'²⁷⁶ Furthermore, in the OECD's Paris Declaration on Aid Effectiveness of 2005, in their efforts to scale up for more effective aid, donors undertook, inter alia, to utilise their partner countries' national institutions and systems in order to strengthen them and promote sustainability.²⁷⁷ In the implementation at the EU level of the Aid Effectiveness Agenda, the EU has been guided by the 2007 European Court of Auditors Special Report on the effectiveness of technical assistance in the context of capacity development.²⁷⁸ In this report, the need for increased focus on improving existing institutional capacity is pushed forward.²⁷⁹ Advice, which was implemented in the EU through the so-called 'Backbone strategy' on reforming technical cooperation and project implementation units for external aid provided by the European Commission.²⁸⁰ In that strategy the focus on institutional capacity development is addressed as one of a set of principles to guide future development cooperation.²⁸¹

The rationale for such persistent institutional focus is a practical one. For societies to function properly, and, moreover, for development aid to be distributed effectively, public sector organisations need to function at least at some level. This latter point was also mentioned by the European Parliament in their 2013 Report with recommendations to the Commission on EU donor coordination on development aid in which the development of capacity was stressed so that countries 'can build up the skills, know-how and *institutions* required to manage their own development effectively.'²⁸²

276 See the Annex of the General Assembly Resolution 71/313 'Work of the Statistical Commission pertaining to the 2030 Agenda for Sustainable Development', A/71/L.75, 6 July 2017 [emphasis added].

277 See point 4(i) 'We commit ourselves to taking concrete and effective action to address the remaining challenges, including: weaknesses in partner countries' institutional capacities to develop and implement results-driven national development strategies.' The Paris Declaration on Aid Effectiveness (2005) is available at: <http://www.oecd.org/dac/effectiveness/34428351.pdf>.

278 European Court of Auditors' Special Report No 6 of 2007 on the effectiveness of technical assistance in the context of capacity development, OJ[2007] C312/02.

279 *Ibid.*, pnts. 9-11.

280 European Commission 'Reforming Technical Cooperation and Project Implementation Units for External Aid provided by the European Commission – A Backbone Strategy' July 2008.

281 *Ibid.*, p. 13

282 European Parliament Report with recommendation to the Commission on EU donor coordination on development aid, (2013/2057(INL)), 15 November 2013, pnt. 8 [emphasis added].

Moreover, according to the Commission, improving institutions 'is one of the most persistent and difficult challenges in development and development cooperation. At the same time, nothing is more crucial for achieving sustained progress, growth and poverty reduction.'²⁸³ For the rule of law, this institutional focus has undeniably entailed a focus on the justice sector,²⁸⁴ with a side role for the legislature.²⁸⁵ Thus, it is apparent that the EU's lopsided approach towards its definition of the rule of law, whereby institutional reform, and, more particularly, judicial reform, is highlighted, follows, at least partially, as a consequence of the international framework in which development cooperation takes place.

4.2.2 *The institutional focus against the background of the rise of good governance and security*

4.2.2.1 *The rise of good governance in development cooperation and its influence on the EU's rule of law definition*

The institutional focus can also be explained on the basis of more substantive reasons. At the end of the 80s, the development debate saw the emergence of the notion of (good) governance.²⁸⁶ The idea behind it was that the creation of a regulative environment is a decisive precondition for reducing poverty and achieving sustainable development. Moreover, as already mentioned above, when it comes to managing resources and aid, the existence of a (well) functioning state is required. Consequently, 'the state and its administrative capacities play a crucial role in the good governance debate... Improving governance in the development context, therefore, means building and strengthening state institutions and capacities.'²⁸⁷

For the EU, until the late 70s value considerations were neither *de jure* nor *de facto* part of its foreign policy in general, or of development cooperation in particular.²⁸⁸ The Union's policy on the latter reflected the conven-

283 Tools and Methods Series Reference Document No. 1 'Institutional Assessment and Capacity Development' EuropeAid (2007), p. 5.

284 See for example the Programming Fiche 'Rule of Law – The judicial system with the broader justice sector context' (2009).

285 See the Programming Fiche 'Rule of Law – The Parliaments' (2006) in which the law-making process is addressed from the institutional perspective of capacity building.

286 See for example the 1989 World Bank Report on Sub-Saharan Africa – From Crisis to Sustainable Growth, A Long-term Perspective Study, p. 3 in which the failure of development aid in that region was analysed and serious governance issues were identified, such as the 'deteriorating quality of government', and 'weak judicial systems and arbitrary decision-making'. See also the OECD Report on 'Participatory Development and Good Governance' (1995), available at: <https://www.oecd.org/dac/accountable-effective-institutions/31857685.pdf>, as well as the UNDP Report on 'Governance for sustainable human development: an UNDP Policy Document' (1997).

287 Tanja A. Börzel, Yasemin Pamuk & Andreas Stahn 'Good Governance in the European Union' *Berlin Working Paper on European Integration* No. 7 (2008), p. 8.

288 Toby King 'Human Rights on the Development Policy of the European Community: Towards a European World Order?' 28 *Netherlands Yearbook of International Law* (1997), pp. 51-99 at 53. The author argues that the failure to reach agreement on political issues led to the omission of any reference to political values in the Rome Treaty.

tional view of the time, namely that development was a precondition for respect for human rights and democratic concerns rather than *vice versa*.²⁸⁹ More particularly, similar to most aid donors at the time,²⁹⁰ the policy of the EU and its Member States was based on the belief that while EU assistance was predicated on the existence of a democratic government, the principle of non-intervention in the internal affairs of states should be observed.²⁹¹ However, practice showed that EU assistance did not lead to the desired results in a number of developing countries. Against the background of international recognition of the importance of governance, the 1991 Council Resolution on human rights, democracy, and development acknowledged the importance of the promotion of the EU's values and the link between development and governance.²⁹² Moreover, the Cotonou Agreement included good governance as a 'fundamental element' of the agreement.²⁹³ Accordingly, Article 9(3) states that:

In the context of a political and institutional environment that upholds human rights, democratic principles and the rule of law, good governance is the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, *transparent and accountable institutions*, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aiming in particular at preventing and combating corruption. [Emphasis added]

From this passage, as well as from the 2003 Commission Communication on Governance and Development, the state-centric approach to governance is clearly visible. Not only does governance concern 'the state's ability to serve the citizen', it is also 'a key component of policies and reforms for poverty reduction, democratisation and global security. This is why *institutional capacity-building*, particularly in the area of good governance and the

289 Bartels (2008), p. 2.

290 See for example the world bank's view on non-intervention in the internal affairs of states, David Williams *The World Bank and Social Transformation in International Politics* London: Routledge (2008), pp. 48-74.

291 1975 Annual Report on Political Cooperation, *Bull EC* 10-1975, p. 96.

292 Resolution on human rights, democracy and development of the Council, and Member States meeting within the Council of 28 November 1991. In it, the Council states that 'human rights and democracy form part of a larger set of requirements in order to achieve balanced and sustainable development. In this context, account should be taken of the issue of good governance.' Accordingly, 'The Council stresses the importance of good governance ... The Community and Member States will support the efforts of developing countries to advance good governance and these principles will be central in their existing or new development cooperation relationships.'

293 Under the Lomé IVbis Convention, governance had merely been 'a particular aim of cooperation'.

rule of law is one of the six priority areas for [EU] development policy...'.²⁹⁴ The notion of governance is further fleshed out in the Reference Document 'Analysing and addressing governance in sector operations'²⁹⁵ and the Handbook on promoting good governance in EC development and cooperation.²⁹⁶ It is split in three overlapping dimensions. The first dimension refers to 'rules, interests, resources and power'. The second dimension includes governance principles such as participation, inclusion, transparency, and accountability. The third dimension encompasses six 'clusters', the third of which is 'reinforcement of the rule of law and the administration of justice.'²⁹⁷ When combining the state-centric approach with these dimensions, the focus of rule of law promotion very quickly shifts to the judicial sector and its operation. In other words, to 'access for all to an independent justice system.'²⁹⁸ Moreover, the influence of governance on development cooperation also explains the conceptual confusion between judicial independence and judicial accountability,²⁹⁹ pointed out in section 3.3.3 above. Through governance, and its insistence on transparency and accountability, the already complicated concept of judicial independence

294 Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, p. 3 [emphasis added]. Also see Commission Communication on Governance in the European Consensus on Development – Towards a harmonized approach within the European Union, COM(2006) 421 final, 30 August 2006.

295 Tools and Methods Series Reference Document No. 4 'Analysing and addressing governance in sector operations' EuropeAid (2008).

296 'Handbook on Promoting Good Governance in EC Development and Cooperation' EuropeAid (2004).

297 Tools and Methods Series Reference Document No. 4 'Analysing and addressing governance in sector operations' EuropeAid (2008), p. 11. The other clusters are: support to democratisation; promotion and protection of human rights; enhancement of the role of civil society; public administration reform, management of public finances and civil service reform; decentralisation and local government reform.

298 Commission Communication on Governance in the European Consensus on Development – Towards a harmonized approach within the European Union' COM(2006) 421 final, 30 August 2006, p. 5.

299 The EU increasingly muddles the conceptual boundaries between good governance and the other EU values. On the one hand, good governance seems to be restricted to the proper functioning of the state administration, separate from the other values. On the other hand, an environment without democratic principles, respect for human rights, and the rule of law will hardly lead to *good* governance. Or, in the somewhat confusing words of the Commission in its 2003 Communication on Governance and Development: 'As the concepts of human rights, democratisation and democracy, the rule of law, civil society, decentralised power sharing, and sound public administration gain importance and relevance as a society develops into a more sophisticated political system, governance evolves into good governance', Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, p. 4. The Council has added to this 'that a holistic approach on governance also entails mainstreaming of human rights and fundamental freedoms, good governance and rule of law to all policy sectors.' Conclusions of the Council and the Representatives of the Governments of the Member States meeting within the Council – Governance in the European Consensus on Development: Towards a harmonised approach within the European Union, Doc. 14024/06, 16 October 2006.

has been enveloped in the vaguely defined notion of judicial accountability. As already argued, these are two different issues coming from two different perspectives. The rule of law itself merely requires judicial independence; it is the notion of good governance that commands accountability.

4.2.2.2 *The increasing importance of the security – development nexus and its influence on the EU's rule of law definition*

Without offering a detailed *exposé* on the relationship between security and development cooperation,³⁰⁰ a few remarks must nonetheless be made on how this nexus has tipped the balance towards an institutionally oriented EU rule of law definition. Although the literature points out that the exact nature of the development-security nexus remains unclear,³⁰¹ it is apparent that for the European Union, the objectives of development cooperation policy and security are intertwined.³⁰² As an 'important and complementary aspects of EU relations with third countries',³⁰³ development and security are, at a minimum, 'equally desirable and potentially mutually reinforcing goals'.³⁰⁴ The Commission formulated it rather bluntly, when it stated that 'there can be no development without peace and security; and no peace and security without development'.³⁰⁵ In essence, this two-way relationship is supported by the belief that an increased level of development reduces the level of insecurity, while, in turn, instability keeps the levels of develop-

300 The literature on this topic is extensive, see for example Gorm Rye Olsen 'Changing European Concerns: Security and Complex Emergencies instead of Development' in Karen Arts & Anna K. Dickson (eds) *EU Development Cooperation. From Model to Symbol* Manchester: Manchester University Press (2004), pp. 80-100.

301 Spornbauer (2014), p. 32. Youngs points out that the EU's broad commitment to ensure coherence between development and security incorporates two very different sets of policy issues that are often conflated by the EU policy makers. One set of issues relates to the security situation within the developing states themselves and the problems these pose for socio-economic development. Another issue relates to the EU's own security concerns and the way these are assuaged by, it is claimed, enhanced development efforts. Richard Youngs 'Fusing Security and Development: Just Another Euro-Platitude' 30 *Journal of European Integration* (2008), pp. 420-421. The latter policy strand was pithily summarised by Commissioner Ferrero Waldner, who, in relation to the development of the European Neighbourhood Policy, stated that if the EU does not export stability, it risks importing instability and will thus put its own security at risk; Benita Ferrero Waldner 'Wider Europe – the Last Five Years, SPEECH/09/467, 13 October 2009, available at: http://europa.eu/rapid/press-release_SPEECH-09-467_en.htm. Also see Commission Communication on The Instruments for external assistance under the future financial perspective 2007-2013, COM(2004) 626 final, 29 September 2004, p. 3.

302 Commission Communication on Increasing the impact of EU development policy: an Agenda for Change, COM(2011) 637 final, 13 October 2011, p. 3.

303 European Consensus on Development (2006), pnt. 37.

304 David Chandler 'The Security-Development Nexus and the rise of anti-foreign policy' 10 *Journal of Intervention and Statebuilding* (2007), pp. 362-386 at 366. Also see Youngs (2008), pp. 419-437 at 420.

305 Commission Communication on Policy Coherence for Development – Accelerating progress towards attaining the Millennium Development Goals, COM(2005) 134 final, 12 April 2005, p. 4.

ment low.³⁰⁶ Thus, whereas there is no development in chronically insecure environments,³⁰⁷ by contrast, stable living conditions lead to increased human capacity, higher investment levels, and have a positive impact on economic growth and development.³⁰⁸ At the policy level, the EU has often recognised the increasingly close link between development and security. Security is stressed as a 'first condition for development',³⁰⁹ and 'key to regional stability, poverty reduction and conflict prevention'.³¹⁰ Moreover, '[r]eforming the security sector in post-conflict environments is critical to the consolidation of peace and for promoting poverty reduction. Only where legitimate State authority is expanded through the rule of law and good governance will countries be prevented from relapsing into conflict and losing development achievements.'³¹¹

In turn, development is recognised as a precondition for peace and security. For these reasons, 'the EU will continue to work to ensure that international security concerns are dealt with in synergy with support to development and good governance so as to achieve a coherent policy mix.'³¹² At the same time, the representatives of the EU Member States have underlined that 'peace, security and stability, as well as human rights, democracy and good governance, are essential elements for sustainable economic growth and poverty eradication.'³¹³ Moreover, the fragility of developing, conflict-prone states is to be addressed 'through governance reforms, the rule of law, anti-corruption measures and the building of viable state institution.'³¹⁴

Against this oft-recognised connection between development and security, in the last decade the EU has strengthened its concept of security sector reform (SSR). SSR focuses on 'strengthening and reforming those institutions that are key to maintaining security and the rule of law' and represents 'a holistic approach to the reform of state institutions.'³¹⁵ As such, it concerns reform of both the bodies which provide security to citizens and the state institutions responsible for management and oversight of

306 Paul Collier *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It?* Oxford: Oxford University Press (2007), pp. 17-35.

307 Commission Communication on Governance and Development, COM(2003) 615 final, p. 7.

308 Community Communication on Conflict prevention, COM(2001) 211, 11 April 2001, p. 5.

309 European Security Strategy (2003), p. 13.

310 Commission Communication on Governance and Development, COM(2003) 615 final, p. 7.

311 Statement on behalf of the European Union by Pedro Serrano, delegation of the EU to the United Nations, New York, 29 June 2010.

312 Council Conclusions, 2622nd External Relations Council, Doc. 12724/04, 22-23 November 2004, p. 27.

313 *Ibid.*

314 European Consensus on Development (2006), pnt. 20.

315 Eva Gross 'Assessing the EU's Approach to Security Sector Reform' *European Parliament Policy Study* (2013), p. 7.

those bodies.³¹⁶ The rule of law's key role is underlined in a number of EU SSR related documents. For example, in the Council's draft Conclusions on a Policy Framework for Security Sector Reform, the point is made that '[p]reventing and resolving violent conflict and addressing fragile states are part of the EU's efforts to reduce insecurity and eradicate poverty through strengthening good governance and the rule of law in third countries.'³¹⁷

In the Commission Staff Working Document accompanying the Communication on EU support for SSR, the Commission has highlighted the link between the rule of law and institutional reform in the justice sector when it stated that SSR support in ACP countries is in the area of 'justice reform, law enforcement and civil management, especially in the area of rule of law. This often includes capacity building of law enforcement agencies, key ministries, legal reforms and access to justice for the population, by strengthening and modernising legal institutions that are primarily responsible for the administration of justice.'³¹⁸ This focus on the justice sector, and in particular on the judiciary, can be explained for the following reason. As shown above, the security sector is closely related to the justice sector, which, in turn, bears a close relation to the rule of law.³¹⁹ Both include several of the same institutions and actors, such as courts, law enforcement bodies, prosecutors, and the penitentiary system.³²⁰ Moreover, both sectors share functional duties, such as securing the rights of individuals and the state,³²¹ as well as the protection of the former against the powers of the latter. In other words, the judiciary is both a mechanism to hold security services accountable and a security provider itself.³²²

In sum, the EU's bias towards an institutionally oriented rule of law conceptualisation can to a large extent be explained on the basis of develop-

316 Commission Communication on A concept for European Community support for security sector reform, COM(2006) 253 final, 24 May 2006, p. 3.

317 Draft Council Conclusions 'A Policy Framework for Security Sector Reform', Doc. 9967/06, 6 June 2006, pnt. 2.

318 Commission Staff Working Document containing the Annexes to the Commission Communication on A concept for European Community support for security sector reform, SEC(2006) 658, 24 May 2006, p. 8.

319 According to the Reference Document on the connection between the rule of law and the operation of the justice sector, both are 'fundamentally inter-connected', as '[t]he justice sector should both uphold the rule of law, and function according to its principles. The justice sector, and all professionals working within it, benefit from consistent application of, and respect for, the rule of law from all governmental authorities and bodies. Clearly, the rule of law cannot exist if the justice sector does not comply with, apply, and enforce its principles.' While this is the case, the rule of law, however, applies beyond the justice sector, and is thus a much broader concept. Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 16.

320 Tools and Methods Series Reference Document No. 9 'Support for Justice Reform in ACP Countries' EuropeAid (2010), p. 12.

321 Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 17.

322 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law – The judicial system within the broader justice sector context (2009), p. 5.

ment of two policy areas adjacent to development cooperation, namely the rise of good governance and the increasing recognition of the development-security nexus. Both bring with them an emphasis on institutional capacity building, which, when combined with the task of strengthening the rule of law, has led to EU to adopt an approach that relies heavily on reform of the judicial sector.

4.3 Some definitional problems and the confines of the EU's development cooperation methodology

It is apparent from the examination of the three categories of rule of law elements undertaken in the present chapter that although it is possible to clearly identify a number of rule of law elements the EU has included in the definition in its development cooperation policy, for some of them, their further articulation leaves something to be desired. For example, in the case of the procedural elements of judicial review and enforcement, it was shown that the Union has adopted a rather generic approach to both elements, without providing clear guidelines for their interpretation. Frequently, the programming documents do not go far beyond stressing the need for general improvement in a particular area without specification of the exact expectations. In contrast, as it was shown in section 4.1 above, the benchmarks proposed become most concrete when outlining measures related to institutional reform and capacity building of the judiciary. However, whereas it is apparent from the analysis undertaken in chapters 1 and 2 that the rule of law allows for flexibility of institutional design, at the very minimum the lack of clearly articulated expectations with tangible benchmarks points to a lack of a comprehensive EU definition that relies on more than judicial reform.

For the rule of law elements of access to justice and judicial independence, the EU has attempted to flesh out the notions by reference to a list of indicators,³²³ as demonstrated for example in the 2013 Sector Guidance for Programming,³²⁴ in the Programming Fiche on Rule of Law – the judicial system within the broader justice sector context,³²⁵ and in the Governance Handbook.³²⁶ In the field of development cooperation, the use of such indicators, whereby specific indicators are linked to expected results, is part and parcel of any policy based on a result-oriented approach, which makes use of conditionality incorporating indicators in order to better assess progress

323 There are some exceptions to this, such as the Commission Communication on Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, COM(1998) 146 final.

324 Sector Indicator Guidance for Programming – Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), pp. 14-18.

325 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law – The judicial system within the broader justice sector context (2009).

326 Governance Handbook on Promoting Good Governance in EC Development and Cooperation (2004), pp. 57-62.

and monitor reform outcomes.³²⁷ Indeed, this methodology underlies the financial aid instrument EDF and DCI, which tie financial aid to a reliance on indicators for the implementation of their objectives.

However, as shown, for example, in the section on judicial independence and judicial accountability, the EU has adopted rather a cherry picking-approach towards the use of indicators. In relation to judicial independence, it was outlined that the Sector Guide for Programming relies heavily on the UN Rule of Law Indicators. The latter is a well-put together, detailed guide on the delivery of justice in conflict and post-conflict situations. It takes as its point of departure a definition of the rule of law found in the 'Report on the rule of law and transitional justice in conflict and post conflict societies' by then-Secretary General Kofi Annan.³²⁸ Its scope has been narrowed down in order to focus solely on criminal justice institutions (police, courts, prosecution and defence, and corrections). More particularly, the indicators focus on the institution's capacity, performance, integrity, transparency and accountability.³²⁹ However, according to the Sector Indicator Guidance Note, the EU proposed these indicators for the area of judicial independence, whereas the UN's indicators fell within the domain of judicial accountability; a related, but nonetheless separate issue.³³⁰ Thus, instead of fully incorporating a set of indicators and their underlying rule of law definitions or creating its own, the Union in relation to judicial independence has done neither while at the same time blurring the conceptual boundaries between the two different notions of independence and accountability.

This EU approach negates the work undertaken in these indicator lists and, more importantly, has not contributed to its own comprehensive definition of the rule of law. This much has been acknowledged by the Commission itself when it stated that '[i]t is not possible to provide an exhaustive list of sector indicators which cover every possible situation in a meaningful way.'³³¹ Without an overarching definition of a specific notion, and especially one as multifaceted as the rule of law, indicators are just lists of boxes to be ticked, without interconnections between elements or an idea of their placement in the end goal of a strong society underpinned by the rule of law. Thus, the Commission's approach whereby the aim of multiannual

327 Following a Communication on budget support in 2000 (COM(2000) 58 final, 2 February 2000), the Commission has pioneered a result-oriented approach in development cooperation based on outcome indicators. Also see Commission Communication on The future approach to EU budget support to third countries, COM(2011) 638 final, 13 October 2011, p. 3.

328 Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies (S/2004/616), pnt. 6.

329 The United Nations Rule of Law Indicators – Implementation Guide and Project Tools (2011), p. vi.

330 See section 3.3.3.

331 Sector Indicator Guidance for Programming – Sector Indicator Guidance Note – Rule of Law & Justice, EuropeAid (2013), p. 1.

and national indicative programmes is to 'include a manageable number of indicators',³³² not only diminishes the importance of the concept, it also obstructs the actual comprehensive implementation of the rule of law in third countries.

It should also be pointed out here that the enhanced conditionality, as proposed in the 2011 Budget Communications,³³³ has not brought more clarity for the rule of law, even though both the High Representative and the Commission called for it in their Joint Communication on human rights and democracy at the heart of external action: 'The task at hand is to ensure the *clarity*, coherence, and effectiveness of policy... The promise of the Lisbon Treaty to put human rights, democracy and the *rule of law* at the centre of all external action ... make this even more pressing.'³³⁴ Specifically when it comes to the distribution of EU funding, the institutions have called for the explication of terms used in financial regulations in order to ensure legal certainty. For example in the 1303/2013 Regulation on the common provision for several internal funds, such as the European Regional Development Fund, it is stated in the Preamble that in order to 'ensure the correct and consistent interpretation of provisions and to contribute to legal certainty for Member States and beneficiaries, it is necessary to define certain terms that are used in this Regulation.'³³⁵ However, when it comes to external aid more generally, the 2011 Joint Communication still called for 'developing benchmarks to assess progress in human rights, democracy and the rule of law.'³³⁶

332 *Ibid.*, p. 2.

333 Commission Communication on The future approach to EU budget support to third countries, COM(2011) 638 final, 13 October 2011, p. 2. See also the Council Conclusions 'The future approach to EU budget support to third countries' (3166th Foreign Affairs Council, 14 May 2012), in which the Council confirmed that '[t]he commitment and record of partner countries to democracy, human rights and the rule of law is one of the key determinants of EU development cooperation, including general and sector budget support, and should be assessed to determine if using budget support is appropriate.'

334 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 final, 12 December 2011, p. 6 [emphasis added].

335 Paragraph 7 of the Preamble of Regulation 1303/2013 of 17 December 2013 laying down common provision on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ[2013] L347/320.

336 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 final, 12 December 2011, p. 11.

Regarding human rights and democracy, this situation has recently ameliorated.³³⁷ In June 2012, the Strategic Framework and Action Plan on Human Rights and Democracy was adopted, the aim of which is to give practical expression to the promise of Lisbon and to provide guidelines for the EU to 'step up its efforts to promote human rights, democracy and the rule of law across all aspects of external action.'³³⁸ Alongside the Strategic Framework, an Action Plan for the period 2012-2014, containing a set of 97 actions covering a detailed range of human rights and democracy issues, was adopted in order to help implement the commitments.³³⁹ A similar Action Plan has been adopted for the 2015-2019 period.³⁴⁰

Regarding the rule of law, two remarks must be made. First, according to the Strategic Framework mentioned above, the EU is to step up its promotion efforts in relation to all three principles. However, although the Action Plans make mention of the rule of law, they focus solely on commitments regarding human rights and democracy. Secondly, even in the case where the most recent Action Plan does highlight rule of law related issues, such as the development of the justice sector, this is done from the institutional perspective of the protection of human rights. Thus, where support is targeted at providing appropriate training of judicial staff, it is done so with a view to increasing awareness of international human rights standards and obligations,³⁴¹ thereby demonstrating a lack of understanding of the strengthening of the rule of law as an objective in itself.

In sum, this section attempted to explain the notably institutional emphasis of the EU's rule of law definition. It was shown that the international development framework within which the EU's policy is situated, as well as the increasing prominence of both good governance and security concerns, have impacted the way the Union has conceptualised the rule of law in development cooperation. Furthermore, it was demonstrated that the arbitrary way the EU has relied on several indicator lists compiled by

337 Following the entry into force of the Lisbon Treaty, High Representative Ashton announced a major review of all human rights processes in relations to the EU's external action. As part of this review the EU commissioned an independent assessment of all EU funded human rights programming in third countries of the period 2000-2010. See the Thematic Evaluation of the European Commission Support to Respect of Human Rights and Fundamental Freedoms (including solidarity with victims of repression), EuropeAid/122888/C/SER/Multi (2011). For Ashton's speech see Catherine Ashton, EU High Representative for Foreign Affairs and Security Policy 'Annual Human Rights Report', SPEECH/10/757, 15 December 2010.

338 EU Strategic Framework and Action Plan on Human Rights and Democracy, Doc. 11855/12, 25 June 2012.

339 For an analysis of the Strategic Framework and the Action Plans accompanying it, see Annabel Egan & Laurent Pech 'Respect for Human Rights as a General Objective of the EU's External Action' *Working Paper 161 Leuven Centre for Global Governance Studies* (2015).

340 Joint Communication of the Commission and the High Representative on Action Plan on Human Rights and Democracy (2015-2019) – Keeping Human Rights at the Heart of the EU Agenda JOIN(2015) 16 final, 28 April 2015.

341 *Ibid.*, pnt. 4a.

other organisation without, however, having outlined its own underlying conception of several rule of law elements, has led to various definitional problems.

5. CONCLUSION

This chapter examined the EU's definition of the rule of law in development cooperation, by testing the analytical framework established in Part I of the thesis against the Union's practice in this policy. After a concise introduction of the international framework, the legal framework and its relevant policy strategies were briefly discussed in order to frame the analysis in the following sections. The chapter continued by focussing on the three categories of rule of law elements, namely formal, procedural, and institutional. It was shown that the elements 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 was asserted 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 showed that the EU's articulation of both elements leaves much to be desired.

Next, the chapter turned to the general findings of the EU's rule of law definition in this policy area and it was established that 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. Indeed, it was argued that the EU's institutional approach towards the rule of law is so pervasive as to also influence the understanding of the procedural elements of judicial review and enforcement. Section four went on to explore the reasons underpinning the EU's emphasis on a fundamentally institutional understanding of the rule of law in development policy. It was asserted that the international framework, which the EU has committed itself to implement, has steered the policy of development cooperation towards the improvement of institutional capacity in aid receiving countries in general. Against this background, it was argued that the EU's institutional conceptualisation of the rule of law can, in particular, be explained by 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.

Finally, the chapter concluded by arguing 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. It was asserted that even though the use of indicator lists is common practice in a result-based cooperation policy, the Union's indiscriminate application of these, without a comprehensive rule of law definition, has led to vagueness and ambiguity.

1. INTRODUCTION

In words similar to those found in the EU's development cooperation policy, the rule of law is 'central to the enlargement process',¹ and 'a key priority'² which needs to be addressed at an early stage of the accession process. Strengthening it 'remains a key challenge'³ for all countries wishing to join the Union, and the both the Council⁴ and the Commission⁵ continue to attach a high priority to all aspects of rule of law in the enlargement countries. In the light of this repeated acknowledgement of the notion's pivotal role in this policy area, a clear and comprehensive definition would be expected in order to guide the applicant states on the way to Membership, if for no other reason than the fact that as future Member States, the countries are themselves expected to safeguard, consolidate, and promote the rule of law.⁶ In this light, the present chapter purports to assess whether, and if so, to what extent, the EU has developed such a conceptualisation of the rule of law in its enlargement policy. More particularly, in a similar manner to the previous case study, the analytical framework established in at the end of part I will be tested against the EU's practice in this external policy area.

To this end, the chapter begins by providing a brief overview of the accession rounds to date, followed by an introduction into the policy area. It will be shown that the rule of law has come to play an increasingly important role in enlargement. More particularly, it will be demonstrated that,

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- 1 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 2.
 - 2 Commission Communication on Enlargement Strategy and Main Challenges 2009-2010, COM(2009) 533, 14 October 2009, p. 5.
 - 3 See for example Consideration 9 of the Preamble of Regulation (EU) No 231/2014 of the European Parliament and the Council of 11 March 2014 establishing an instrument for pre-accession assistance for the period 2014-2020 (IPA II), OJ[2014] L77/11; Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700, 8 October, 2014, p. 11.
 - 4 Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5.
 - 5 Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700, 8 October, 2014, p. 12.
 - 6 Articles 3(1), 21(2)(b), and 21(2)(a) TEU respectively. On the different functions of the rule of law in the EU see the Introduction to this thesis.

based on the experiences of earlier enlargement rounds, progress in the area of the rule of law needs to be demonstrated more thoroughly and earlier than ever before. Following this, the EU's legal framework will be explored in order to provide the background against which the analysis of the different rule of law elements will take place. The chapter continues by examining the three categories of elements established in the analytical framework for the purpose of ascertaining whether these elements are validated by the EU's practice. It will be shown that the formal element of legality has not only remained underdeveloped, but that it is actually undermined by the enlargement methodology's focus on quantity in the legal approximation process – to the detriment of legality's requirements of quality of legislation. Furthermore, it will be asserted that the elements of impartiality and judicial efficiency have increasingly been addressed in the annual reports, thereby gradually becoming core procedural elements of the rule of law. However, it will be also demonstrated that this prominence has not resulted in detailed standards for the applicant states to follow and apply. Following this, it will be claimed that the EU's conceptualisation of the rule of law in enlargement is perceived to a large extent in terms of institution and capacity-building, more particularly judicial reform. It will be shown that this institutional orientation has led to a particular emphasis on the institutional element of judicial independence. Against this background, the chapter will conclude by summarising the general findings of the exploration of the notion of the rule of law in this policy field.

A final note on methodology must be provided here. Since initial accessions were predominantly based on political decisions without clearly defined criteria,⁷ the chapter will focus on the accession of 2004 based on the elaboration of the 1993 Copenhagen criteria, and the subsequent rounds, including the negotiations with the current candidate and potential candidate states. In this way, if and where possible, a comparison can be drawn between the rounds in order to demonstrate the evolution of the EU's conceptualisation in its enlargement policy. Considering the fact that there is only a single provision in the EU Treaty serving as the legal basis for the enlargement (Art. 49 TEU), the policy has developed over the years through Commission Opinions on the application for Membership of the EU, Strategy Papers, annual progress reports, Accession and European Partnerships, complemented by Presidency and Council Conclusions.⁸ It is in these Copenhagen related documents that the rule of law elements in enlargement can be found.

7 Wolfgang Nozar 'The 100% Union: The Rise of Chapters 23 and 24' (2012), available at: <https://www.clingendael.nl/sites/default/files/The%20100%25%20Union.%20The%20rise%20of%20Chapters%2023%20and%2024.pdf>.

8 For reasons of readability, references to the annual reports and Accession and European Partnerships will be abbreviated (year and country). The full references can be found in the table of documents.

2. THE RULE OF LAW AND ITS RELATION TO EU ENLARGEMENT: EU POLICY AND THE TOOLBOX FOR RULE OF LAW PROMOTION

Before venturing into the central part of the case study, it is necessary to provide some background to the EU's enlargement policy to date and to set out the relationship between this policy area and the rule of law on the basis of the legal and policy framework within which this connection is shaped. For this reason, this section will provide the setting for the examination of the EU's conceptualisation of the rule of law in this particular external policy area. After a brief overview of the previous accession rounds, it will be shown that the EU has progressively concentrated on the rule of law as a central condition for development in the applicant states. More particularly, it will be pointed out that it is a condition for eligibility and one of the four Copenhagen political criteria, the non-compliance with which can constitute a potential case for suspension throughout the process. Moreover, by way of Chapter 23, it is also an issue to be tackled early on in the negotiations, lack of progress in the implementation of which can potentially halt the entire negotiations. Following this, the focus will turn to the rule of law in the enlargement's legal framework. The main aim of the section will be to provide insight into the legal instruments that underpin the enlargement policy and the significance of the rule of law therein. The section will conclude by demonstrating that this legal framework mirrors the increasing importance of the rule of law in this external policy field.

2.1 Brief overview of the enlargement process to date

The founding Treaties and all subsequent amending Treaties have continually allowed for enlargement, and the European Communities always envisaged the possibility of more states than the original six (Germany, France, Italy, the Netherlands, Belgium, and Luxembourg) joining in the project of integration.⁹ A mere four years after the conclusion and signing of the Treaty of Rome, the first applications for enlargement were made by the United Kingdom, Ireland, Denmark and Norway. Due to French concerns over the British application, this request was denied, prompting a second attempt by the same four countries in May 1967.¹⁰ After a second French

9 Kirstyn Inglis 'EU Enlargement: Membership Conditions Applied to Future and Potential Member States' in Steven Blockmans & Adam Lazowski *The European Union and its Neighbours* The Hague: TMC Asser Press (2006), pp. 61-94 at p. 67.

10 See Jean-Pierre Puissechot *The Enlargement of the European Communities: A Commentary on the Treaty and the Acts concerning the Accession of Denmark, Ireland and the United Kingdom* Leiden: Sijthoff (1975).

intervention the Council shelved the request¹¹ until the opening of negotiations in 1970 and the signing of the first Accession Treaty on 22 January 1972.¹² After a negative popular vote Norway withdrew its application.¹³

The second enlargement round consisted of Greece. The application was made in June 1975, a year after the country had shed the colonels' rule. The Accession Treaty was signed on 28 May 1979.¹⁴ The restoration of democracy also clearly played an important role in the positive outcome of the accession applications made by Spain and Portugal.¹⁵ Having applied for membership in 1977, the two countries concluded the third round¹⁶ of enlargement and the accession Treaty was signed on June 12, 1985.¹⁷

The applications for the fourth enlargement round came within three years of each other in the period 1989–1992. The negotiations and subsequent signing of the Accession Treaty with Austria, Sweden, Finland, and Norway on 24 June 1994¹⁸ did not pose many obstacles, apart from the failure to ratify the Accession Treaty by Norway due to a second negative referendum.¹⁹ In 1993 accession perspective was granted by the European Council meeting in Copenhagen to the newly created countries in Eastern

11 De Gaulle vetoed the first request on grounds of economic suitability. He then expressed a second veto during a press conference on 27 November 1967. Notwithstanding official support from the other EEC Member States, the Council of Ministers decided in December of the same year to shelve all four applications: 'One Member State considered that the re-establishment of the British economy must be completed before Great Britain's request can be considered.' See Christopher Preston *Enlargement and Integration in the European Union* London: Routledge (1997).

12 Treaty of Accession of Denmark, Ireland and the United Kingdom, OJ[1972] L73/5.

13 Allan F. Tatham *Enlargement of the European Union* The Hague: Kluwer Law International (2009), p. 22.

14 Treaty of Accession of Greece, OJ[1979] L291/9.

15 See Commission Opinion on Spain's Application for Membership, COM(78) 630, 30 November 1978, p. 9; Commission Opinion on Portuguese Application for Membership, COM(78) 220, 23 May 1978, p. 7.

16 The German reunification of 20 October 1990 after the fall of the Berlin wall in 1989, while considered a *de facto* enlargement of the Communities, is not considered as a separate enlargement round. It found its legal basis in national law (Article 23 of the German Basic Law), not the Treaties. See for example Michael Bothe 'The German Experience to meet the Challenges of Reunification' in Alfred Kellerman, Jaap de Zwaan & Jenő Czuczai (eds) *EU Enlargement: The Constitutional Impact at EU and National Level* The Hague: T.M.C. Asser Press (2001).

17 Treaty of Accession of Spain and Portugal, OJ[1985] L302/9.

18 Treaty of Accession of Austria, Finland, and Sweden, OJ[1994] C241/9.

19 Within the same timeframe, Switzerland has also faced the consequences of a negative referendum. After taking part in the negotiations and signing of the EEA Agreement, the Swiss government submitted an application for accession to the EU in May 1992. During a referendum, held in December of the same year, the EEA membership was rejected. Consequently, since the EEA Agreement was regarded as a precursor to EU membership, the Swiss government suspended negotiations for EU accession. The application of Switzerland has remained dormant until the Swiss parliament voted on 15 June 2016 to officially withdraw the application for membership. Further, see <https://www.dfae.admin.ch/missions/mission-eu-brussels/de/home/aktuell/news.html/content/dea/de/meta/news/2016/10/26/EU-Beitrittsgesuch>.

Europe. This decision led, over time, to the fifth 'big bang' enlargement, which consisted of eight new democracies from Central and Eastern Europe and two Mediterranean states: The Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia, Slovenia, Cyprus, and Malta. An amalgamation of several political issues played in the background of this enlargement round. It started with the application of Turkey in 1987, which was put on hold by the Commission in its Opinion when it considered that it would 'not be considered useful to open accession negotiations with Turkey straight away.'²⁰ The Turkish application was followed by the membership applications of Cyprus and Malta in July of 1990 as well as the applications of the ten countries of Central and Eastern Europe (the CEECs) in the period 1994-1996.²¹ At the Luxembourg European Council of December 1997, taking into consideration the positive Commission assessment in its Agenda 2000,²² it was decided that negotiations would be opened with Cyprus, the Czech Republic, Estonia, Hungary, Poland, and Slovenia.²³ At the Helsinki European Council in 1999 it was decided that the six countries that were left out would be included at the table²⁴ and formal negotiations were opened with Bulgaria, Latvia, Lithuania, Malta, Romania, and Slovakia in February 2000.

The fifth enlargement round was formally concluded with the signing of the Accession Treaty on 16 April 2003.²⁵ Because of concerns over the lack of progress made with the implementation of reform measures, Bulgaria and Romania were given a later date of accession. Their joined signing of the Accession Treaty on 25 April 2005²⁶ formed the sixth round of enlargement. The Commission itself considers the latter to be the second phase of the fifth enlargement round.²⁷ However, because both enlargements concerned two different Accession Treaties and involved two different sets of transitional measures, they will be treated as separate rounds in the present study.

20 Commission Opinion on Turkey's Request for the Accession to the Community, SEC(89) 2290 final/2, p.8.

21 Hungary – 31 March 1994; Poland – 5 April 1994; Romania – 22 June 1995; Slovakia – 27 June 1995; Latvia – 13 October 1995; Estonia – 24 November 1995; Lithuania – 8 December 1995; Bulgaria – 14 December 1994; Czech Republic – 17 January 1996; Slovenia – 10 June 1996.

22 Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997.

23 Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, pnt. 27.

24 Presidency Conclusions, Helsinki European Council, 10-11 December 1999, pnt. 10.

25 Treaty of Accession of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Slovenia and Slovakia, OJ[2003] L236/17. On this Accession Treaty see, for example, Kirstyn Inglis 'The Union's Fifth Accession Treaty: New Means to Make Enlargement Possible' 41 *Common Market Law Review* (2004); Christophe Hillion 'The European Union is Dead. Long Live the European Union. A Commentary on the Treaty of Accession 2003' 29 *European Law Review* (2004), pp. 583-612.

26 Treaty of Accession of the Republic of Bulgaria and Romania, OJ[2005] L157/11.

27 See for example the Commission Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania, COM(2006) 549 final, 26 September 2006.

The Santa Maria da Feira European Council of June 2000 made it clear that the countries of the Western Balkans would be 'potential candidates' for membership.²⁸ In February 2003 Croatia made its formal application for membership and was confirmed by the Council as a candidate country in June of 2004.²⁹ The Accession Treaty was signed on 9 December 2011,³⁰ and Croatia's single state accession to the Union on 1 July 2013 marked the seventh enlargement round.

The list of officially recognised candidate countries includes at present Albania,³¹ the former Yugoslav Republic of Macedonia (FYROM),³²

28 Presidency Conclusions, Santa Maria da Feira European Council, 19-20 June 2000, pnt. 67. This has been repeatedly confirmed by subsequent European Council Conclusions, most vocally at Thessaloniki in 2003; Presidency Conclusions, Thessaloniki European Council, 19-20 June 2003, para. 40. For more on the term 'potential candidate' see for example Lykke Friis & Anna Murphy 'Enlargement of the European Union: Impacts on the EU, the Candidates and the "Next Neighbours"' 14 *ECSA Review* (2001), pp. 2-7.

29 Presidency Conclusions, Brussels European Council, 17-18 June 2004, pnt. 31.

30 Treaty of Accession of Croatia, OJ[2012] L112/10. On the Accession Treaty see for example Adam Łazowski 'European Union Do Not Worry, Croatia is Behind You: A Commentary on the Seventh Accession Treaty' 8 *Croatian Yearbook of European Law and Policy* (2012) pp. 1-39.

31 Albania applied for EU membership on 24 April 2009. In its Opinion of 9 November 2010, the Commission assessed that before negotiations could be opened, Albania had to achieve a greater degree of compliance with the membership criteria and meet 12 key priorities identified in the Opinion. In its 2012 Progress Report, the Commission recommended that Albania receive candidate status, subject to completion of key measures, particularly in the area of judicial and public administration reform. In June 2014, the Council granted Albania candidate status, which was endorsed by the European Council a few days later (Presidency Conclusions, Brussels European Council, 26-27 June 2014, pnt. 34).

32 FYROM applied for membership on 22 March 2004. The Commission issued a favourable Opinion on 9 November 2005 after which the country received candidate status on 16 December 2005 (Presidency Conclusions, Brussels European Council, 15-16 December 2005, pnt. 25). Negotiations have not started yet.

Montenegro,³³ Serbia,³⁴ and Turkey.³⁵ Two more countries are potential candidates: Bosnia and Herzegovina,³⁶ and Kosovo (as defined by UN Security Council Resolution 1244 of 10 June 1999).³⁷ In its 2018 Western Balkans Strategy, the Commission holds out the prospect that both Serbia and Montenegro could potentially be ready to join the EU by 2025.³⁸ The newest Strategy lays down a roadmap after Commission President Juncker had signalled an increased openness toward EU enlargement in his 2017 State of the Union speech.³⁹ Finally, Iceland, having gained candidate status

33 Montenegro applied for membership on 15 December 2008. Following the Commission Opinion of 9 November 2010 in which seven key priorities were identified that would need to be addressed before negotiations could be opened, the European Council confirmed Montenegro's candidate status in December of the same year (Presidency Conclusions, Brussels European Council, 16-17 December 2012, pnt. 10) after which accession negotiations started on 29 June 2012 (the European Council endorsed the Council decision thereto during its Brussels summit in June 2012; Presidency Conclusions, Brussels European Council, 28-29 June 2012).

34 Serbia applied for EU membership on 22 December 2009. Following the Commission Opinion of 14 October 2011, the European Council confirmed Serbia's candidate status in March 2012 (Presidency Conclusions, Brussels European Council, 1-2 March 2012, pnt. 39). In line with the June 2013 decision of the European Council to open accession negotiation, the latter started in 21 January 2014.

35 On 1 April 1987 Turkey has applied for membership of the European Communities. After the Helsinki European Council of December 1999 declared Turkey a candidate country (Presidency Conclusions, Helsinki European Council, 10-11 December 1999, pnt. 12), negotiations were formally opened in October 2005. Due to Turkey's non-compliance with the additional protocol of the Ankara Association Agreement in relation to Cyprus, it was decided that negotiations on eight chapters are not to be opened. At the time of writing they still remain closed.

36 After having been identified by the European Council as a potential candidate in Santa Maria da Feira in June 2000 along with the other countries in the Western Balkans, Bosnia has applied for membership in February 2016.

37 In its Communication 'A European Future for Kosovo', the Commission indicated that the 'European perspective' for the Western Balkans, as confirmed in the Thessaloniki declaration of the European Council of June 2003, is also open to Kosovo; Commission Communication on A European Future for Kosovo, COM(2005) 156 final, 20 April 2005. For the explicit acknowledgement of the Western Balkan countries' membership potential see Presidency Conclusions of the European Council meetings in Lisbon (pnt. 47) of 23-24 March 2000, and Santa Maria da Feira (pnt. 67), 19-20 June 2000, as well as the Declaration of the Zagreb Summit of 24 November 2000, made by the Heads of State or Government of the EU Member States, Albania, FYROM, Bosnia and Herzegovina, Croatia and the FRY, as well as the Foreign Minister of Slovenia, and the President of the European Commission, in the presence of the Secretary General/High Representative for the CFSP, the Special Representative of the United Nations Secretary General, the Special Representative of the EU to act as Coordinator of the Stability Pact for south-east Europe and the High Representative for Bosnia and Herzegovina, pnt.4.

38 Commission Communication on A Credible Enlargement Perspective for and enhanced EU engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, pp. 7-8.

39 Jean-Claude Juncker 'State of the Union Address 2017', SPEECH/17/3165, 13 September 2017, available at: http://europa.eu/rapid/press-release_SPEECH-17-3165_en.htm.

in 2010, requested in March 2015 that it should no longer be regarded as a candidate country.⁴⁰

2.2 The policy framework: the increasing importance of the rule of law

There is abundant scholarly literature discussing the development of the enlargement process and its legal framework from various angles.⁴¹ The purpose of this section, therefore, is not to replicate this, but to sketch out the framework within which accession takes place, while highlighting the increasing importance of the rule of law in the context of the policy.

Until the European Council's decision to acknowledge the membership perspective of the Countries from Central and Eastern Europe,⁴² the enlargement process had by and large been covered by the same basic rules, set out in the Treaty.⁴³ It was, however, during the fifth enlargement round that the expansion process progressed from an *ad hoc* procedure into a fully-fledged enlargement policy on EU eligibility and on Member State-

40 Iceland formally applied for EU membership on 16 July 2009. The Commission delivered its positive Opinion on 24 February 2010 after which the European Council decided to open negotiations in June 2010, Presidency Conclusions, Brussels European Council, 17 June 2010, pnt. 24. The negotiations had already been put on hold since June 2013, at the Icelandic government's own request.

41 See for example Christophe Hillion 'EU Enlargement' in Paul Craig & Gráinne de Búrca (eds) *The Evolution of EU Law* Oxford: Oxford University Press (2011), pp. 187-216; Tatham (2009); John O'Brennan *The Eastern Enlargement of the European Union* New York: Routledge (2006); Helene Sjursen (ed) *Questioning EU Enlargement: Europe in Search of Identity* New York: Routledge (2006); Christophe Hillion (ed) *EU Enlargement: A Legal Approach* Oxford: Hart Publishing (2004); Neil Nugent (ed) *European Union Enlargement* Basingstoke: Palgrave Macmillan (2004); Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003); Andrea Ott & Kirtyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C. Asser Press (2002); Marc Maresceau & Erwan Lannon (eds) *The EU's Enlargement and Mediterranean Strategies, A Comparative Analysis* Basingstoke: Palgrave (2001); Victoria Curzon Price, Alice Landau & Richard G. Whitman (eds) *The Enlargement of the European Union. Issues and Strategies* London: Routledge (1999); Phedon Nicolaïdes, Sylvia Boean, Frank Bollen & Parlos Pezaros *A Guide to the Enlargement of the European Union: A Review of the Process, Negotiations, Policy Reforms, and Enforcement Capacity* Maastricht: EIPA (1999); Heather Grabbe & Kirstyn Inglis *Eastward Enlargement of the European Union* London: Royal Institute of International Affairs (1998); Graham Avery & Fraser Cameron *The Enlargement of the European Union* Sheffield: Sheffield Academic Press (1998); Marc Maresceau (ed) *Enlarging the European Union: Relations between the EU and Central and Eastern Europe* London: Longman (1997); Christopher Preston *Enlargement and Integration in the European Union* London: Routledge (1997).

42 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

43 Legally speaking, however, as the EU has gradually expanded and the body of enlargement rules and principles has developed in its wake, no enlargement round is identical to the previous one. For a brief analysis of the differences in procedure in the aforementioned Articles, see Frank Hoffmeister 'Changing Requirements for Membership' in Andrea Ott & Kirtyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C. Asser Press (2002), pp. 90-102 at 91-91. Also see Hillion (2011), pp. 188-193.

building,⁴⁴ including yearly monitoring rounds during which progress is measured on the road to accession. Nonetheless, the Treaty text does not convey much of the 'pre-accession strategy'⁴⁵ – the strategy by which the EU 'will continue to follow closely progress in the associated countries towards filling the conditions of accession'⁴⁶ – that lies behind it and which forms the basis for the Union's enlargement policy. Currently, Article 49 TEU provides:

Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union. The European Parliament and national Parliaments shall be notified of this application. The applicant State shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the consent of the European Parliament, which shall act by a majority of its component members. The conditions of eligibility agreed upon by the European Council shall be taken into account.

The conditions of admission and the adjustments to the Treaties on which the Union is founded, which such admission entails, shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

Next to proscribing the procedure, the current provision is connected to the rule of law in two ways. First, Article 2 TEU refers to the rule of law as one of the founding values of the Union – a *conditio sine qua non* for third states to be considered as a candidate for membership. Secondly, the Article mentions the conditions of eligibility agreed upon by the European Council in Copenhagen in 1993.⁴⁷ In relation to the latter, the rule of law has been

44 Further on this argument see Christophe Hillion 'The Creeping Nationalisation of the EU Enlargement Policy' *Swedish Institute for European Policy Studies* No. 6 (2010) and the subsequent commentary by Marise Cremona, available at http://sieps.se/sites/default/files/Commentary_cremona_2010_6_1.pdf; Frank Emmert & Siniša Petrović 'The Past, Present, and Future of EU Enlargement' 37 *Fordham International Law Journal* (2014), pp. 1349-1419 at 1379.

45 Council Conclusions, Essen European Council, 9-10 December 1994, Annex IV. The idea of a pre-accession period can be traced back to the Commission's conclusions in its Opinion on Greece's application for membership in 1976. Further, see Tatham (2009), p. 31; Alan Mayhew *Recreating Europe. The European Union's Policy towards Central and Eastern Europe* Cambridge: Cambridge University Press (2002), chapter 6.

46 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

47 Fulfilment of which will lead to a country's admissibility for accession negotiations. Christophe Hillion 'Enlargement of the European Union: A Legal Analysis' in Anthony Arnall & Daniel Wincott (eds) *Accountability and Legitimacy in the European Union* Oxford: Oxford University Press (2002), pp. 401-418 at 412.

inserted as one of the four 'political conditions'⁴⁸ for accession. According to the first of the three 'Copenhagen criteria', membership requires that the candidate country demonstrates 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.'⁴⁹

Following the formulation of these accession conditions, the European Council, with the help of the European Commission, has progressively elaborated their normative content. This has been done in a rather *ad hoc* manner, taking into account the circumstances of both the state of the Union, and the candidate states. Thus, the Commission developed the policy framework through various Communications,⁵⁰ addressing the concerns on the mutual dependency of widening and deepening EU enlargement⁵¹ that arose out of the applications for membership by the CEECs. At the same time, the European Council has refined the accession conditions, notably at the summits of Madrid in 1995⁵² and Helsinki in 1999.⁵³ Specific condi-

48 The first set of Copenhagen criteria is frequently referred to in the literature as the 'political conditions' for membership – in this thesis, the same term is used. See, for example, Hillion (2011), p. 195; Bruno de Witte 'Enlargement and the EU Constitution' in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 209–262 at 228–233; Heather Grabbe 'A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants' *EUI Working Papers RSC* No. 12 (1999).

49 The Copenhagen criteria furthermore cover the shape and state of the economy – 'the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union' – and the country's ability to take on the *acquis communautaire* – 'the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union.' Presidency Conclusions, Copenhagen European Council, 21–22 June 1993.

50 For further detail see for example Commission Communication on The Europe Agreements and Beyond: A Strategy to Prepare the Countries of Central and Eastern Europe for Accession, COM(1994) 320 final, 13 July 1994; Commission White Paper on the Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final, 3 May 1995; Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(1997) 2000 final, 15 July 1997.

51 Emmert & Petrović (2014), p. 1379.

52 The Madrid European Council defined that the initiated pre-accession strategy would have to be intensified 'in order to create the conditions for the gradual, harmonious integration of those States, particularly through the development of the market economy, the adjustment of their administrative structures and the creation of a stable economic and monetary environment.' Since without these reinforced administrative structures, implementation of the *acquis* proved to be very difficult. Presidency Conclusions, Madrid European Council, 15–16 December 1995.

53 At Helsinki and in the wake of the Kosovo crisis, the European Council urged the candidate states to resolve their outstanding border disputes and other related bilateral issues, if need be through involvement of the International Court of Justice, before entering the EU. Presidency Conclusions, Helsinki European Council, 10–11 December 1999.

tions in relation to the Western Balkans followed⁵⁴ – after their ‘European perspective’ was acknowledged in 2002.⁵⁵

In contrast to previous accessions where candidate countries had to fulfil the admission conditions without EU interference, and, which, thus, afford only limited insight into the Union’s rule of law conceptualisation,⁵⁶ a more detailed and coordinated pre-accession approach was unavoidable, particularly because of the number and diversity of candidates both among themselves, and as compared to previous applicants, as well as to the EU Member States.⁵⁷ Since the Copenhagen European Council left the content of admission conditions quite vague, elaborating upon them has been left largely to the institutions⁵⁸ and the Member States.⁵⁹ The first step towards this was provided by Agenda 2000 (July 1997), which contained the Commission’s opinions on the membership applications of the CEECs.⁶⁰ This document and the accompanying opinions are noteworthy for three reasons. First, they provide an insight into the Commission’s early conception of the rule of law. In this initial attempt at fleshing out the criterion of the rule of law, the Commission provided the rather pithy analysis that ‘[a]ll the applicant countries have flaws in the rule of law which they need to put right.’⁶¹ The Agenda then indicated the areas under examination supporting this conclusion: ‘There is a lack of suitable qualified judges and guarantees for their independence. Police forces are poorly paid and require better training and discipline. The autonomy of local government

54 See the Council Conclusions ‘The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region’, Annex to Annex III, 2203rd General Affairs Council, 29-30 April 1997; Council Conclusions ‘The Thessaloniki Agenda for the Western Balkans: Moving towards European Integration’, Annex A, 2518th External Relations Council, 16 June 2003. Further see Steven Blockmans ‘Raising the Threshold for Further EU Enlargement Process and Problems and Prospects’ in Andrea Ott & Ellen Vos (eds) *50 Years of European Integration: Foundations and Perspectives* The Hague: TMC Asser Press (2009), pp. 203-220.

55 See for example the Presidency Conclusions, European Council Santa Maria de Feira, 19-20 June 2000; Presidency Conclusions, European Council Copenhagen, 12-13 December 2002.

56 Hillion (2010), p. 11.

57 Kirstyn Inglis ‘The Pre-accession Strategy and the Accession Partnerships’ in Andrea Ott & Kirstyn Inglis (eds) *Handbook on European Enlargement* The Hague: T.M.C Asser Press (2002), pp. 103-112 at 103.

58 The Court of Justice of the EU has however refrained from giving further indications on the membership conditions; Case 93/78 *Lothar Matthæus v Doego Fruchtimport und Tiefkühlkost eG* [1978] ECR 2203. See also Karen E. Smith ‘The Evolution and Application of EU Membership Conditionality’ in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 105-140 at 115.

59 Further see Hillion (2010).

60 Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997.

61 *Ibid.*, p. 40.

also requires a firmer legal basis in several cases.⁶² Without entering into a detailed analysis at this juncture since this is the focus of the second half of the case study, it suffices to say here that within the initial framework, the Commission seemed to consider the rule of law from the perspective of the functioning of the (wider) judicial system – specifically in terms of quality of personnel, and the legal underpinnings of the separation of powers.

Secondly, Agenda 2000 and the Opinions, as well as the subsequent endorsement of their set-up by the European Council, introduced the Commission's methodology for its analysis of the CEECs' fulfilment of the conditions, providing a first insight into the rule of law elements that would be considered critical in order for applicant countries to be able to accede.⁶³ Instead of examining the developments related to the four political criteria separately, the Commission initially adopted a binary approach, whereby on the one hand democracy and the rule of law, and on the other hand, human rights and minority protection, were bundled together. In relation to the first category, the examination was subsequently classified into three sections: the structure and functioning of the parliament (legislature), the structure and functioning of the executive, and the structure and functioning of the judiciary.⁶⁴ In the Regular Reports of the following years a fourth category, anti-corruption measures, was added.⁶⁵ Overall, this categorisation suggests that the Commission views the rule of law in terms of the

⁶² *Ibid.*

⁶³ The European Council, upon a positive assessment of Agenda 2000, endorsed the methodology and recommended the Commission follow it in its future evaluation of applicant States' ability to meet the criteria; Presidency Conclusion, Luxembourg European Council, 12-13 December 1997, pnt. 29.

⁶⁴ In relation to the monitoring process on the countries of the Western Balkans, this sub-categorisation has been added to over the years. The 2005 Albania Progress Report, for example, discusses developments in the area of democracy and the rule of law under the sub-headings of Parliament, Government, Public Administration, Judicial System, and Anti-Corruption Policy. The Progress Report of Serbia and Montenegro of the same year also includes a discussion of Defence reforms, whereas, for example, the 2006 Bosnia and Herzegovina Progress Report has an additional section on reform of the constitutional framework. During the 2013 and 2014 rounds of Progress Reports, three more subcategories are added to the section: Ombudsman, Civil society, and the Fight against organised crime; see for example the 2013 Montenegro Progress Report.

In the 2015 and 2016 rounds of reporting, the Commission has opted for a different approach, particularly in relation to the rule of law. In order to reflect its 'fundamentals first'-approach and with the aim to further increasing the quality of the assessments in the reports as well as providing greater transparency, the assessment of the political criteria is split into five components: democracy, public administration reform, rule of law, human rights and the protection of minorities, and regional issues and international obligations. The section on the rule of law is then further split into issues of the functioning of the judiciary, fight against corruption, and fight against organised crime, including the fight against terrorism. See for example, the 2015 Bosnia and Herzegovina Report, pp. 12-20.

⁶⁵ See for example the 1998 Poland Regular Report; 1999 Czech Regular Report.

structure and functioning of the judicial system in ways similar to the previous point made above.⁶⁶

Thirdly, Agenda 2000 laid the groundwork for a reinforced accession strategy in order to bring the different forms of support provided by the Union within a single framework. Formally launched as the 'enhanced pre-accession strategy' by the 1997 Luxembourg European Council, new instruments included the so-called Accession Partnerships (APs) in which the Copenhagen criteria were progressively spelled out in short, medium, and long term priorities,⁶⁷ to be met by the candidate states as a condition to their accession, detailed assessments of each candidate's performance in implementing the APs through annual reports,⁶⁸ as well as increased

66 This view is reinforced by the Commission later on in Agenda 2000, where it stressed the importance of the administrative and, in particular, judicial capacity for the application of the *acquis* (as formulated initially by the 1995 Madrid European Council). After all, '[t]he applicant countries' administrative and judicial capacity is of crucial importance for the adoption, implementation and enforcement of the *acquis* and for the efficient use of financial support... It is vital that Union legislation be transposed into national law. But this is not sufficient to ensure its correct application ... The applicants' judicial systems must be capable of ensuring that the rule of law is enforced. This requires the retraining, and in some cases the replacement of judges to ensure that courts are able to operate effectively in cases involving Community law.' For further analysis of this issue, particularly on the relationship between the strengthening of the rule of law and judicial reform, see section 3.3.2.

67 According to the Council's framework AP regulation, the Commission drafted individual country APs covering the priorities, principles, intermediate objectives, and conditions on which preparations for accession must concentrate in view of the political and economic criteria, as well as the financial resources for assistance (Article 1). Following this proposal by the Commission and after adoption by the Council by qualified majority voting, the APs were submitted to the candidate countries (Article 2). Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ[1998] L85/1.

A similar methodology has been applied in relation to the countries of the Western Balkans. Within the framework of the stabilisation and association process with these countries, the EU has set up partnerships with Albania, Bosnia and Herzegovina, the former Yugoslav Republic of Macedonia, Montenegro, and Serbia, including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999. For the Council's framework regulation see Council Regulation (EC) No 533/2004 of 22 March 2004 on the establishment of European partnerships in the framework of the stabilisation and association process, OJ[2004] L86/1.

68 On the intensified review procedure, the 1997 Luxembourg European Council decided that '[f]rom the end of 1998, the Commission will make regular reports to the Council, together with any necessary recommendations for opening bilateral intergovernmental conferences, reviewing the progress of each Central and East European applicant State towards accession in the light of the Copenhagen criteria, in particular the rate at which it is adopting the Union *acquis*. ... The Commission's reports will serve as a basis for taking, in the Council context, the necessary decisions on the conduct of the accession negotiations or their extension to other applicants.' Presidency Conclusions, Luxembourg European Council, 12-13 December 1997, pnt. 29.

pre-accession aid linking financial support to progress and compliance.⁶⁹ This strategy effectively meant that the EU institutions, particularly the Commission,⁷⁰ had far-reaching powers to shape the enlargement policy and monitor the candidate's developments and progress on the way to accession. In relation to the rule of law, this also meant that the fulfilment of the accession conditions became subject to systematic EU monitoring.

Over the following years adjustments have been made to the enlargement policy, which has progressively concentrated on the rule of law as a central condition for development in applicant states. Introduced as 'fair and rigorous conditionality'⁷¹ by the renewed consensus on enlargement,⁷² the Commission expanded on the accession methodology starting with its 2006-2007 accession strategy. Agreed in the aftermath of Romania and Bulgaria's accession and in order to waylay misgivings about the incongruity between accession conditions and membership obligations,⁷³ the strategy linked progress in the EU's values, including the rule of law, to advancement in the negotiations through the introduction of opening and

69 For a legal appraisal of the pre-accession strategy and its components see Tatham (2009), pp. 287-299; Marc Maresceau 'Pre-accession' in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 9-42; Inglis (2002), pp. 103-112; Karen E. Smith *The Making of EU Foreign Policy: the Case of Eastern Europe* Basingstoke: Palgrave Macmillan (1999), pp. 122-134.

70 Brigid Laffan 'From Policy Entrepreneur to Policy Manager: The Challenge Facing the European Commission' 3 *Journal of European Public Policy* (1997) 4, pp.422-438.

71 Commission Communication on 2005 enlargement strategy paper, COM(2005) 561 final, 9 November 2005, p. 3.

72 The Commission's approach, which envisaged the new principles to govern the accession policy and methodology, was based on consolidation, conditionality, and communication. Consolidation of the EU's commitments on enlargement, extended use of fair and rigorous conditionality throughout the negotiations phase, and better communication of the enlargement policy towards citizens, both within the Member States and the applicant states. This 'renewed consensus on enlargement' was endorsed by the European Council. Presidency Conclusions, Brussels European Council, 14-15 December 2006, pnt. 4.

73 Bulgaria and Romania are still formally under post-accession monitoring under the Cooperation and Verification Mechanism, see Council Conclusions 'Cooperation and Verification Mechanism', Doc. 7118/16, 15 March 2016. For the latest round of progress reports see: Report from the Commission on Progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2017) 43 final, 25 January 2017; Report from the Commission on Progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 44 final, 25 January 2017.

For the legal basis of the mechanism see Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Bulgaria to address specific benchmarks in the areas of judicial reform and the fight against corruption and organised crime, OJ[2006] L354/58, and Commission Decision of 13 December 2006 establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas of judicial reform and the fight against corruption, OJ[2006] L354/56.

closing benchmarks of the chapters of the *acquis*.⁷⁴ This meant that the rule of law not only forms an eligibility condition (enlargement rules state that a country is eligible for membership if it is European and if it respects the EU's values), but also that non-compliance therewith could constitute a case for suspension of the process.⁷⁵

Next to the continuous monitoring of the rule of law as an EU value and the possible consequences of lack of progress for the opening and pace of the negotiations, the rule of law dimension of the pre-accession process has also expanded in scope. In order to take on board the experiences of the 2004 'big bang' accession and considering the state of the Western Balkan applicants with their legacy of relatively recent armed conflict and bilateral disputes, the 2005 negotiating frameworks for Croatia⁷⁶ and Turkey⁷⁷ introduced two specific negotiating chapters meant to assist enlargement countries to establish a society based on the rule of law: Chapter 23, including judiciary matters, and Chapter 24, entitled Justice, Freedom and Security.⁷⁸ In this manner, the EU made it clear that it conceives the rule of law as an integral part of the *acquis*,⁷⁹ whereby parts of the notion are, thus, also considered under the third Copenhagen criterion (the candidates' ability to take on the obligations of membership).

Including rule of law issues as a chapter of the *acquis* enabled the EU to further cement the notion's place as a focal point of enlargement. Against the background of continued shortcomings in the areas of judicial reform, the fight against corruption and organised crime in Romania and Bulgaria,⁸⁰

74 The Commission proposed the introduction of benchmarks, defined by the Council, which the candidate state has to meet in order for the Union to consider opening and/or closing a particular negotiating chapter. According to the strategy, the purpose of benchmarks is 'to improve the quality of the negotiations, by providing incentives for the candidate countries to undertake necessary reforms at an early stage.' Moreover, benchmarks 'are measurable and linked to key elements of the *acquis* chapter.' Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 6.

75 *Ibid.*, p. 6. See also the Negotiating Framework for Turkey, 3 October 2005, pnt. 5; Negotiating Framework for Iceland, 26 July 2010, pnt. 17; Negotiating Framework for Croatia, 3 October 2005, pnt. 12; Negotiating framework for Montenegro, 29 March 2012, pnt. 4; Negotiating Framework for Serbia, 17 December 2013, pnt. 22.

76 Negotiating Framework for Croatia, 3 October 2005.

77 Negotiating Framework for Turkey, 3 October 2005.

78 Technically, chapter 23 is a new chapter introduced in 2005 in the negotiations with Croatia and Turkey, entitled in full 'judiciary and fundamental rights', whereas chapter 24 has previously existed (under the former title of 'cooperation in the field of justice and home affairs').

79 See also the Negotiating Frameworks for Montenegro, Serbia, and Iceland.

80 See the Commission's stocktaking of the work undertaken in the context of the Cooperation and Verification Mechanism over the past ten years, Commission Report on progress in Bulgaria under the Co-operation and Verification Mechanism, COM(2017) 43 final, 25 January 2017; Commission Report on progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 44 final, 25 January 2017.

as well as the lessons learned from Croatia's accession,⁸¹ the 2011 Enlargement Strategy makes it clear that issues related to the judiciary and fundamental rights and to justice and home affairs, *i.e.* Chapters 23 and 24, would be tackled early in the accession process on the basis of national Action Plans.⁸² This 'new approach' was subsequently endorsed by the Council,⁸³ and implemented in the negotiations with Montenegro, as reflected in its negotiating framework of June 2012.⁸⁴ According to the Commission, the new approach 'maximises the time countries have to develop a solid track record of reform implementation, thereby ensuring that reforms are deeply rooted and irreversible.'⁸⁵

The current Commission again emphasised the importance of the rule of law as one of the pillars⁸⁶ of its enlargement policy by underlining, in the outline of its medium-term strategy for enlargement, the need to reaffirm a strong focus on the 'principle of fundamentals first' in the accession process.⁸⁷

81 Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, pp. 2-3.

82 *Ibid.*, p. 5. The instrumental significance of Chapters 23 and 24 within this strategy is best evidenced by Montenegro's negotiating framework, in which it is stated that '[g]iven the link between the chapters 'Judiciary and fundamental rights' and 'Justice, freedom and security' ... as well as their importance for the implementation of the *acquis* across the board', should progress under these chapters significantly lag behind progress in the negotiations overall, the Commission on its own accord or on the request of one third of the Member States can propose to withhold its recommendation to open and/or close other negotiating chapters 'until this equilibrium is addressed'. See the Negotiating framework for Montenegro, 29 March 2012, pnt. 6.

83 Council Conclusions, 3132nd General Affairs Council, Doc. 18089/11, 5 December 2011. See also Presidency Conclusions, Brussels European Council, 9 December 2011.

84 Negotiating framework for Montenegro, 29 March 2012, pnt. 6.

85 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 2.; Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p.3. Also see General EU Position – ministerial meeting opening the Intergovernmental Conference on the Accession of Montenegro to the European Union, AD 23/12, 27 June 2012.

In addition, the Commission proposed to strengthen the use of benchmarks, through the introduction of interim benchmarks of the *acquis* chapters in addition to the opening and closing benchmarks. This 'new approach' to the enlargement policy, furthermore, included the use of screening reports, which establish the discrepancies between EU law and the candidates' legislation over the whole range of the *acquis*, and the use of actions plans, drawn up by the candidate countries. Such action plans operate as guidance documents for both the opening and interim benchmarks, as well as for the subsequent negotiations. Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, p. 5; Negotiating framework for Montenegro, 29 March 2012, pnt. 22.

86 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 6.

87 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 3.

According to this principle, the core issues of the rule of law, fundamental rights, strengthening of democratic institutions, as well as economic development remain key priorities in the enlargement process, since these issues 'reflect the importance the EU attaches to its core values and general policy priorities.'⁸⁸ The 2018 Western Balkan Strategy as well as the Enlargement Strategy of the same year reinforce the pivotal importance of rule of law reform in the applicant states and reconfirm the fundamentals first-approach.⁸⁹ According to the latter, addressing reforms in the area of the rule of law 'remains the most pressing issue for the Western Balkans'; not only that, it is also '*the* key benchmark against which the prospects of these countries will be judged by the EU.'⁹⁰ However, the former adds that '[e]fforts should be intensified to guide rule of law-related reforms in the region, to support the ambitious steps to be taken by the countries themselves,'⁹¹ indicating the importance of the notion as well as the continued struggles and need for more developments in this area.

This section showed that the EU has progressively concentrated on the rule of law as a central condition for development in the candidate states. It was demonstrated that the rule of law is not only a condition for eligibility and a Copenhagen political criterion – the non-compliance with which can constitute a potential case for suspension throughout the process. In addition, it is now also the first hurdle to overcome in the enlargement negotiations by way of Chapter 23; lack of progress in the rule of law can reduce the speed of or effectively halt the entire enlargement process. Next, the focus of this chapter will turn to the instruments that form the basis for the EU's rule of law promotion in its accession policy.

2.3 The EU's toolbox for rule of law promotion in its enlargement policy

The EU's legal framework of its enlargement policy, *i.e.* its toolbox for rule of law promotion, mirrors the increasing importance of the rule of law as presented above. This section will show that the rule of law has become an important element in the legal framework. The basic aim here is to provide insight into the legal instruments that underpin the EU's enlargement policy and the significance allocated to the consolidation and strengthening of the rule of law therein.

88 *Ibid.*, p. 5. See also Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 2.

89 Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 1.

90 *Ibid.*, p. 2 [emphasis added].

91 Commission Communication on A Credible Enlargement Perspective for and Enhanced Engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, p. 10.

The relations between the applicant countries and the EU are regulated by their individual association agreements. In the case of the CEECs this meant the so-called Europe Agreements (EAs). For Turkey, Malta and Cyprus the relationship was based on the Association Agreements concluded in 1963 and in the early 70s.⁹² In relation of the countries in the Western Balkans the association is covered by the Stabilisation and Association Agreements (SAAs) within the broader context of the Stabilisation and Association Process.⁹³

All agreements contain references to the rule of law, and, thus, clearly demonstrate the notion's increasing significance. After the collapse of the Soviet Union and the subsequent signing of Trade and Cooperation Agreements with the newly independent countries in Central and Eastern Europe, the European Council, meeting in Strasbourg in 1989, affirmed that the Community was ready to strengthen bilateral relations beyond the existing trade agreements.⁹⁴ Subsequently, Europe Agreements⁹⁵ were signed over a period of seven years – starting in 1991 with Poland,⁹⁶ Hungary,⁹⁷ and Czechoslovakia – before the articulation of the Copenhagen criteria, and with the Czech Republic⁹⁸ and Slovakia⁹⁹ separately, Estonia,¹⁰⁰ Latvia,¹⁰¹

92 Agreement establishing an Association between the EEC and Turkey, OJ[1964] P217/3687; Agreement establishing an Association between the EEC and Malta, OJ[1971] L61/2; Agreement establishing an Association between the EEC and the Republic of Cyprus, OJ[1973] L133/2.

93 Commission Communication on The Stabilisation and Association Process for the Countries in South-Eastern Europe, COM(1999) 235 final, 26 May 1999. See further Steven Blockmans 'Consolidating the Enlargement Agenda for South Eastern Europe' in Steven Blockmans & Sacha Prechal (eds) *Reconciling the Deepening and Widening of the European Union* The Hague: T.M.C. Asser Press (2008), pp. 59-86.

94 Presidency Conclusion, Strasbourg European Council, 8-9 December 1989, p. 10.

95 For a comprehensive study of Europe Agreements see Peter-Christian Müller-Graff (ed) *East Central Europe and the European Union: From Europe Agreements to Member Status* Baden-Baden: Nomos (1997); Peter-Christian Müller-Graff 'Legal Framework for Relations between the European Union and Central and Eastern Europe: General Aspects' in Marc Maresceau (ed) *Enlarging the European Union. Relations between the EU and Central and Eastern Europe* London: Longman (1997), pp. 27-40.

96 Europe Agreement establishing an association between the EC and the Republic of Poland, OJ[1993] L348/2.

97 Europe Agreement establishing an association between the EC and the Republic of Hungary, OJ[1993] L347/2.

98 Europe Agreement establishing an association between the EC and the Czech Republic, OJ[1994] L360/2.

99 Europe Agreement establishing an association between the EC and the Republic of Slovakia, OJ[1994] L359/2.

100 Europe Agreement establishing an association between the EC and the Republic of Estonia, OJ[1998] L68/3.

101 Europe Agreement establishing an association between the EC and the Republic of Latvia, OJ[1998] L26/3.

Lithuania,¹⁰² Slovenia,¹⁰³ Bulgaria,¹⁰⁴ and Romania¹⁰⁵ after the acknowledgement of the CEECs membership perspective. While in the Preamble of all Europe agreements the rule of law is mentioned as one of the values underpinning the new political order, none of the EAs contain an explicit reference to the rule of law in the main body of the agreement.¹⁰⁶

Similar to the pre-accession process for the CEECs, the Stabilisation and Association Process (SAP)¹⁰⁷ is the broader strategic framework for the EU's relations with the countries in the Western Balkans, designed to promote stability and bring the countries, each at their own pace, closer to the Union.¹⁰⁸

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- 102 Europe Agreement establishing an association between the EC and the Republic of Lithuania, OJ [1998] L51/3.
 - 103 Europe Agreement establishing an association between the EC and the Republic of Slovenia, OJ[1999] L51/3.
 - 104 Europe Agreement establishing an association between the EC and the Republic of Bulgaria, OJ[1994] L358/3.
 - 105 Europe Agreement establishing an association between the EC and Romania, OJ[1994] L357/2.
 - 106 All but the earliest Europe Agreements contain an essential elements clause in which reference is made to 'respect for democratic principles and human rights, established by the Helsinki Final Act and in the charter of Paris for a New Europe, as well as the principle of market economy...'. Even though the latter, drawn up in the context of the OSCE, highlights human rights, democracy, and the rule of law in equal measure, it is just the first two that made their way into the essential elements clause of the EAs explicitly.
 - 107 Borrowing its 'regional approach', with elements of political and economic conditionality, from its practice under the Lomé conventions, the EU's approach towards South East Europe as a region was initiated at the multilateral Royaumont summit in 1995, during which the foreign ministers of the Member States, representatives of the former Yugoslav countries, representatives of the neighbouring countries, including Albania, met with delegations from Russia and the USA, as well as representatives from the Council of Europe and the OSCE. The 'regional approach' to support the implementation of the Dayton Peace Agreements and facilitate political stability and economic prosperity was adopted by the Council thereafter (see Council Conclusions and Declaration on former Yugoslavia of 26 February 1996). The approach was open to those countries in the region for which the Council had not yet adopted negotiating directives for an association agreement. Effectively, this meant the countries of former Yugoslavia and Albania. The EU offered financial assistance, trade preferences and contractual relations and progressive compliance with the conditions established by the Council is to be rewarded with intensified bilateral cooperation. In case of serious and repeated non-compliance with the conditions underpinning the respective level of cooperation, however, trade preferences might be withdrawn, financial assistance may be frozen and, where applicable, an agreement may be suspended. For a detailed account of these measures see Christian Pippan 'The Rocky Road to Europe: The EU's Stabilisation and Association Process for the Western Balkans and the Principle of Conditionality' *European Foreign Affairs Review* (2004) 9, pp. 219-245 at 229-238.
 - 108 Council Conclusions 'The Thessaloniki Agenda for the Western Balkans: Moving towards European Integration', Annex A, 2518th External Relations Council, 16 June 2003; Commission Report on The Stabilisation and Association Process – First Annual Report, COM(2002) 163 final, 3 April 2002, p. 4.

Originally, the SAP stipulated that establishing SAAs would 'depend on the willingness of the countries concerned to work towards consolidating peace and to the respect of human rights, the rights of minorities and democratic principles.'¹⁰⁹ However, the General Affairs Council elucidated that rule of law conditionality has also always been part and parcel of the conditionality applied to the Western Balkans.¹¹⁰ This conclusion is reinforced by, amongst others, the feasibility studies prepared by the Commission for the negotiation of the SAAs, in which, for example in the case of Bosnia and Herzegovina, it is stated that: 'Respect for democratic principles and human rights as proclaimed in key international documents such as the Universal Declaration of Human Rights, and respect for the principles of international law and *rule of law in general* should form the basis of the domestic and external policies of parties to a SAA.'¹¹¹ Qualified by the Commission as a new type of contract,¹¹² Stabilisation and Association Agreements have been

109 Council Conclusions and Declaration on former Yugoslavia of 26 February 1996. See also the Commission Communication on Common Principles for Future Contractual Relations with certain Countries in South-Eastern Europe, COM(96) 476 final, 2 October 1996, p. 1, which limits itself to these three principles.

110 Council Conclusions 'The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex to Annex III, 2203rd General Affairs Council, 29-30 April 1997.

111 Commission Report on the preparedness of Bosnia and Herzegovina to negotiate a Stabilisation and Association Agreement with the European Union, COM(2003) 692 final, 18 November 2003, p. 6 [italics added]. Also see Commission Communication on the preparedness of Serbia and Montenegro to negotiate a Stabilisation and Association Agreement with the European Union, COM(2005) 476 final, 12 April 2005, p. 4; Commission Report on the feasibility of negotiating a Stabilisation and Association Agreement with the Republic of Croatia, COM(2000) 311 final, 24 May 2000, pp. 4-5; Report from the Commission on the feasibility of negotiating a Stabilisation and Association Agreement with Albania, COM(1999) 599 final, 24 November 1999 p. 16; Commission Report on the feasibility of negotiating a Stabilisation and Association Agreement with the Former Yugoslav Republic of Macedonia, COM(1999) 300 final, 16 June 1999.

112 Commission Communication on the Stabilisation and Association Process for countries of South-Eastern Europe, COM(1999) 235 final, 26 May 1999, p. 3. Pippan has called the SAAs a 'sui generis type of EU agreement' the primary aim of which is the establishment of a formal association with the EU over a transitional period, during which the Western Balkan countries gradually adopt their laws to the core standards and rules of the single market. Pippan (2004), p. 233. See, however, Phinnemore's article on the SAAs' considerable similarities with the earlier Europe Agreements, David Phinnemore 'Stabilisation and Association Agreements: Europe Agreements for the Western Balkans?' 8 *European Foreign Affairs Review* (2003), pp. 77-103. For more on the SAAs see Steven Blockmans *Tough Love. The European Union's Relations with the Western Balkans* The Hague: T.M.C. Asser Press (2007), pp. 253-268; Tatham (2009) pp. 167-170.

signed since 2001 with FYROM,¹¹³ Croatia,¹¹⁴ Albania,¹¹⁵ Montenegro,¹¹⁶ Serbia,¹¹⁷ Bosnia and Herzegovina,¹¹⁸ and Kosovo.¹¹⁹

The SAAs clearly emphasise the importance of the rule of law. Next to a reference in the preamble,¹²⁰ the notion is included in Article 2 as an essential element, the non-compliance with which can, depending on the suspension clause in the agreement, be a reason for suspending the agreement¹²¹ or can give rise to 'appropriate measures'.¹²² It should be noted, however, that no further details as to the interpretation of the essential elements, and, thus, to the EU's understanding of the rule of law in the specific context of the SAAs has been forthcoming so far. Furthermore, all SAAs' aims (but for the earliest ones with Macedonia and Croatia) include support to the efforts of the country to strengthen democracy and the rule of law.¹²³ More particularly, the agreements frame the strengthening efforts of the rule of law in terms of the specific focus of the reinforcement of institutions. Accordingly, particular importance is attached 'to the consolidation of the rule of law, and the reinforcement of institutions at all levels in the areas of administration in general and law enforcement

113 Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia, OJ[2004] L84/13.

114 Stabilisation and Association Agreement with the Republic of Croatia, OJ[2005] L26/3.

115 Stabilisation and Association Agreement with the Republic of Albania, OJ[2009] L107/166.

116 Stabilisation and Association Agreement with the Republic of Montenegro, OJ[2010] L108/3.

117 Stabilisation and Association Agreement with the Republic of Serbia, OJ[2013] L278/16.

118 Stabilisation and Association Agreement with Bosnia and Herzegovina, of the other part, OJ[2015] L164/2.

119 Stabilisation and Association Agreement with Kosovo*, OJ[2016] L 71/3.

120 Exceptionally, the Preamble of the SAA with Kosovo pays specific attention to the commitment of the parties to *institutions* based on the rule of law, to good governance and democratic principles, thereby diverging from the other SAAs on this particular paragraph.

121 See for example Article 133 of the Stabilisation and Association Agreement with Serbia, which provides that '[e]ither Party may suspend this Agreement, with immediate effect, in the event of the non-compliance by the other Party of one of the essential elements of this Agreement.'

122 See for example Article 126(2) of the Stabilisation and Association Agreement with Albania, in which it is stated that '[i]f either Party considers that the other Party has failed to fulfil an obligation under this Agreement, it may take appropriate measures. Before doing so, except in cases of special urgency, it shall supply the Stabilisation and Association Council with all relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties.' According to the Joint Declaration concerning Article 126, attached to the Agreement, the parties agree that the cases of special urgency referred to in the Article mean 'cases of material breach of the Agreement by one of the two Parties.' Violation of the essential elements, including the rule of law, is provided as an example of such a material breach. See also the Joint Declaration concerning Article 120 attached to the Stabilisation and Association Agreement with Croatia.

123 See for example the Article 1(2)(a) of the Stabilisation and Association Agreement with Montenegro.

and the administration of justice in particular.¹²⁴ This specific aim is further divided into the elements for cooperation: strengthening judicial independence, improving judicial efficiency, improving the functioning of the police and other law enforcement bodies, providing adequate training, and fighting corruption and organised crime. The SAA with Kosovo adds to this list two more areas of cooperation: improving judicial impartiality and accountability, as well as developing adequate structures for the police, prosecutors and judges and other judicial and law enforcement bodies to adequately prepare them for cooperation in civil, commercial and criminal matters, and to enable them to effectively prevent, investigate, prosecute and adjudicate organised crime, corruption and terrorism.¹²⁵ Overall, the text of the SAAs makes it abundantly clear that the objective of assistance under the agreements is focused on institution building and shall, thus, contribute to 'the democratic, economic and *institutional reforms*'¹²⁶ of the countries covered by the Stabilisation and Association Process.

Next to the bilateral Europe Agreements and Stabilisation and Association Agreements, the EU's legal arsenal for rule of law promotion in the pre-accession process and the Stabilisation and Association Process consists of Accession Partnerships (APs) in the case of the CEECS, and the similar instrument of European Partnerships (EPs) for the Western Balkans, as well as a number of financial regulations which create the framework for financial and technical cooperation. Below, the APs, EPs, and the financial regulations will be briefly discussed, in so far as they relate to the rule of law.

While the Europe agreements formed the basis for the relations between the EU and the applicant states, it is the APs that guided the work of the candidates during the pre-accession process.¹²⁷ Originally based on Regulation 622/98 of 16 March 1998,¹²⁸ the individual Partnerships were used as the framework in which the priorities, objectives, and conditions for each country are set out, including all forms of EU assistance.¹²⁹ They define the priorities to be observed for adopting the EU *acquis*, formulated as short

124 See for example Article 80 of the Stabilisation and Association Agreement with Serbia; Article 75 of the Stabilisation and Association Agreement with Croatia; Article 74 of the Stabilisation and Association Agreement with Macedonia; Article 78 of the Stabilisation and Association Agreement with Albania; Article 80 of the Stabilisation and Association Agreement with Montenegro.

125 Article 83 of the Stabilisation and Association Agreement with Kosovo.

126 Cf. Article 105 of the Stabilisation and Association Agreement with Macedonia [emphasis added].

127 Inglis (2002), p. 107.

128 Council Regulation (EC) No 622/98 of 16 March 1998 on assistance to the applicant States in the framework of the pre-accession strategy, and in particular on the establishment of Accession Partnerships, OJ[1998] L85/1.

129 Maresceau (2003), p. 31.

and medium-term objectives. As a process of permanent adaptation,¹³⁰ the APs were prepared, reviewed and updated by the Commission on the basis of its annual progress reports and subsequently proposed to the Council.¹³¹ As such, they form unilateral decisions by the Council and are, thus, legally binding on the Council and the Member States only.¹³² However, in direct response to their country AP, every applicant has had to adopt a National Programme for the Adoption of the Acquis (NPAA) – a detailed, multi-annual plan for the alignment of domestic legislation with EU regulations.¹³³ Because of the fact that they are unilateral instruments, the APs were more comprehensive than the Europe Agreements, in principle reaching all areas of the *acquis*, including those areas that were not included, or even in existence, at the time of the conclusions of the earlier EAs. Annual reports on each country's progress in meeting the objectives spelled out in the APs were included in the Commission annual reports.¹³⁴

130 For the first round of the Accession Partnerships of the ten CEECs see Decisions 1998/259-1998/268, OJ[1998] L121/1-L121/46. Revisions occurred in 1999 (see Decisions 1999/850-1999/859, OJ[1999] L335/1-L335/61) and 2002 (see Decisions 2002/83-2002/94, OJ[2002] L44/1-L44/101). For Bulgaria and Romania a further revision followed in 2003 (Decision 2003/396, OJ[2003] L145/1 and Decision 2003/397, OJ[2003] L145/21 respectively).

The APs for Malta and Cyprus were introduced in 2000 on the basis of Council Regulation (EC) No 555/2000 13 March 2000 on the implementation of operations in the framework of the pre-accession strategy for the Republic of Cyprus and the Republic of Malta (see Decision 2000/248, OJ[2000] L78/10 for Cyprus and Decision 2000/249, OJ[2000] L78/17 for Malta). Both APs were updated together with the CEEC APs in 2002, see above.

In the case of Turkey, Council Regulation (EC) No 390/2001 of 26 February 2001, on assistance to Turkey in the framework of the pre-accession strategy, and in particular on the establishment of an Accession Partnership, formed the basis for the adoption of Turkey's initial AP (Decision 2001/235, OJ[2001] L85/13). Revisions followed in 2003 (Decision 2003/398, OJ[2003] L145/40), 2006 (Decision 2006/35, OJ[2006] L22/34), and 2008 (Decision 2008/157, OJ[2008] L51/4).

Even though Malta, Cyprus, and Turkey were, and are in case of the latter, covered by a separate legal regime from the CEECs, scholarly literature has pointed out that the all candidates in the fifth and sixth enlargement round were treated in essentially the same manner. See for example Inglis (2002), p. 107; Blockmans (2007), pp. 278-279; Tatham (2009), pp. 289-290.

131 In the Commission's original proposal presented in Agenda 2000, the APs were intended to be Commission decisions, Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997, pp. 63-64.

132 Kirstyn Inglis 'The Europe Agreements Compared in the Light of their Pre-accession Reorientation' 37 *Common Market Law Review* (2000) pp. 1173-1210 at 1184.

133 Inglis (2002), p. 108; Tatham (2009) pp. 291-293.

134 See for example Section D on 'Accession Partnership and National Programmes for the Adoption of the Acquis: Global assessment' in the 2001 Poland Regular Report, pp. 108-112.

For the countries in the Western Balkan, the European Partnerships¹³⁵ fulfil a largely similar role¹³⁶ to the Accession Partnerships.¹³⁷

Analysing the financial regulations underlying the Accession Partnerships and European Partnerships, it becomes apparent that the rule of law is emphasised in an incremental fashion, mirroring the EU's enlargement policy's increasing acknowledgement of its importance, as outlined above. From the beginning, Regulation 622/98, establishing the Accession Partnerships, linked financial assistance to respect of the commitments contained in the Europe Agreements and to progress towards fulfilment of the Copenhagen criteria, including the rule of law.¹³⁸ The so-called 'coordinating' Regulation 1266/99, subsequently ensured for applicant countries with an Accession Partnership that the PHARE regulation – the original financial regulation for economic aid to the CEECs¹³⁹ – was reoriented to a fully

135 Council Decisions 2004/515/EC, 2004/528/EC, 2004/518/EC, 2204/519/EC, 2004/520/EC, and 2004/648/EC, OJ[2004] L221/10, L222/20, L223/20, L227/21, and L297/19, respectively. These acts were repealed and replaced in 2006 by Council Decisions 2006/55/EC, 2006/57/EC, 2006/54/EC, and 2006/56/EC, OJ[2006] L35/19, L35/57, L35/1, and L35/32, respectively, and once more in 2008 by Council Decisions 2008/211/EC, 2008/212/EC, 2008/210/EC, and 2008/213/EC, OJ[2008] L80/18, L80/32, L80/1, and L80/46, respectively. After declaring its independence on 3 June 2006, it was appropriate to establish a separate European Partnership with Montenegro, which was done on 22 January 2007, see Council Decision 2007/49/EC, OJ[2007] L20/16.

136 For a comparison on the framework in relation to the Accession Partnerships with the CEECs, the framework covering Malta and Cyprus, and the regime that applies to Turkey, see Inglis (2002), pp. 106-107. For an analysis of the European Partnerships in the light of the Accession Partnerships, see Tatham (2009), pp. 324-325; Blockmans (2007), pp. 278-279.

137 Introduced by the Commission as a means of bolstering the SAP on the basis of past experiences, particularly the enhanced pre-accession process, the first round of EP's with Bosnia-Herzegovina, FYROM, Albania, Serbia and Montenegro (including Kosovo as defined by UN Security Council Resolution 1244 of 10 June 1999), and Croatia was approved by the Council in March 2004 on the basis of Council Regulation 533/2004. See Commission Communication on The Western Balkans and European Integration, COM(2003) 285 final, 21 May 2003, pp. 2-4. Also see the Declaration adopted at the EU-Western Balkans Summit adopted at Thessaloniki, Doc. 10229/03, 21 June 2003, pnt. 4.

138 Article 1 Regulation (EC) No 622/98. Also see Article 1 of both Regulation (EC) 555/2000 and Regulation (EC) 390/2011 on the Accession Partnerships and the pre-accession strategy for Cyprus and Malta, and Turkey, respectively.

139 Council Regulation (EEC) No 3906/89 of 18 December 1989 on economic aid to the Republic of Hungary and the Polish People's Republic, OJ[1989] L375/11. From 1990 onwards, Yugoslavia, amongst others, was a recipient of PHARE assistance, see Council Regulation (EEC) 2698/90 of 17 September 1990, OJ[1990] L257/1. Until 2000 PHARE assistance was extended to Albania (Council Regulation (EEC) No 3800/91 of 23 December 1991, OJ[1991] L357/10); Bosnia-Herzegovina (Council Regulation (EC) No 753/96 of 22 April 1996, OJ[1996] L103/5); Croatia (Council Regulation (EC) No 1366/95 of 12 June 1995, OJ[1995] L133/1); Former Yugoslav Republic of Macedonia (Council Regulation (EC) No 463/96 of 11 March 1996, OJ[1996] L65/3).

accession driven approach in line with the priorities, objectives and conditions set out in the APs.¹⁴⁰

The identification of priority areas for each candidate state is based on the analysis of the states' ability to fulfil the Copenhagen criteria. However, the first two rounds of APs show that the objectives within the political criteria are jumbled together, treated in a very condensed manner, and specific rule of law aims, short-term or medium-term, are virtually absent.¹⁴¹ Be that as it may, the 2002 Accession Partnerships manifest an increased focus on the rule of law, in line with the enlargement's policy focus on the rule of law, and the functioning of the judiciary in particular. Following the structure of the Regular Reports, the objectives under the political criteria have been made explicit and are divided on the basis of the binary approach of democracy and rule of law on the one hand, and human rights and the protection of minorities on the other.¹⁴² It is clear that in relation to the rule of law, the emphasis is heavily on the reform of the judicial system, with such objectives as the alleviation of courts' workload,¹⁴³ the review of the degree of immunity of members of the judiciary to ensure it is in line with international standards,¹⁴⁴ and the continued training of specialised judges and prosecutors including in *acquis*-related matters.¹⁴⁵

In contrast to the financial instruments covering the CEECs, the framework for assistance to the Western Balkans has provided more detail on the topic. Already in the earliest financial regulation on the countries in the area, with aid allocated to the restructuring process, the objective of consolida-

140 Article 4(2) Council Regulation (EC) No 1266/1999 of 21 June 1999 on coordinating aid to the applicant countries in the framework of the pre-accession strategy and amending Regulation (EEC) No 3906/89, OJ[1999] L161/68.

141 The only exception is the 1998 Accession Partnership with the Slovak Republic in which mention is made of the necessity of guaranteeing the independence of the judiciary as a medium-term objective under the political criteria. However, in all 1998 and 1999 Accession Partnerships the functioning, efficiency and reinforcement of the judiciary is discussed under the heading of 'Reinforcement of institutional and administrative capacity' (1998) or 'Reinforcement of administrative and judicial capacity' (1999). See for example the 1999 AP of the Czech Republic, which states as one of the short-term objectives under the latter heading 'begin implementing a programme to reform the judiciary (judges and state prosecutors) by filling vacancies, simplifying procedures, stepping up training of judges to EC law.'

142 See for example Council Decision 2002/87/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Hungary, OJ[2002] L44/37.

143 Council Decision 2002/88/EC of 28 January 2002 on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Latvia, OJ[2002] L44/45.

144 Council Decision 2002/83/EC on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Bulgaria, OJ[2002] L44/1.

145 Council Decision 2002/89/EC on the principles, priorities, intermediate objectives and conditions contained in the accession partnership with Lithuania, OJ[2002] L44/54.

tion of democracy and civil society is included.¹⁴⁶ Furthermore, not only is respect for the rule of law expressly identified as an essential aspect for aid, the essential elements clause also includes fulfilment of the 'specific conditions laid down by the Council for the implementation of cooperation with former Yugoslavia' as a precondition for financial assistance¹⁴⁷ – going further than the comparable provisions of the framework for the CEECs. The term 'specific conditions' referred to the February 1996 Council Conclusions and the simultaneously adopted Declaration on former Yugoslavia, in which value conditionality was introduced, albeit, however, in very broad and opaque terms.¹⁴⁸ The General Affairs Council alleviated this indeterminacy in April 1997 with its adoption of specific conditionality governing the EU's relations with the Western Balkans. According to the Conclusions, the EU intends to develop its relations with the countries of the region 'within a framework which promotes democracy, the rule of law, higher standards of human and minority rights, transformation towards market economies and greater cooperation between countries.'¹⁴⁹ Furthermore, adding some level of specificity, rule of law benchmarks are introduced and include effective means of redress against administrative decisions, access to courts and right to fair trial, and equality before the law and equal protection by the law.¹⁵⁰

Against this background, it can be shown that the subsequently adopted financial regulations underpinning the reform in the applicant states have augmented the rule of law's importance both by making it a primary objective of cooperation and assistance as well as by adding more specific indicators and benchmarks. Thus, the CARDS Regulation enumerated the creation of an institutional and legislative framework for the rule of law and the strengthening of legality as the second aim in the list of the Union's assistance objectives,¹⁵¹ and the latest Instrument for Pre-accession Assistance (IPA II) called attention to the strengthening of the rule of law as a 'key challenge'¹⁵² and a specific objective for the beneficiary countries, including an independent and efficient judiciary as well as the improve-

146 Article 4(2) Regulation (EC) No 1628/96, the so-called OBNOVA Regulation. This inclusive approach to aid was already apparent from the Commission's initial proposal on the topic, see Commission Communication on The European Union's Financial Contribution to Reconstruction in Former Yugoslavia, COM(95) 581 final, 18 December 1995, p. 2.

147 Article 2 Regulation (EC) No 1628/96.

148 Phipan (2004), pp. 223-224; Tatham (2009), p. 319.

149 Council Conclusions 'The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex to Annex III, 2203rd General Affairs Council, 29-30 April 1997.

150 *Ibid.*

151 Article 2(2)(b) Council Regulation (EC) 2666/2000 of 5 December 2000 on assistance for Albania, Bosnia and Herzegovina, Croatia, the Federal Republic of Yugoslavia and the Former Yugoslav Republic of Macedonia, repealing Regulation (EC) No 1628/96 and amending Regulation (EEC) No 2906/89 and (EEC) No 1360/90 and Decisions 97/256/EC and 1999/311/EC, OJ[2000] L306/1.

152 Paragraph 9 of the Preamble of Regulation (EU) No 231/2014.

ment of law enforcement.¹⁵³ Moreover, in addition to this specific purpose of cooperation, the rule of law also forms a horizontal aim, to which particular attention should be paid throughout all actions in the policy areas covered by the Regulation.¹⁵⁴

The greater emphasis – for example, ensuring full respect for the rule of law is a ‘key short-term priority’ for Kosovo in its 2008 European Partnership¹⁵⁵ – and level of detail of rule of law benchmarks are also reflected in the European Partnerships. Following the two-pronged approach of the structure of the political criteria, as introduced in the pre-accession process covering the CEECs, the section on democracy and the rule of law in the EPs has continued to provide a detailed list of rule of law related objectives in need of improvement, demonstrating the EU’s interpretation of the notion. To highlight one example in relation to the strengthening of the judicial system taken from Croatia’s European Partnership:¹⁵⁶

Develop and implement a comprehensive strategy for judicial reform in consultation with interested bodies, including the adoption of necessary new legislation and the establishment of a career management system which also includes an open, fair and transparent system for recruitment, evaluation and mobility. Enhance professionalism in the judiciary by ensuring adequate State funding for the training institutions for judges and other judicial officials, allowing it to develop high-quality training for judges, prosecutors and administrative staff. Provide for adequate initial and vocational training schemes. Address the problem of backlog in courts. Take measures to ensure proper and full execution of court rulings.

Finally, in addition to the legal framework for rule of law promotion in enlargement described above, mention should be made of the judicial dialogues on rule of law or rule of law related matters. Initiated with three of the Western Balkan countries under the Stabilisation and Association Process, the dialogues were set up with the aim of advancing structured relations on the implementation of the rule of law with aspiring member countries prior to the SAAs entering into force. The Structured Dialogue on Justice with Bosnia-Herzegovina, launched in 2011, attempts to ensure an independent, effective, impartial and accountable judicial system.¹⁵⁷ It is a platform for discussing the reforms necessary to allow Bosnia-Herzegovina

153 Article 2(1)(a)(i) Regulation (EU) No 231/2014.

154 Article 3(2) Regulation (EU) No 231/2014.

155 Council Decision 2008/213/EC of 18 February 2008 on the principles, priorities and conditions contained in the European Partnership with Serbia including Kosovo as defined by United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2006/56/EC, OJ[2008] L80/46.

156 Council Decision 2004/648/EC of 13 September 2004 on the principles, priorities and conditions contained in the European Partnership with Croatia, OJ[2004] L297/19.

157 Stefan Füle, European Commissioner for Enlargement and European Neighbourhood Policy, ‘Friends of Bosnia and Herzegovina’, SPEECH/11/730, 8 November 2011, available at: http://europa.eu/rapid/press-release_SPEECH-11-730_en.htm.

to progress in the alignment of its judicial system with the *acquis* and relevant standards.¹⁵⁸ At the end of each plenary session, the European Commission issues a set of recommendations in which necessary reform measures of, mostly, the judiciary sector are outlined.¹⁵⁹

In order to address the rule of law early on in Kosovo's pre-accession process, the Commission jointly with the Kosovo authorities launched a Structured Dialogue on the Rule of Law in May 2012. The Dialogue takes place twice a year and proves a context in which to regularly assess Kosovo's progress on the judiciary, the fight against organised crime, and the fight against corruption.¹⁶⁰ With the opening of accession negotiations blocked by Greece for some years from 2009 onwards, the EU devised the so-called High Level Accession Dialogue as a mechanism with the intention to maintain the tempo of the reforms that the Former Yugoslav Republic of Macedonia was carrying out under its National Programme for the Adoption of the Acquis, adopted in response to its European Partnership. The Dialogue covers five issues, including the rule of law.¹⁶¹ Stressing the importance of the Dialogue, the Commission noted in its 2013-2014 Enlargement Strategy that: 'The High Level Accession Dialogue has contributed to progress in most priority areas, including the elimination of court backlogs and progress in the fight against corruption. The country has already reached a high level of alignment relative to where it is in the accession process and has made further progress in improving its ability to take on the obligations of membership.'¹⁶²

Against the background provided in this section, in which the Union's enlargement policy was set out and the positioning of the rule of law within the framework of the policy was explained, the following section will turn to the testing of the analytical framework of the rule of law, established in Part I on the basis of an examination of the common rule of law elements found in the national rule of tradition (chapter 1) and in legal theory (chapter 2), against the EU's practice in the field of enlargement.

158 See for example the first set of preliminary recommendations from the European Commission, of 6 June 2011, available at http://europa.ba/wp-content/uploads/2015/05/delegacijaEU_2012022712220919eng.pdf.

159 For an overview of the recommendation adopted so far see the site of the EU's Delegation to Bosnia-Herzegovina: http://europa.ba/?page_id=553.

160 See for example, European Commission 'Structure Dialogue on the Rule of Law with Kosovo: Conclusions' Press release, Brussels, 30 May 2012, available at: http://ec.europa.eu/archives/commission_2010-2014/fule/docs/news/20120530_rol_d_conclusions_30_may.pdf; European Commission 'Third meeting of the Structured Dialogue on the Rule of law – Operational conclusions, Brussels, 16 January 2014, available at: <http://md.rks-gov.net/desk/inc/media/7BAF7A77-014B-4509-8D27-09A084C932D3.pdf>.

161 The other themes are the freedom of expression, ethnic relations, challenges for electoral reform, public administration reform, strengthening of the market economy, and good neighbourly relations.

162 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(700) final, 16 October 2013, p. 17.

3. RULE OF LAW ELEMENTS IN THE EU'S PRACTICE IN ENLARGEMENT

In this part of the chapter, the Union's practice in its enlargement policy will be tested against the framework on the rule of law, established in Part I of the thesis. It should be recalled that the common rule of law elements found on the basis of an examination of the national rule of law traditions and legal theory were categorised in the framework along the lines of *formal*, *procedural*, and *institutional* elements. It was demonstrated in the first part of this thesis that to the first category belong those elements that are concerned with the qualifications for the validity and quality of law itself, encapsulated by the notion of legality. However, in order for the rule of law to exist, those laws must be applied and enforced in a way that is procedurally just, and, moreover, in a judicial system that effectively supports their application. Therefore, to the second category belong those elements that have to do with the procedures of how the law is applied in practice, including impartiality, efficiency, and access to justice. Finally, the analysis undertaken in the first part showed that for a state to function under the rule of law some form of the doctrine of the separation of powers must be established. Moreover, the point was made that legal scholars have concentrated their scrutiny of the rule of law on the ways of separation and the powers of one branch in particular, that of the judiciary. Consequently, the third category of institutional elements includes the notion of the separation of powers, with a particular emphasis on judicial independence. In this light, section 3.1. will focus on *formal* elements, section 3.2 on *procedural* elements, and section 3.3 will cover the *institutional* elements of the rule of law.

3.1 Formal elements of the rule of law

The present section is concerned with the examination of the EU's practice in its enlargement policy in relation to the principle of legality. The main argument advanced here is that, in line with the findings in the case study on development cooperation, the EU has little consideration for the element of legality in its conceptualisation of the rule of law in enlargement. It will be argued that the examination of the legal framework and the Copenhagen related policy documents shows that the Union not only values *institutional* aspects of the rule of law over *formal* ones, but also that the demands of legal approximation in combination with the qualitative methodology underlying the enlargement policy actually threaten formal elements such as stability and the coherence of law.

To this end, the section is divided into three subsections. Subsection one will focus on the definition of the rule of law proffered in Europe Agreements concluded with the countries in central and Eastern Europe, the Association Agreements with Cyprus, Malta, and Turkey, the Stabilisation and Association Agreements underlying the EU's relations with the countries in South-eastern Europe, as well as the financial framework pertaining to the enlargement policy. It will be shown that the earlier Europe and

Association Agreements provide little towards the EU's definition on the rule of law. Moreover, while the Stabilisation and Association Agreements expressly include support for the rule of law as an aim of association, it will be demonstrated that the areas of cooperation listed are again only *institutional* in nature, thereby neglecting the formal element of the rule of law. It will furthermore be argued that the financial framework underpinning the EU's enlargement policy provides a similar picture, whereby the early Regulations underpinning the Europe Agreements, such as PHARE, do not expressly include the rule of law, and the later financial Regulations covering the countries in South-eastern Europe offer financial aid for *institutional* rule of law reform, legislative approximation, and capacity building.

Subsection two will then continue by testing these findings against the policy's main documents, including the Enlargement Strategy's and the annual regular/progress reports. It will be argued that the Copenhagen documents confirm the *institutional* focus of the legal framework, with little attention for the rule of law's formal element of legality. However, it will also be shown that the EU's demands for legislative approximation in combination with the accession methodology has led to a quantitative approach, whereby alignment with the *acquis* is described in terms of quantity, not quality. In the third subsection it will be demonstrated that the EU's quantitative approach, whereby progress assessment of the implementation of the *acquis* is measured on the basis of numbers rather than on the basis of legislative quality, has given rise to problems of legality at the domestic level, including stability, coherence, and compliance. It will be shown that even though there is growing evidence that for law to be effective local 'adaptation' is preferred over 'adoption', the nature of the *acquis* is such that it precludes alterations by the applicant states, thereby leaving little to no room for considerations of the quality of the transposed laws within the overall domestic legal framework. Moreover, the literature confirms the findings of the preceding subsections that the EU's 'more is better' mindset encourages a quantitative assessment to the detriment of legality and its requirements for the quality of law.

3.1.1 *The lack of formal legality in the legal framework underpinning enlargement*

The EU's legal framework for enlargement (Article 49 TEU, including the Copenhagen criteria, the bilateral agreements underpinning the relations with the applicant countries, and the financial framework) offers limited insight into the element of formal legality. While Article 49 TEU, without further elaboration, refers to Article 2 TEU and the European council conclusions, including the Copenhagen criteria, the latter merely provides that in order to become a Member State, the candidate country has achieved 'stability of institutions guaranteeing ... the rule of law....' As discussed in the section on the EU's toolbox for enlargement,¹⁶³ the Europe Agreements,

163 See section 2.3.

as well as the Association Agreements covering the relations with Cyprus, Malta, and Turkey, did not provide much clarity on the notion's understanding, merely mentioning the significance of the rule of law for the political system of the candidate countries in the Preamble.

In this respect, the Stabilisation and Association Agreements are slightly more illuminating. Incorporating support for the strengthening of the rule of law as a principal aim of the association, the agreements thereupon place the rule of law under the Title on 'Justice and Home Affairs' or, in the later agreements, 'Justice, Freedom and Security', the relevant provision of which lists a number of rule of law elements as the aims of cooperation. In line with the heading of the Article, namely, 'Reinforcement of institutions and the rule of law', the included elements comprise the quality and functioning of the institutions involved in the judicial sector, such as the judiciary, the police and other enforcement bodies.¹⁶⁴ As such, the Article closely follows the formulation of the Copenhagen political criteria of 'stability of *institutions*' guaranteeing the rule of law. As demonstrated by the formulation of this particular provision, the institutional focus does not include a reference to the quality requirements for law itself.

It has to be mentioned that, notwithstanding this institution-centric interpretation of the rule of law, there is one reference in the later SAAs to a particular requirement of legality, namely, stability. The 'strengthening of the rule of law in the business area through a stable and non-discriminatory trade-related legal framework',¹⁶⁵ is incorporated as a particular goal in the context of cooperation in the area of economic and trade policy. However, considering the consensus among legal philosophers on the relevance of the requirements of formal legality, it would be expected that stability is a desired quality of the entire legal framework, not merely of the trade area. It should be recalled that stability of the legal framework features prominently as a rule of law requirement put forward by Fuller and most other legal philosophers. After all, as it was argued in chapter 2,¹⁶⁶ in the absence of both stability and predictability in law, citizens have difficulty managing their affairs effectively, putting law's guiding function under pressure. Moreover, legal stability also has moral value insofar as it assures that like cases will be treated equally. Therefore, particularly in the context of the enlargement policy with its heavy emphasis on the implementation of the entire EU *acquis*, the issue of stability of the legal framework would be expected to be especially pertinent. After all, both the Europe Agreements and the Stabilisation and Association Agreements stipulate that the major

164 See for example Article 80 of the Stabilisation and Association Agreement with Serbia.

165 See Article 87 of the Stabilisation and Association Agreement with Albania; Article 89 of the Stabilisation and Association Agreement with Montenegro; Article 89 of the Stabilisation and Association Agreement with Serbia; Article 87 of the Stabilisation and Association Agreement with Bosnia and Herzegovina; Article 94 of the Stabilisation and Association Agreement with Kosovo.

166 See chapter 2, section 3.2.

precondition for the applicant countries' economic integration into the Community, now Union, is the approximation of the existing and future legislation to that of the EU.¹⁶⁷

However, examination of the reports confirms the initial findings on this requirement. In line with the Stabilisation and Association Agreements, the basic statement made in the reports is that weaknesses in the judiciary and subsequent lack of stability, or legal certainty, hamper a fully functioning market economy.¹⁶⁸ For example, in the 2009 Progress Report on FYROM, the Commission offers that 'in general, legal procedures are still slow and sometimes the quality of court decisions is low. This is continuing to have a negative impact on legal certainty and is impeding the proper functioning of market mechanisms, with an adverse impact on the business environment and the country's attractiveness to foreign investment.'¹⁶⁹

167 See for example Article 68 of the Europe Agreement with Poland. According to Article 69, the approximation of laws would extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport, and the environment. Later Europe Agreements have added other areas such as insurance law, rules on public contracts and public procurement, nuclear law and regulation, telecommunications, public procurement, statistics, product liability, labour law, and entrepreneurial law. See for example the Europe Agreements with Lithuania, Latvia, and Estonia respectively.

For the SAAs, see for example 72(1) of the Stabilisation and Association Agreement with Montenegro, which states that: 'The Parties recognize the importance of the approximation of the existing legislation in Montenegro to that of the Community and of its effective implementation. Montenegro shall endeavour to ensure that its existing laws and future legislation will be gradually made compatible with the Community *acquis*. Montenegro shall ensure that existing and future legislation will be properly implemented and enforced.'

168 2005 Progress Report Croatia, p. 80; 2005 Progress Report Kosovo, p. 57; 2006 Progress Report Bosnia and Herzegovina, p. 25; 2006 Progress Report Croatia, p. 28; 2006 Progress Report Former Yugoslav Republic of Macedonia, p. 21; 2007 Progress Report Former Yugoslav Republic of Macedonia, p. 22; 2008 Progress Report Former Yugoslav Republic of Macedonia, p. 26; 2008 Progress Report Albania, p. 22; 2008 Progress Report Kosovo, p. 37; 2009 Progress Report Bosnia and Herzegovina, p. 35; 2009 Progress Report Montenegro, p. 24; 2010 Progress Report Croatia, p. 29; 2010 Progress Report Former Yugoslav Republic of Macedonia p. 30; 2011 Progress Report Albania, p. 37; 2011 Progress Report Croatia, p. 28; 2013 Progress Report Bosnia and Herzegovina, p. 31; 2013 Progress Report Former Yugoslav Republic of Macedonia, p. 46; 2014 Progress Report Albania, p. 45; 2014 Progress Report Former Yugoslav Republic of Macedonia, p. 11; 2014 Progress Report Serbia, p. 45; 2015 Report Serbia, p. 53; 2016 Report Bosnia and Herzegovina, p. 42; 2016 Report Serbia, p. 16.

169 2009 Progress Report Former Yugoslav Republic of Macedonia, p. 28. Also see Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649, 8 November 2006, p. 25; Commission Communication on Enlargement Strategy and Main Challenges 2007-2008, COM(2007) 663 final, 6 November 2007, p. 38; Commission Communication on Enlargement Strategy and Main Challenges 2008-2009, COM(2008) 674 final, 5 November 2008, p. 39; Commission Communication on Enlargement Strategy and Main Challenges 2010-2011, COM(2010) 660, 9 November 2010, p. 38.

Furthermore, while in the later enlargement strategies legal certainty is described as an outcome of the strengthening of the rule of law, it remains firmly entrenched only as a requirement for the proper functioning of the business environment.¹⁷⁰ Apart from this very singular interpretation of this particular requirement of legality, presented in the specific legal framework of the SAAs, it can, at this point, merely be concluded that the element of legality is not a predominant feature in the EU's conceptualisation of the rule of law in enlargement. Further examination of the financial framework underpinning enlargement seems to substantiate this conclusion.

As already outlined above, the original PHARE Regulation and the Regulations relating to the accession partnerships do not provide further clarity on the rule of law elements the applicant states are expected to comply with.¹⁷¹ Even though the provision of aid is linked to respect of the commitments contained in the Europe Agreements/ Association Agreements and to progress towards fulfilment of the Copenhagen criteria, from the above examination it is clear that neither bring further detail to the table in terms of insight into the EU's understanding of the rule of law in this context. Where the rule of law is mentioned, for example in the Coordinating Regulation in its reorientation of the PHARE Regulation, it again closely follows the formulation of the Copenhagen political criteria by stating that funding under the PHARE Programme shall focus on the main priorities for the adoption of the *acquis*, which is then phrased in terms of 'building up the administrative and institutions capacities of the applicant States...'.¹⁷²

The same institutional focus of rule of law reform can be observed in relation to the Western Balkans in the aims of cooperation of the CARDS Regulation.¹⁷³ Similarly, the second Instrument for Pre-accession Assistance (IPA II) Regulation and its predecessor stipulate that assistance should be programmed and implemented, *inter alia*, in relation to institution- and

170 According to the 2015 Strategy, '[t]he rule of law and economic development can be seen as two sides of the same coin. Strengthening the rule of law increases legal certainty, encourages and protects investment and contributes significantly to supporting economic development and competitiveness. Conversely, economic reforms and integration have the capacity to stabilise countries in the longer term.' Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 5. Further see, Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013, p. 6; Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 10.

171 See for example Article 6 of Regulation (EC) No 555/2000 on the pre-accession strategy for Cyprus and Malta which stipulates that: 'Where an element that is essential for continuing to grant pre-accession assistance is lacking, in particular when the commitments contained in the Association Agreements are not respected and or progress towards fulfilment of the Copenhagen criteria is insufficient, the Council, acting by a qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to Cyprus or Malta.'

172 Article 2(3) Regulation (EC) No 1266/99.

173 Article 2(3) Regulation (EC) No 2666/2000.

capacity building.¹⁷⁴ However, where the CARDS Regulation at least considered the generic legislative angle next to the strengthening of institutional capacity by stipulating that assistance should *inter alia* be for ‘the creation of an institutional and *legislative framework* to underpin ... the rule of law...’,¹⁷⁵ this component has disappeared in the later financial instruments for pre-accession assistance. Moreover, the reference in the CARDS Regulation to the ‘strengthening of legality’,¹⁷⁶ inserted almost as an afterthought under the aims of cooperation in the same section that includes the rule of law and without further elaboration, has not been transposed to the later framework of the IPA Regulations.

After having examined the legal framework, it can be concluded that the EU’s understanding of the rule of law in enlargement does not consider formal legality as a main component. While the requirement of stability is put forward in the Stabilisation and Association Agreements in relation to the business environment, it is not regarded as a focal element for the overall legislative framework. Against this backdrop, the next section will focus on the Union’s implementation of this framework through the relevant Copenhagen related documents, including the Commission’s enlargement Strategies and the annual progress reports.

3.1.2 *The lack of the element of formal legality in the Copenhagen criteria related documents in the light of the EU’s quantitative approach*

Exploring the relevant documents, it appears that the Commission has attempted to create the impression of having constructed a pre-accession procedure that examines not just law in the books, but, rather, rule of law in action. For example, in the very first composite paper, the Commission stressed that concerning democracy and the rule of law it has looked at ‘the way democracy functions in practice instead of relying on formal descriptions of the political institutions.’¹⁷⁷ In 2010, then EU enlargement Commissioner Füle, during his presentation of the yearly Enlargement strategy, underscored that: ‘The EU expects a convincing track record in

174 Article 3(1)(a) Regulation (EU) No 231/2014. According to the overall institutional approach, the specific objectives pursued under the Regulation framed the rule of law in terms of an independent and efficient judiciary as well as capacity-building measures for improving law enforcement, see Article 2. For the previous IPA Regulation see Article 3(1)(a) Regulation (EC) No 1085/2006. Also see paragraph 13 of its Preamble, which states that: ‘Assistance for candidate countries as well as for potential candidate countries should continue to support them in their efforts to strengthen democratic institutions and the rule of law... and it should therefore be targeted at supporting a wide range of institution-building measures.’ [emphasis added]

175 Article 2(2)(b) Regulation (EC) 2666/2000 [emphasis added].

176 *Ibid.*

177 Commission Composite Paper on progress towards accession by each of the candidate countries, COM(98) 712 final, 17 December 1998, p. 3.

the fulfilment of these benchmarks, in particular regarding judiciary and fundamental rights. Accession negotiations do not simply involve ticking boxes about legislative approximation. Countries must build a credible track record of reform and implementation, in particular in the area of rule of law.¹⁷⁸ This suggests that the European Union in its enlargement policy has not merely adopted an approach towards its rule of law reform that would focus on creating functioning institutions, the adoption of EU legislation and a quantitative progress analysis thereof during the pre-accession process, but a process that examines the quality of laws, of how law is applied in practice and of how law both guides peoples behaviour and sets the boundaries for institutions. However, already just one paragraph further down in the same 1998 composite paper, the Commission couched what needs to change in the applicant countries in purely *institutional* terms by stating that in the area of the rule of law '[a] common problem for all the candidate countries remains the inherent weakness of the judiciary, from the training of judges to procedural reforms aimed at overcoming excessive delays in court cases.'¹⁷⁹

This institutionally oriented approach towards the rule of law is confirmed in the later Enlargement Strategies, for example in 2001 when the Commission remarked on the progress achieved by the applicant countries so far: 'Further progress was made in reforming and strengthening the judicial system, as a vital element in ensuring respect for the rule of law and in the effective enforcement of the *acquis*.'¹⁸⁰ Similarly, the 2006-2007 Strategy states that the Commission 'will pay particular attention to the establishment of the structures needed to ensure the rule of law. This includes administrative and judicial capacity...'¹⁸¹ Also on the level of the individual candidate states the implementation of the *acquis* is formulated with reference to effective implementation capacity, as evidenced, for example, by the following in relation to Bulgaria:

178 Stefan Füle, European Commissioner for Enlargement and the Neighbourhood Policy, 'Press point on enlargement package', SPEECH/10/639, 9 November 2010, available at: http://europa.eu/rapid/press-release_SPEECH-10-639_en.htm.

179 Commission Composite Paper on progress towards accession by each of the candidate countries, COM(98) 712 final, 17 December 1998, p. 3.

180 Commission Strategy Paper & Report on the progress towards accession by each of the candidate countries 'Making a Success of Enlargement, COM(2001) 700 final, 13 November 2001, p. 10. See also Commission Enlargement Strategy Paper & Report on progress towards accession by each of the candidate countries, COM(2000) 700 final, 8 November 2000, p. 17; Commission Strategy Paper & Report on the progress towards accession by each of the candidate countries – Making a Success of Enlargement, COM(2001) 700 final, 13 November 2001, p. 12.

181 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 22.

Overall, Bulgaria has now achieved a reasonable degree of alignment with the *acquis* in the large majority of areas. It is also on track in developing adequate administrative capacity to implement the *acquis* in a considerable number of fields. Bulgaria has established most of the necessary institutional structures. Nevertheless, in some sectors, further efforts and resources are required to strengthen the capacities of these institutions and to ensure their effective functioning.¹⁸²

More importantly, in relation to the element of formal legality, as the above example shows, alignment with the *acquis* and changes made to domestic legislation are described in terms of quantity, not quality. Legal approximation, that is the harmonisation of national legislation to the Union's *acquis*, is a critical component of the pre-accession process; alignment leads to credibility of reforms, and, thus to progress in the arduous and lengthy transition process in candidate countries to make them fit for accession. The logic behind this process assumes that the EU model brings with it a comprehensive quality and density of regulation that is superior to the existing legislation in the applicant states. Thus, according to Commission officials, 'adopting the EU *acquis*, irrespective of any imperfections, would still represent an improvement over the status quo.'¹⁸³ Indeed, the *acquis* comprises a ready-made corpus of rules that needs to be accepted *en bloc*,¹⁸⁴ and which will be difficult to develop in the absence of effective domestic policy-making and legislative processes.¹⁸⁵ Accordingly, the Commission sets the transposition of and the alignment with the *acquis* in all areas of EU law as the short and medium-term objectives in the Accession Partnerships.¹⁸⁶

Inevitably, this approach encourages the setting of benchmarks and an appraisal of progress on the basis of a quantitative evaluation of transposed legislation. Indeed, progress is measured 'on the basis of decisions actually taken, legislation actually adopted, international conventions actually ratified (...) and measures actually implemented.'¹⁸⁷ In other words, according to the Commission, progress is measured on what is actually happening on

182 Commission Communication on 2005 Enlargement Strategy Paper, COM(2005) 561 final, 9 November 2005, p. 10.

183 Michaela Dodini & Marco Fantini 'The EU Neighbourhood Policy: Implications for Economic Growth and Stability' 44 *Journal of Common Market Studies* (2006), pp. 507-532 at 513-514.

184 Guy Harpaz & Lior Herman 'Approximation of Laws by Non-EU Countries to the EU *Acquis*' 9 *European Journal of Law Reform* (2007), pp. 357-360 at 357.

185 Andreas Herdina 'Approximation of Laws in the Context of the European Neighbourhood Policy' 9 *European Journal of Law Reform* (2007), pp. 501-504.

186 See for instance the 1999 Accession Partnership with Hungary, which requests for example the complete transposition and enforcement of legislation in the area of nature protection under the environmental chapter. Similarly, the 2002 Accession Partnership with Poland stipulates that the country continue its legal alignment in the field of transport, while taking into account the latest developments.

187 See for example the Commission's description and justification of its methodology in the 2002 Report on Slovenia, p. 9.

the ground and not just on the basis of promises made by the negotiating partners. However, the analysis in the annual progress reports and remarks made in the annual reports of the financing instruments,¹⁸⁸ show that this has led to a quantitative approach of crunching data and numbers. For instance, in the 2000 Regular Report on Romania's progress towards accession it is mentioned that '[i]n 1999, only 59 of the 453 draft laws, ordinances and emergency ordinances submitted to Parliament were adopted by the end of the year. This represents a significant decrease in comparison to previous years.'¹⁸⁹ In a similar fashion, Turkey's 2005 Regular Report states that '[a]fter the intensive reforms of the previous two years, Parliament continued its regular legislative work. A total of 184 draft laws have been submitted to Parliament since October 2004. Between October 2004 and June 2005 Parliament adopted 166 new laws.'¹⁹⁰ The 2018 reporting round show that the Commission still relies on its quantitative approach albeit not only in terms of critique; the increase of legislative output is praised¹⁹¹ as much as the slowdown of reform pace is criticised.¹⁹²

The reports also demonstrate that, in the essentially top-down EU driven process of legal approximation, compliance with the *acquis* is equated with success in legal reform.¹⁹³ However, measuring the outcome of law transplants in terms of compliance is an 'over-simplification', which remains short of capturing the reality of legal change.¹⁹⁴ While the enlargement success story of the fifth enlargement round comports with quantitative studies examining the behaviour of new members – finding that they transpose and comply with EU law at rates similar to older Member States,¹⁹⁵ in contrast, qualitative studies talk of a 'world of dead letters'¹⁹⁶

188 The annual reports on the PHARE Regulation in particular discuss progress of the candidate states in terms of 'the momentum reached in transposing legislation' and 'significant progress in legislative harmonization', see for example Commission Report on The Phare Programme – Annual Report 1998, COM(2000) 183 final, 31 March 2000, p. 25; Commission Staff Working Paper Annex to the 2002 Report on Phare and the pre-accession instruments for Cyprus, Malta and Turkey, SEC(2003) 910, 11 August 2003, p. 26.

189 2000 Romania Regular Report, p. 15.

190 2005 Turkey Progress Report, p. 10.

191 2018 Albania Report, p. 9; 2018 Former Yugoslav Republic of Macedonia Report, p. 11.

192 2018 Bosnia and Herzegovina Report, p. 4.

193 Rilka Dragneva 'CIS Model Legislation and its Contribution to Company Law Reform and Harmonization' in Rilka Dragneva (ed) *Investor Protection in the CIS: Legal Reform and Harmonization* Leiden: Martinus Nijhoff (2007), pp. 1-44 at 1-2.

194 Randall Peerenboom 'What Have We Learned about Law and Development? Describing, Predicting, and Assessing Legal Reforms in China' 27 *Michigan Journal of International Law* (2006), pp. 823-871 at 834-836.

195 Ulrich Sedelmeier 'Is Europeanisation Through Conditionality Sustainable? Lock-in of Institutional Change after EU Accession' 35 *West European Politics* (2012), pp. 20-38; Bernard Steunenberg & Dimitar Toshkov 'Comparing Transposition in the 27 Member States of the EU: The Impact of Discretion and Legal Fit' 16 *Journal of European Public Policy* (2009), pp. 951-970.

196 Gerda Falkner, Oliver Treib & Elisabeth Holzleithner *Compliance in the Enlarged European Union: Living Rights or Dead Letters?* Surrey: Ashgate (2008).

– pointing to problems of legality¹⁹⁷ as well as issues of compliance.¹⁹⁸ The EU's 'more is better' mindset¹⁹⁹ in combination with conditionality and the compliance paradigm has led to a methodology that emphasises quantity over quality, whereby no consideration is given to legality's requirements at the domestic level. As it will be shown in the next section, there is growing evidence that the quantitative approach followed by the EU in actual fact often undermines the element of legality by not considering the requirements for the quality of laws at the domestic level.

3.1.3 *The quantitative approach in enlargement and problems with the element of legality*

The previous section confirmed that the element of legality does not form part of the conceptualisation of the rule of law in enlargement, thereby corroborating the conclusion reached on the basis of the examination of the legal framework. In this section it will be shown that the quantitative progress analysis of the implementation of the *acquis* and the concomitant changes to domestic legislation adopted by the Commission comes with a specific set of problems that actually undermine legality. It is submitted that in combination with the speed of reforms,²⁰⁰ the demonstrable struggle of the applicant countries with administrative and judicial capacity, and the necessity of establishing a 'solid track record', the demand for more laws has potentially fostered legal inflation, instability, lack of generality of law, as well as problems of enforcement.²⁰¹

197 Marko Kmezić *EU Rule of Law Promotion – Judiciary Reform in the Western Balkans* London: Routledge (2017); Martin Mendelski 'The EU's Pathological Power: The Failure of External Rule of Law Promotion in South Eastern Europe' 39 *Southeastern Europe* (2015), pp. 318-346; Martin Mendelski 'The EU's Rule of Law Promotion in Central and Eastern Europe: Where and Why Does It Fail, and What Can be Done About It?' *Bingham Centre for the Rule of Law Global Rule of Law Exchange Papers* (2016); Martin Mendelski 'Europeanization and the Rule of Law: Towards a Pathological Turn' 40 *Southeastern Europe* (2016), pp. 346-384.

198 Jonathan B. Slapin 'How European Union Membership can Undermine the Rule of Law in Emerging Democracies' 38 *West European Politics* (2015), pp. 627-648.

199 Mendelski (2016b), p. 11.

200 Also coined the 'hasty transplant syndrome', explained by Grabbe in the context of the countries in central and Eastern Europe: 'It took Greece well over a decade to adapt to the EU's single market norms. By contrast, prospective CEE members are expected to have oriented their institutions and policies to the EU prior to membership, which means less than a decade in practice. Moreover, they have done so from a much lower starting-point and with very limited scope for negotiating transitional periods.' Heather Grabbe 'Europeanisation Goes East: Power and Uncertainty in the EU Accession Process' in Kevin Featherstone & Claudio M. Radaelli (eds) *The Politics of Europeanization* Oxford: Oxford University Press (2003), pp. 303-330 at 306.

201 For empirical evidence on these so-called 'pathologies of Europeanization' see Mendelski (2016a), pp. 353-357.

The Commission has recognised, in a number of reports throughout the years, that there are problems of legislative quality arising from the tension between the need to attain the agreed targets and the impact on the quality of the implemented legislation at the domestic level. For example, FYROM's 2007 Progress Report states: '[A] backlog of EU-related legislation built up in the second half of 2006. The government, in pursuit of its stated objective of having all the legislation for 2006 and 2007 adopted by the end of the summer, stepped up its efforts on legislative drafting. It managed to catch up partially, but without always giving sufficient attention to the *quality and enforceability of legislation*.'²⁰² Moreover, lack of expertise on EU issues at the domestic level may also hamper the harmonisation of legislation, as evidenced for example by the 2007 Progress Report on Albania in which it is stated that '[t]he level of expertise available to the parliament, including on EU integration issues, remains low. This is reflected in the quality of legislation.'²⁰³

Furthermore, because of the quantitative agreements underlying the adoption of the *acquis*, minority governments often need to resort to other legislative options in order to ensure that targets are met, thereby severely undermining the stability of the law. For example, since the ruling coalition lost its majority in Romania in 2000, one of the mechanisms used by the government to bypass this has been the issuing of ordinances and emergency ordinances. These ordinances enter into force immediately and only need retrospective approval by the Parliament. However, while the Commission on the one hand pushes for more 'progress', on the other hand Romania's 2000 Report continues to state that this practice is a matter of concern 'since legislation can be adopted before adequate consultation has taken place and because Parliament's powers to modify or reject the ordinances, without a time limit being set for the examination of the ordinances, can lead to legislative instability.'²⁰⁴

Moreover, it is acknowledged that hasty adoption and the subsequent lack of quality can also lead to problems further down the road, as demonstrated by the Progress Reports on FYROM. In 2011 the Constitutional Court increased the number of annulments of new legislation by 5% to nearly 30% of all laws.²⁰⁵ In 2014, this trend showed no sign of diminishing with visible complications for the coherence of the legal framework: 'The

202 2007 FYROM Progress Report, p. 7 [emphasis added]. Also see 2018 Kosovo Report, p. 7.

203 2007 Albania Progress Report, p. 6. See also Serbia's 2009 Progress Report, which highlights a related problem: 'There has been increased legislative output from the parliament. There is, however a need to improve ex ante compatibility checks with EU standards before legislation is adopted. There has, moreover, been insufficient public consultation on content and impact of draft laws.' 2009 Serbia Progress Report, p. 7.

204 2000 Romania Regular Report, p. 15. In a similar vein, the Commission has criticised FYROM's and Serbia's use of the shortened/urgent legislative procedure, see 2018 FYROM Report, p. 12; 2018 Serbia Report, p. 6.

205 2011 FYROM Progress Report, p. 11.

number of constitutional challenges received and handled annually remains on par with previous years, but there still have not been any steps taken to improve legal certainty as regards legislation which has been annulled due to unconstitutionality, and this often creates gaps in the legal framework.²⁰⁶ In addition to this, the reports frequently mention that monitoring implementation²⁰⁷ and compliance²⁰⁸ of new legislation with the *acquis* remains a difficult task.

The acknowledgement that the legal approximation process undertaken by the candidate states has led to questionable developments in relation to the requirements of formal legality such as stability, generality, and coherence,²⁰⁹ has recently gained traction in political science literature but has so far not been recognised in legal literature. Political science scholarship has been building on the critical law and development literature and the growing realisation that 'law is not a kitchen appliance that we can unplug in the United States or Germany and simply plug in again in Russia,'²¹⁰ and that introducing the right laws is insufficient to create incentives for the correct behaviour in developing and transition countries.²¹¹ Generally speaking, for law to be effective, it must be meaningful in the context in which it is applied so citizens have the incentive to use the law and institutions will enforce and develop the law. Moreover, information about the existence of a norm and its contents is a prerequisite for any impact of the law beyond a shelf life.²¹² In addition to this, judges, lawyers, politicians, and other legal intermediaries that are responsible for developing the law 'must be able to increase the quality of law in a way that is responsive to demand for legality.'²¹³ Interestingly, the origin of the law *per se* is not necessarily the crux of the problem, rather, complications stem from 'law reform processes that generally do not permit users to participate in adapting the draft – whatever its origin – to local conditions. ... Lack of local input, not transplantation is the problem.'²¹⁴ After all, legal rules must

206 2014 FYROM Progress Report, p. 5. The problem of gaps in the legislative framework is a recurring worry across various reports, see for example the 2013 Bosnia and Herzegovina Progress Report, p. 20; 2016 Kosovo Report, p. 28.

207 2016 Montenegro Report, p. 5.

208 2016 Albania Report, p. 7; 2016 Turkey Report, p. 15; 2004 Turkey Regular Report, p. 160.

209 See the work undertaken by Mendelski and Slapin.

210 Stephen Holmes 'Can Foreign Aid Promote the Rule of Law?' 68 *East European Constitutional Review* (1999), pp. 68-74 at 71.

211 Rilka Dragneva & Kataryna Wolczuk 'EU Law Export to the Eastern Neighbourhood' in Paul James Cardwell (ed) *EU External Relations Law and Policy in the Post-Lisbon Era* The Hague: T.M.C. Asser Press (2012) pp. 217-240 at 220.

212 Katharina Pistor 'The Standardization of Law and its Effect on Developing Economies' G-24 *Discussion Paper* No. 4 (2000), p. 8.

213 Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard 'Economic Development, Legality and the Transplant Effect' 47 *European Economic Review* (2003), pp. 165-195 at 167.

214 Wade Channell 'Lessons not Learned about Legal Reform' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad – In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 137-159 at 140.

be understood to be effective; something that is a serious constraint for legal transplantation since the meaning of legal statements is a function of social norms, not of the speaker's intentions.²¹⁵ Accordingly, because the impact of any law is ultimately determined by how it is understood by law makers, law enforcers, and law users at the receiving end,²¹⁶ domestic participation is indispensable.²¹⁷ Consequently, it is emphasised that 'adaptation' is preferred over 'adoption', *i.e.* without taking local conditions into account, attempting to use a pattern of law outside the environment of its origin entails the risk of rejection.²¹⁸ However, the EU's model is one of adoption rather than adaptation because of the specific nature of the *acquis*.

The *acquis* is a unifying concept that needs to ensure its self-preservation and continued coherent development.²¹⁹ Its rationale encompasses 'ensuring the continued coherence, integrity and viability of the Union edifice, by preventing incompatible foreign bodies from violating the communal corpus politiek.'²²⁰ In scholarly literature on the nature of the *acquis*, there is general agreement on the fact that a legal order, which seeks to preserve its 'genetic code',²²¹ must refer to some type of acquired characteristics as 'guarantees of its integrity'.²²² The specific nature of the *acquis* has, by necessity, two corollaries. Not only is it a unifying Union concept, which, through its collective nature, should provide a shared standard for Member States and acceding states alike, it is, moreover, an objective standard over which

215 Cass R. Sunstein 'On the Expressive Function of Law' 144 *University of Pennsylvania Law Review* (1996), pp. 2021-2053 at 2050.

216 Pistor (2000), p. 8.

217 In the past decade, adaptation to local circumstances and taking into account existing legal tradition have increasingly been recognised as crucial elements of sustainable legal reform. See for example, Cheryl Gray 'Reforming Legal Systems in Developing and Transition Countries' 34 *Finance and Development* (1997), pp. 14-16; Dragneva (2007), p. 6.

218 Otto Kahn-Freund 'On Uses and Misuses of Comparative Law' 37 *Modern Law Review* (1974), pp. 1-27 at 27.

219 Amichai Magen 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Relations' 9 *European Journal of Law Reform* (2007), pp. 361-392 at 370. For an overview of the role of law the *acquis* throughout earlier enlargement rounds see Grabbe (1999), pp. 6-7. Further see José Luís da Cruz Vilaça *EU Law and Integration. 20 Years of Judicial Application of EU Law* Oxford: Hart Publishing (2014), pp. 34-35; Loïc Azoulay 'The *Acquis* of the European Union and International Organizations' 11 *European Law Journal* (2005), pp. 196-231; Antje Weiner 'The Embedded *Acquis Communautaire*: Transmission Belt and Prism of New Governance' in Karlheinz Neunreither & Antje Weiner (eds) *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* Oxford: Oxford University Press (2000), pp. 318-342; Horst Günther Krenzler & Michelle Everson 'Preparing for the *Acquis Communautaire*: Report of the Working Group on the Eastward Enlargement of the European Union' Robert Schuman Centre Policy Paper (1998) No. 6; Pierre Pescatore 'Aspects judiciaires de l'*acquis communautaire*' *Revue Trimestrielle de Droit Européen* (1981), pp. 617-651.

220 Magen (2007), p. 377.

221 Christine Delcourt 'The *Acquis Communautaire*: Has the Concept had its day?' *Common Market Law Review* 38 (2001), pp. 829-870 at 840.

222 Azoulay (2005), p. 197.

the EU has exclusive control.²²³ Accordingly, it is projected by the EU not only as the 'right' legal template for development but also as the exclusive and comprehensive legal template from which deviations or opt-outs are not permitted for the aspiring Member States. However, this absence of the possibility of engagement limits from the outset its potential for becoming 'living law' in the applicant states.²²⁴ Indeed, 'the effort to plough through reform blueprints ... resembles a form of dependent development, to the point of precluding the 'organic' development of accountable domestic policies.'²²⁵ In the same vein, the suitability of the *acquis* can be questioned as a template for post-communist reforms during the enlargement preparations of the CEECs. The EU regulatory framework was never designed as a development agenda; instead the rules are the incremental result of negotiations, compromises, and agreements between the Member States over decades of European integration.²²⁶ Thus, in the light of the critique and the Commission's own acknowledgement of the pathological effects, *i.e.* negative reinforcing effects, at the very least questions arise as to the extent to which the EU's method of legal approximation in the enlargement policy is bound to undermine legality by its very nature.

3.1.4 Conclusions

Despite the promises made by former Commissioner Füle, that the accession negotiations would not simply involve a ticking of boxes on the issue of legislative approximation, it was shown in this section that the accession framework is set up in such a way to do just that – with its emphasis on support for rule of law institutions and the quantitative progress analysis of the implementation of the *acquis*. Whereas it was shown in chapters 1 and 2 that the national concepts of the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, as well as legal theory place legality and its requirements of stability, coherence, generality, and congruence at the centre of their understanding of the rule of law, from the above examination it is clear that in enlargement, legality – in the sense of the quality of domestic laws – is not considered. In this way, the findings of the previous case study on the EU's development cooperation policy are confirmed here. Furthermore, apart from the fact that the requirements of legality are wholly neglected in the EU's understanding of the rule of law in development, on the basis

223 Next to these two features, Magen has identified three more characteristics of the *acquis*, that of aiding of bureaucratic coherence and Commission domain expansion in external relations; extraordinary rule scope, determinacy, and flexibility; and the *acquis*' instrumental nature through which intrusive change can be couched in technocratic, de-politicized language. Magen (2007), pp. 382-391.

224 Dragneva & Wolczuk (2012), p. 219.

225 Anna Grzymala-Busse & Abby Innes 'Great Expectations: The EU and Domestic Political Competition in East Central Europe' 17 *East European Politics and Societies* (2003), pp. 64-63 at 66.

226 Grabbe (2003), pp. 306-307.

of careful analysis of the relevant Copenhagen documents, it was demonstrated that the nature of enlargement together with its methodology even has the potential of jeopardising the rule of law's formal element of legality in the applicant states. Consequently, by choosing quantitative progress analysis over qualitative scrutiny of the applicant states' headway in their process of legal approximation, the EU has put legality, and thus, the rule of law, at risk in the new Member States. The next section will continue the study into the *procedural* elements of the rule of law in enlargement.

3.2 Procedural elements of the rule of law

In the present section, the focus will turn to the *procedural* elements of the rule of law. Four elements will be presented here. First the section will tackle the issue of impartiality. In relation to this notion, it will be argued that the assessment of the Copenhagen related documents demonstrates its increasing importance, whereby the Commission's reporting has progressed from generic statements to providing actual guidance for improvement in this area. More particularly, it will be asserted that impartiality is perceived to consist of two sets of sub-elements. On the one hand, the legal framework, including the incorporation of international ethical standards, and the procedures for the internal organisation of courts can be distinguished. On the other hand, there is a subset of elements that highlights a particular aspect of impartiality, but only in the reports of a single country. However, it will also be demonstrated that in spite of the element's incremental importance, there is evidence of conceptual confusion between impartiality and judicial independence. It will be shown that impartiality is only infrequently addressed in its own right. Furthermore, even when it is, the presented analysis in the reports very often touches upon issues of independence, rather than impartiality, demonstrating a persistent level of conceptual indeterminateness.

Secondly, it will be argued that the pre-accession process shows that efficiency and quality of the judiciary, while not necessarily obstacles to accession, did become issues of major concern in the Commission's analysis of the functioning of the judiciary. It will be asserted that these topics have been considered as prime rule of law elements from the very beginning, not in the least because of the role of Member States courts in the application of EU law. It will be argued that the Commission has conceptualised procedural efficiency in terms of its underlying impediments, namely problems of enforcement, low clearance rates and backlogs, excessive length of proceedings, and lack of procedural legislation. However, it will also be shown that the Commission has not provided a standard for efficiency the applicant countries can introduce into their systems, leaving the countries sufficient space to introduce their own.

Thirdly, it will be asserted that the Copenhagen documents demonstrate that the Commission has taken a rather fragmented approach regarding the pivotal task of the judiciary, namely judicial reform. Whereas it was shown

in chapters 1 and 2 that judicial reform is related to the overall checks and balances between the three branches of government, the monitoring reports bear out the view that the focus is on the individual components of the judicial system, such as the establishment of courts and capacity-building, rather than on the judiciary's actual task and the functioning of the review process itself.

Fourthly, it will be shown that for the EU, access to justice is one of the preconditions in order to safeguard the right to a fair trial; a right, which the applicant countries as future Member States of the EU have to guarantee. More particularly, it will be asserted that access to justice is mainly interpreted to contain two aspects, namely access to court and access to legal aid. Furthermore, the section will also address the fact that the Copenhagen documents do not distinguish between access to justice as a rule of law or as a human rights element, evaluating the element in both sections, demonstrating the Commission's understanding of the interrelatedness of both notions in relation to this element. Finally, the section will conclude by asserting that, even though the monitoring reports evidence the inclusion of access to justice as a rule of law element, the Commission's general lack of critique in situations where there was little to no progress seems to suggest that access to justice does not fulfil a central role as a procedural element in the understanding of the rule of law in enlargement.

3.2.1 *The growing importance of the element of judicial impartiality*

In relation to the notion of impartiality it is manifest from the examination of the Copenhagen documents that its importance has increased over time. While references to the notion are scattered throughout the rounds of reports relating to the fifth enlargement, from 2005 onwards impartiality is clearly included as a rule of law element in Chapter 23 on the functioning of the judiciary and fundamental rights. Not only that, across the reporting rounds, reports have gone from including generic statements on the need for improvement, such as in the 2002 Regular Report on Slovakia which states that '[t]here is still concern about the level of professional impartiality and political neutrality amongst part of the judiciary',²²⁷ to providing guidance on what should be done in order to enhance this particular element. To give an example of the latter, the 2010 Progress Report on Croatia discusses the ethnic bias against Serbs in local courts in the context of war crimes trials in domestic courts. The Report points to the existing problems but goes on to provide the solution in order to remedy the situation: 'Problems persist in certain localities. Insufficient use is being made of one powerful weapon

²²⁷ 2002 Slovakia Regular Report, p. 23. Also see for example the 2002 Turkey Report in which it is stated that '[s]ubstantially more work is needed to strengthen the impartiality and independence of the judiciary', without, however, any indication as to the criteria of improvement. 2002 Turkey Regular Report, p. 122.

for impartial prosecution of war crimes – the specialised courts, although an increased willingness to use this possibility is evident recently.²²⁸

Throughout the annual reports and the screening reports on Chapter 23 on the functioning of the judiciary in the countries in South-eastern Europe, two sets of sub-elements of the notion of impartiality can be distinguished. First, there is the subset of elements that includes the necessary legal framework underpinning impartiality. In the screening reports it is verified whether impartiality, or rather its outcome – equality before the law – is enshrined in the law.²²⁹ In the analyses in the the annual reports it is checked whether or not the international framework on ethical standards has been implemented both for judges and prosecutors and whether there are effective mechanisms to monitor compliance.²³⁰ The first subset furthermore includes rules dealing with the internal organisation of the courts in order to remove doubts as to the impartiality of judges and prosecutors, such as conflict of interest rules in combination with rules on asset declarations,²³¹ rules on the random allocation of cases,²³² and rules regulating the withdrawal/recusal,²³³ disciplinary proceedings,²³⁴ dismissal,²³⁵ and disqualification.²³⁶ Secondly, there is a subset of elements that highlights a particular aspect of impartiality, but only in the reports of specific countries: the prevention of ethnic bias in relation to war crimes in

228 2010 Croatia Progress Report, p. 49.

229 Croatia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 16473/07, 18 December 2007, p. 19; Iceland Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12975/11, 19 July 2011, p. 4; Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 20; Serbia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12003/14, 16 July 2014, p. 23.

230 See for example the 2005 Turkey Report: 'In order to raise awareness of international ethics standards, the High Council of Judges and Prosecutors disseminated the United National Bangalore Principles of Judicial Conduct to all judges and prosecutors.' 2005 Turkey Progress Report, p. 104. Further see 2006 Croatia Progress Report, p. 49; 2006 Turkey Progress Report, p. 58; 2008 Croatia Progress Report, p. 52; 2011 Albania Progress Report, p. 11; 2011 FYROM Progress Report, p. 58; 2014 Montenegro Progress Report, p. 37.

231 See for example 2007 Croatia Progress Report, p. 48; 2010 Croatia Progress Report, p. 47.

232 See for example 2011 Albania Progress Report, p. 11; 2011 FYROM Progress Report, p. 58; 2011 Montenegro Progress Report, p. 11; 2012 Serbia Progress Report, p. 10; 2013 Serbia Progress Report, p. 39; 2014 Montenegro Progress Report, p. 37; 2015 Albania Report, p. 13; 2015 Kosovo Report, p. 13; 2015 Turkey Report, p. 15; 2016 Albania Report, p. 15; 2016 Kosovo Report, p. 14.

233 See for example 2014 FYROM Progress, p. 40; 2014 Montenegro Progress Report, p. 37; 2015 FYROM Report, p. 13; 2015 Bosnia and Herzegovina Report, p. 13.

234 See for example 2008 FYROM Progress Report, p. 56; 2008 Croatia Progress Report, p. 51; 2010 Croatia Progress Report, p. 47.

235 See for example 2011 FYROM Progress Report, p. 58; 2013 FYROM Progress Report, p. 39.

236 See for example 2015 Bosnia and Herzegovina Report, p. 13; 2015 Montenegro Report, p. 13.

Croatia;²³⁷ and the recurring issue of military judges in the civilian Constitutional Court,²³⁸ as well as problems of subjective impartiality, *i.e.* public statements on cases made by members of the judiciary,²³⁹ in Turkey.

However, in spite of the element's incremental importance, it has to be pointed out that across all the annual reports throughout the years, in relation to both the CEECs and the Western Balkans, there is evidence of conceptual confusion between impartiality and judicial independence. In a nutshell, the difference between the notions lays in the fact that judicial independence safeguards the judiciary against interference by state organs or private persons in the performance of judicial duties. This independent status in relation to others rests in objective conditions and involves both individual and institutional relationships, as reflected in such matters as the security of tenure and the institutional/administrative relationships to the legislative and executive branches of government, respectively.²⁴⁰ In contrast, impartiality implies that judges must not harbour any preconceptions about the matters put before them, and that they must not act in ways that promote the interest of one of the parties;²⁴¹ it reflects the attitude of the tribunal in relation to the issues in a particular case. According to the case-law of the ECHR, the notion of impartiality contains both a subjective and an objective element; not only should 'no member of the tribunal holds any personal prejudice or bias', but the tribunal must also 'be impartial from an objective viewpoint', in that 'it must offer guarantees to exclude any legitimate doubt in this respect'.²⁴²

Even though the concepts are closely linked, more clarity could have been provided had assessment criteria on impartiality been articulated.²⁴³ Almost always mentioned in the same breath as the latter,²⁴⁴ impartiality is only infrequently addressed in its own right. Even when it is, the analysis very often touches upon issues of independence, rather than impartiality.

237 See for example 2005 Croatia Progress Report, p. 104; 2006 Croatia Progress Report, p. 49; 2010 Croatia Progress Report, p. 49.

238 See 2010 Turkey Progress Report, p. 13; 2011 Turkey Progress Report, p. 15.

239 2008 Turkey Progress Report, p. 67; 2009 Turkey Progress Report, p. 69; 2010 Turkey Progress Report, p. 13.

240 Council of Europe Report 'Challenges for Judicial Independence and Impartiality in the Member States of the Council of Europe', SG/Inf(2016)3 rev, 24 March 2016, pp. 7-10.

241 Human Rights Committee, Communication No. 387/1989 (*Karttunen v. Finland*), UN Doc. CCPR/C/46/D/387/1989, para. 7.2.

242 See for example ECtHR, *Daktaras v. Lithuania*, Appl. No. 42095/98, para. 30; ECtHR, *Morice v. France*, Appl. No. 29369/10, paras. 73-78.

243 For possible indicators, see for example the ECtHR's Guide on Article 6 of the European Convention on Human Rights, 31 December 2017, pp. 39-43, available at https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf.

244 See for example the 2003 Report on Cyprus: 'Under the constitutions judges are obliged to be impartial. They are independent from the government.' 2003 Cyprus Comprehensive Monitoring Report, p. 12-13. Similarly, in relation to Turkey: 'With regard to strengthening the impartiality and independence of the judiciary, no concrete steps can be reported.' 2002 Turkey Regular Report, p. 119.

For instance, in the 2011 report on Kosovo the question of a secure working environment for judges is raised: 'There are still reports of threats and intimidation against judges, especially in sensitive cases such as on property rights. This is a serious concern as regards impartiality of judiciary.' However, the report then continues by linking the need for a secure working environment to problems of judicial independence rather than impartiality, by stating that: 'Political interference in the work of the judiciary is still a concern.'²⁴⁵ Similarly, the 2010 Report on FYROM examines the efforts the country has undertaken to combat corruption in order to ensure impartiality. However, in the same section the report proceeds with an analysis of the role of the Minister of Justice within the Judicial Council, which raises 'serious concerns about the interference of the executive power and political control in the work of the judiciary.'²⁴⁶ As it will be demonstrated in more detail in section 3.3, the latter is much more concerned with the separation of powers and judicial independence than impartiality.

Thus, despite this procedural element's significance for the rule of law, and the common subset of elements found throughout the reports related to the countries in South-eastern Europe, the reports demonstrate a persistent level of conceptual indeterminateness. In this respect it is noteworthy that while the reports make mention of the international ethical standards, which, like the United Nations Bangalore Principles of Judicial Conduct, include a definition of impartiality,²⁴⁷ the reports fail to present a particular EU definition of impartiality, or even discuss the existing European standards as set out by the European Court of Human Rights under Article 6 of the ECHR.²⁴⁸

3.2.2 *Judicial efficiency and quality as crucial elements underpinning the EU's procedural understanding of the rule of law*

Despite the fact that issues such as judicial impartiality and independence are often seen as the bedrock of a well-functioning judiciary, the pre-accession process shows that judicial efficiency and quality were, and are, at least as great a stumbling block for applicant countries to be able to guarantee procedural safeguards for the rule of law. It will be demonstrated that the elements of judicial efficiency and quality did become issues of major concern in the Commission's analysis of the functioning of the judiciary.

The legal foundation for the efficiency of the judicial process is stipulated in Article 6(1) ECHR and Article 47 of the Charter of Fundamental Rights. Article 6(1) ECHR reads that '[i]n the determination of his civil

245 2011 Kosovo Progress Report, p. 12.

246 2010 FYROM Progress Report, p. 57.

247 See Value 2 of the UN Bangalore Principles of Judicial Conduct which outlines both a definition of the principle of impartiality and guidelines for its application,

248 See for example the ECtHR's standard formulation of judicial impartiality in Case ECtHR, *Micallef v. Malta*, Appl. No. 17056/06, paras. 93-101.

rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time...'.²⁴⁹ In requiring cases to be heard within a reasonable time, the ECHR has underlined the importance of administering justice without delays which might jeopardise its effectiveness and credibility.²⁵⁰ A growing caseload on the issue of 'reasonable time', *i.e.* the problem of extensive delays in court proceedings, against the member states of the Council of Europe has made this topic from the very beginning one of the prime rule of law elements to be considered in the EU's enlargement policy, not in the least because of the role of Member States courts in the application of EU law. After all, as highlighted in the Introduction, from the date of accession, the EU becomes dependent on the way the national courts of the new Member States function.²⁵¹ In fact, because of the doctrine of direct effect,²⁵² the obligation to refer,²⁵³ as well as the principle of sincere cooperation,²⁵⁴ the EU legal order as a whole, and the CJEU in particular, is dependent on their effectiveness. Moreover, for the principle of mutual trust between the Member States to operate, particularly in the light of a common and reliable Area of Justice,²⁵⁵ a well-functioning effective judicial system is an essential requirement, indispensable for membership.²⁵⁶

249 The Council of Europe Committee of Ministers Recommendation No R(94) 12 on the Independence, Efficiency and the Role of Judges provides further clarification.

250 See for example Case ECtHR, *H. v. France*, Appl. No. 10073/82, para. 58; Case ECtHR, *Klatte Klitsche de la Grange v. Italy*, Appl. No. 12539/86, para. 61.

251 Dimitry Kochenov *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* The Hague: Kluwer Law International (2008), p. 228.

252 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

253 In relation to the preliminary ruling procedure, the Court has stated that the procedure 'requires the national court and the court of justice, both keeping within their respective jurisdiction, and with the aim of ensuring that Community law is applied in a unified manner, to make direct and complementary contributions to the working out of a decision.' Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1965] ECR 877.

254 As the Court ruled in *Unión de Pequeños Agricultores*, 'in accordance with the principle of sincere cooperation laid down in Article 5 of the Treaty [current Article 4(3) TEU], national courts are required, so far as possible, to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of a Community act of general application, by pleading the invalidity of such an act. Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 42.

255 Daniela Piana 'New Legal Instruments in a Changing World: Legal Political and Cultural Developments in EU Judicial Cooperation' *International Spectator* (2012), pp. 49-66.

256 Commission Communication on Towards the Enlarged Union – Strategy Paper and Report of the European Commission on the Progress towards Accession by Each of the Candidate Countries, COM(2002) 700 final, 9 October 2002, p. 11. Cf. Opinion 2/13 *ECHR II*, EU:C:2006:81, 18 December 2014, para. 191.

From the outset, the conclusion must be drawn that from the early start of the pre-accession process both in the countries in central and Eastern Europe and in the countries of the Western Balkans, a wide array of issues of judicial effectiveness, such as lack of legislation on procedures, clearance rate and backlogs, enforcement, and length of proceedings, have hampered the judicial process. Indeed, the Commission's Opinion on the Slovenia's Application for Membership illustrates the Commission's analysis of the *status quo* at the beginning of the fifth enlargement round: 'The main problems facing the Slovenian judiciary are inefficiency and the amount of time it takes to hand down judgements: it can take up to five years before a civil case is brought before the courts. ... This situation should be improved as a result of the programme to equip courts with computers and the planned procedural reforms.'²⁵⁷ The early regular and progress reports of the countries in both central and Eastern, and South-eastern Europe confirm this picture. Poland's 1999 Regular Report, for example, adds that '[a]lthough some progress has been recorded ... significant further efforts are expected... In particular, the level of enforcement of judicial decision and the length of judicial proceedings, particularly in commercial matters, require significant further improvements.'²⁵⁸ Similarly, the 2005 Report for Croatia states that '[i]mproving the functioning of the judiciary remains a major challenge',²⁵⁹ with little improvement in the problems highlighted in the Opinion, such as the inefficiency of courts, the excessive length of court proceedings, and difficulties with the enforcement of judgments. Furthermore, '[t]hese structural difficulties have contributed to an increase in the already very large backlog of cases before the Croatian courts, thus further weakening judicial capacity.'²⁶⁰ Notwithstanding the fact that EU law was already applied by a number of courts in the candidate countries of central and Eastern Europe before accession,²⁶¹ it is clear from the reports that the issue of efficiency of judicial procedures has been at the focus of attention early on, and is a recurring issue in the pre-accession process of the Western Balkans. In order to understand their importance for the Commission's understanding of the rule of law in enlargement, the underlying obstacles to procedural effectiveness, namely problems of enforcement, low clearance rates and backlogs, excessive length of proceedings, and lack of procedural legislation, will be briefly sketched out and illustrated on the basis of the relevant Copenhagen documents below.

257 Commission Opinion on Slovenia's Application for Membership of the European Union, COM(97) 2010 final, 15 July 1997, p. 14.

258 1999 Poland Regular Report, p. 15.

259 2005 Croatia Progress Report, p. 15.

260 *Ibid.*

261 See Albi's comprehensive assessment on this issue, Anneli Albi *EU Enlargement and the Constitutions of Central and Eastern Europe* Cambridge: Cambridge University Press (2005), pp. 52-56. Further Zdeněk Kühn 'European Law in the Empires of Mechanical Jurisprudence: The Judicial Application of European Law in Central European Candidate Countries' *Croatian Yearbook of European Law and Policy* (2005), pp. 1-14.

Both the Accession Partnerships and the European Partnerships acknowledge concern over the effective enforcement of court decisions and, accordingly, it is among the main priorities in all rounds of partnerships.²⁶² The reports reveal that problems of enforcement afflict all levels of the judiciary, including the Constitutional Courts of candidate countries.²⁶³ In order to address this problem,²⁶⁴ the Commission recommended that court judgements be more effectively enforced, mostly through the introduction of the profession judicial executors or bailiff services,²⁶⁵ including the adoption of relevant legislation on bailiffs 'without delays'.²⁶⁶

In relation to the issue of backlogs of cases and the concomitant problem of length of proceedings, the 2013 Serbian Progress Report is exemplary for the situation throughout the years, across all the reports: 'The size of the backlog of cases continue to raise concern. There are still major imbalances in the workload of judges and the length of proceedings remains excessive in many cases.'²⁶⁷ Backlogs were and are found in all courts,²⁶⁸ however, as Kochenov has pointed out in relation to the fifth enlargement, the judiciaries were quite unequally affected.²⁶⁹ In some countries certain regions tended to be more overburdened than others;²⁷⁰ while in other countries the majority of backlogs were concentrated at certain levels.²⁷¹ In the countries of the Western Balkans the same trend is visible,²⁷² including backlogs in particular courts.²⁷³

The fact that this problem is not so easily tackled, particularly in the light of the enlargement methodology, is demonstrated by the 2009 Croatian Report, which highlights that the overall backlog as well as the number of unresolved cases remains high. However, the report then addresses the fact that without more far-reaching reform, continued reduction might not be sustainable, 'especially if judges have focussed on 'easier' cases to

262 For the Accession Partnerships, see for example 1999 Accession Partnership Romania; 2002 Accession Partnership Estonia; 2002 Accession Partnership Latvia. For the European Partnerships, see for example, 2004 European Partnership Croatia; 2004 European Partnership Serbia and Montenegro including Kosovo.

263 1998 Slovakia Regular Report, p. 10.

264 See the 2009 Progress Report on the Situation in Croatia, in which it is stated that 'problems with the enforcement of court rulings constitute a major obstacle to the efficiency of the judicial system.' 2009 Croatia Progress Report, p. 52.

265 See for example, 2002 Czech Republic Regular Report, p. 23. On Bailiffs see for example 1999 Slovenia Regular Report, p. 59; 2000 Romania Regular Report, p. 92; 2001 Latvia Regular Report, p. 17; 2010 FYROM Progress Report, p. 57; 2013 Serbia Progress Report, p. 40; 2016 Albania Report, p. 40.

266 2002 Latvia Regular Report, p. 22. Cf. Montenegro 2013 Progress Report, p. 37.

267 2013 Serbia Progress Report, p. 9.

268 See for example 2016 Albania Report, p. 16.

269 Kochenov (2008), p. 291.

270 2000 Poland Regular Report, p. 17; 2002 Estonia Regular Report, p. 24.

271 1999 Hungary Regular Report, p. 12; 2001 Hungary Regular Report, p. 17.

272 See for example the 2013 Report on Serbia in which the backlog of the constitutional Court is of particular concern, 2013 Serbia Progress Report, p. 40.

273 2013 Montenegro Progress Report, p. 37.

meet output targets.²⁷⁴ On the same topic, but from a different angle, both the reports on the countries in central and Eastern Europe, as well as the reports on the South-eastern European countries, address the problem of accurate data.²⁷⁵ Without having provided a central definition of backlog,²⁷⁶ the Commission questions the reliability of statistics and the soundness of the methods used, thereby even calling attention to the fact that this creates 'problems with the consistency of data and effective follow-up'.²⁷⁷ Moreover, apart from providing an analysis of the yearly *status quo* on the basis of unclear data, the Commission has failed to shed light on what is an acceptable backlog situation and what is not. Furthermore, even though the reduction of backlogs is a concern in all rounds of Accession and European Partnerships,²⁷⁸ it is still an issue at the time of the accession, as demonstrated by the Comprehensive Monitoring Reports.²⁷⁹

As a result of the persistent problem of backlogs, the issue of length of proceedings was, and still is, high on the agenda,²⁸⁰ with the reports noting, more often than not, that 'the overall length of court proceedings from initiation to final judgment remains a concern'.²⁸¹ Not in the least because of the number of cases on the violation of the right to a speedy trial dealt with by the ECtHR.²⁸² By including in its analysis the case law of the latter, the Commission circumvented having to provide its own standards on this

274 2009 Croatia Progress Report, p. 52.

275 See for example 2000 Estonia Regular Report, p. 16; 2001 Slovenia Regular Report, p. 17; 2002 Lithuania Regular Report, p. 23; 2008 Kosovo Progress Report, p. 14; 2009 Montenegro Progress Report, p. 11.

276 It should be pointed out that the Commission did not refer to the existing Council of Europe's Recommendation R (86) 12 of 16 September 1986 Concerning Measures to Prevent and Reduce the Excessive Workload in the Courts or Council of Europe Recommendation R(95) 12 of 11 September 1005 on the Management of Criminal Justice. It did, however, in the later reports on the Western Balkans, come back to this issue by referring to the Guidelines of the European Commission for the Efficiency of Justice (CEPEJ) and the instruction for collecting statistical data therein. See for example 2015 Report Montenegro, p. 51.

277 Montenegro 2011 Progress Report, p. 11.

278 See for example, 2002 Accession Partnership Estonia; 2002 Accession Partnership Latvia; 2008 Accession Partnership Croatia; 2006 European Partnership Bosnia and Herzegovina; 2006 European Partnership Serbia and Montenegro including Kosovo.

279 See for example 2003 Latvia Comprehensive Monitoring Report, p. 12; 2012 Croatia Comprehensive Monitoring Report, p. 6.

280 The Commission regularly pointed to problems arising from this issue, as in the 2000 Report on Slovakia, in which it outlined that '[a] recent survey, produced at the request of the government, indicated that about one fifth of the parties involved in court proceedings would have experienced corrupt behaviour from judges. Bribes were given either to influence the outcome of the cases or to accelerate their proceedings.' 2000 Slovak Regular Report, p. 17.

281 2015 FYROM Report, p. 15.

282 On the requirement of 'reasonable time' as mentioned in Article 6 ECHR in relation to the applicant states, see, for example, ECtHR, *Tricković v. Slovenia*, Appl. No. 39914/98; ECtHR, *Bočvarska v. The Former Yugoslav Republic of Macedonia*, Appl. No. 27865/02; ECtHR, *Oršuš and Others v. Croatia*, Appl. No. 5766/03.

point.²⁸³ It did push, however, for the development of the legislative basis of procedures applied by the courts. Progress, or lack thereof, on the implementation of civil and criminal procedural legislation, including the reduction of pre-trial detention time, received ample mention in the reports.²⁸⁴

Examination of the reports shows that the Commission did not (in relation to the CEECs) and does not (in relation to the countries in the Western Balkans), provide a blueprint for improvements the applicant countries can introduce to their systems. While this creates unclarity, is also leaves the countries sufficient space to introduce their own. The Commission, has, however, proposed a number of improvements in order to enhance the overall quality of the judicial process.²⁸⁵ As described in the 2013 report on the Former Yugoslav Republic of Macedonia:²⁸⁶

As regards quality of justice, improvements are needed to ensure that the way in which the court system and the career structure of judges are organised does not drive them towards formalistic decision-making in order to reach short-term productivity targets, rather than actually solving disputes, building a stable jurisprudence, issuing clear, well-reasoned judgments and providing long-term legal certainty in the interest of the citizen.

In a nutshell, these improvements relate to the following four sub-elements:²⁸⁷ training of judges, prosecutors, and court staff, particularly in information technology, EU law and ECtHR jurisprudence;²⁸⁸ monitoring of judicial activities through the introduction of a so-called case-management system;²⁸⁹ open access electronic availability of decisions in order to

283 See for example Croatia's 2006 Report in which it is reported that '[t]he European Court of Human rights delivered 25 judgements (sic) concerning Croatia in the reporting period. The majority of judgments issued against Croatia continue to concern violations of the right to a fair trial and the length of proceedings, under Article 6 of the European Convention for the Protection of Human Rights', 2006 Croatia Progress Report, p. 8. Further see, 1999 Poland Regular Report, p. 14; 2000 Slovakia Regular Report, p. 17; 2006 FYROM Progress Report, p. 12.

284 See for example 1999 Bulgaria Regular Report, p. 12; 2000 Czech Republic Regular Report, p. 18; 2001 Estonia Regular Report, p. 17; 2002 Poland Regular Report, p. 25; 2009 Montenegro Progress Report, p. 11; 2015 FYROM Report, p. 52; 2015 Albania Report, p. 15.

285 For an examination of the quality of the judicial process in each of the Western Balkan countries individually, see Kmezić (2017), pp. 105-118.

286 2013 FYROM Progress Report, p. 11.

287 The elements are outlined in a more systematic fashion from the 2015 round of reports onwards, however, all elements can be found throughout all the reports from the very beginning.

288 See for example 2000 Latvia Regular Report, p.17; 2000 Hungary Regular Report, p. 16; 2000 Czech Republic Regular Report, p. 20; 2002 Turkey Regular Report, p. 22; 2002 Slovakia Regular Report, p. 24; 2002 Poland Regular Report, p. 25.

289 See for example 2000 Czech Republic Regular Report, p. 21; 2002 Slovakia Regular Report, p. 24; 2009 FYROM Progress Report, p. 13; 2009 Montenegro Progress Report, p.11.

enhance transparency and consistency²⁹⁰ of jurisprudence; and the availability of alternative dispute resolution.²⁹¹ Since all of these issues need sufficient budget in order to be realised, the Commission annually considered the applicant countries' budgetary allocations.²⁹² Coming from a situation of 'manual registration and administrative processing',²⁹³ the computerisation of courts took up a large part of the analysis. However, irrespective of, or perhaps because of, the fact that the Council of Europe has been monitoring developments in this field for decades,²⁹⁴ the Commission, much like in the area of judicial effectiveness, did not go much further than examining developments and advocating the need for improvements, thereby failing to provide detailed recommendations or standards to which the applicant countries should adhere.²⁹⁵

3.2.3 *The fragmented approach to the element of judicial review*

In chapter 1 it was established that in order to comply with the rule of law, the judiciary branch of government is endowed with the possibility of judicial review of both legislative and executive action. Moreover, it was shown that to rule on the propriety of government behaviour, courts must rely on the ability to review legislation and actions under a higher authority, generally the constitution. Examination of the Copenhagen documents shows that the Commission has taken a rather fragmented approach regarding this pivotal task of the judiciary – related to the overall checks and balances of the three branches; it focusses on the individual components that make up the judicial system, rather than on the actual execution of the judicial review process itself.

For judicial review of administrative acts, this has meant, at a very basic level, that a number of applicant countries, both from Central Eastern Europe as well as from South-Eastern Europe, first needed to establish some of the requisite judicial organs. Early reports on the Czech Republic's progress towards accession, for example, noted and later criticised that the Supreme Administrative Court stipulated in the Constitution was non-existent.²⁹⁶ Similarly, the 2006 Progress Report on the Former Yugoslav Republic

290 See for example 2015 Albania Progress Report, p. 14; 2015 Bosnia and Herzegovina Progress Report, p. 14.

291 See for example 2015 Bosnia and Herzegovina Progress Report, p. 14; 2015 Albania Progress Report, p. 14; 2015 FYROM Progress Report, p. 14.

292 See for example 2005 Serbia and Montenegro Progress Report, p. 15.

293 2001 Bulgaria Regular Report, p. 18.

294 See for the latest documentation for example the Council of Europe's CEPEJ 2016 Thematic report on the use of information technologies in courts, available at: http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_2%20-%20CEPEJ%20Study%2024%20-%20IT%20Report%20-%20EN.pdf.

295 Also see Kochenov (2008), p. 295.

296 1998 Czech Republic Regular Report, p. 9; 1999 Czech Republic Regular Report, p. 13.

of Macedonia highlighted the necessity of the creation of administrative courts for first instance judicial review of administrative decisions, a task that up till then overburdened FYROM's Supreme Court.²⁹⁷

In addition, the various rounds of reports address issues of capacity (the filling of judicial posts),²⁹⁸ and issues of effectiveness of judicial procedure. It was, however, demonstrated in the previous section that quality of the judicial process is understood by the Commission in terms of modernisation through case-management systems and electronic availability of decisions, as well as training (particularly in EU/ECHR law and jurisprudence) of employees in the judicial sector. While these elements are undoubtedly meant to ensure that qualified personnel works in an effectively and efficiently organised modern(ised) judiciary, the reports rarely go beyond a descriptive approach chronicling the 'existence' of each individual element on a yearly basis. By doing so, they fail to give insight into a preferred minimum standard or to provide a comprehensive update as to the actual practice of judicial review, *i.e.* how the judicial institutions fulfil their roles as opposed to institutional questions such as those related to qualified staff.

Regarding judicial review of individual rights, the analysis of the judicial system in the Commission Opinions on the Application for Membership of the CEECs and SEECs indicates a predilection for the existence of the protection of such rights through Constitutional Courts.²⁹⁹ However, while a more substantive analysis and examples of best practices of rights adjudication of particular rights are occasionally provided in the section on human rights,³⁰⁰ the reports again do not produce a clear picture of the preferred modalities of constitutional judicial review. Some applicant states have constitutional complaint proceedings,³⁰¹ however, the lack of criticism in relation to states that do not afford this opportunity demonstrates that this is not a requirement. Similarly, in relation to legislative review, examples can be found of *ex post* control or *ex ante* review,³⁰² abstract (adjudication on the constitutionality of a legislative act without the need for a specific case) or concrete (in a particular case on the basis of referral by an

297 2006 FYROM Progress Report, p. 9.

298 See for example 2000 Lithuania Regular Report, p. 16; 2002 Romania Regular Report, p. 26; 2013 Albania Progress Report, pp. 38-39.

299 See for example the Commission Opinion on Poland's Application for Membership of the European Union, COM(1997) 2002 final, 15 July 1997, p. 14; Commission Opinion on Hungary's Application for Membership of the European Union, COM(1997) 2001 final, 15 July 1997; Commission Opinion on Croatia's Application for Membership of the European Union, COM(2004) 257 final, 20 April 2004, p. 17.

300 See for example, 2000 Poland Regular Report, p. 19; 2008 Montenegro Progress Report, p. 13.

301 See for example 2002 Czech Republic Regular Report, p. 22.

302 See for example 2014 Albania Progress Report, p. 39

ordinary court) review,³⁰³ with the Commission abstaining from indicating its own preferences. Along the same lines, examination of the reports does not demonstrate a predisposition on the side of the EU as to who can commence constitutional proceedings. Abstract review can be initiated by the President,³⁰⁴ but also a group of parliamentarians.³⁰⁵ Additionally, it seems that abstract review can be initiated by the Supreme Court³⁰⁶ or the Ombudsman.³⁰⁷

It was argued in chapter 1 that the rule of law allows for various modalities of judicial review. Accordingly, the fact that the Commission does not provide a concrete outline of its preferred institutional set-up can be in line with the rule of law. After all, as demonstrated previously, the national traditions of *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law display their own similarities and differences. Even the Council of Europe, in its Recommendation (2004)20 on Judicial Review of Administrative Acts, provides a broadly defined concept by merely stating that '[a]ll administrative acts should be subject to judicial review'.³⁰⁸ However, particularly in relation to this form of judicial review, it seems that by adopting the outlined fragmented approach whereby the courts main task is not directly addressed but, rather, the emphasis is on a descriptive yearly overview of the institutional set-up of judiciary bodies whereby the judicial process is divided into quantifiable sub-elements, the Commission displays a lack of understanding of the ways through which it could truly promote and further consolidate this rule of law element.

3.2.4 *The auxiliary element of access to justice*

Access to justice is one of the prime procedural rule of law elements through which states can ensure that all citizens have effective means of recourse to their rights. It enables individuals to protect themselves against infringements of their rights, to hold executive power accountable, to remedy civil wrongs, and to defend themselves in criminal proceedings; it is crucial for individuals seeking to benefit from their procedural and substantive rights.³⁰⁹ Moreover, access to justice is one of the preconditions in order to

303 See for example 2001 Poland Regular Report, p. 20; 2001 Czech Republic Regular Report, p. 21; 2007 Montenegro Progress Report, p. 36.

304 See for example 2012 Bosnia and Herzegovina Progress Report, p. 38.

305 See for example 2013 Montenegro Progress Report, p. 9.

306 See for example 2016 FYROM Report, p. 55.

307 See for example 2009 Montenegro Progress Report, p. 10; 2010 Serbia Progress Report, p. 9; 2013 Turkey Progress Report, p. 10.

308 Council of Europe Recommendation Rec(2004)20, 15 December 2004, under B(1)(a).

309 *Handbook on European Law Relating to Access to Justice* Prepared jointly by the European Union Agency for Fundamental Rights and the Council of Europe (2016), p. 16.

safeguard the right to a fair trial; a right, which the applicant countries as future Member States of the EU have to guarantee.³¹⁰

On the basis of the examination of the Copenhagen documents, three conclusions can be drawn. First, access to justice is mainly interpreted to contain two aspects: access to court and access to legal aid, in particular for disadvantaged groups. Secondly, the way the Commission has addressed these two aspects of this procedural element – both under the rule of law and under human rights – in the different sections of the report, reflects the nature of these two aspects and the underlying interrelation on this issue between the rule of law and human rights. Thirdly, from the analysis of the monitoring reports, it is clear that even though access to justice is included in the EU's rule of law conceptualisation in its enlargement policy, it only plays an auxiliary role, since the absence of developments in relation to the consolidation of this element does not lead to lack of progress in the negotiations, or even accession. Below, these three conclusions will be address in turn.

The first conclusion relates to the two aspects that make up the more generic term of access to justice, namely access to court and legal aid. Both aspects are referred to in the documents pertaining to the fifth enlargement round of the countries in central and Eastern Europe, as well as in the annual reports covering progress in the countries in South-eastern Europe. To give a few examples of the first aspect, the Polish 1999 Report discusses the lack of improvement in relation to the provisions of access to courts;³¹¹ the Romanian report of 2002 analyses the problems of prisoners and their lack of access to a court in order to review the final outcome an administrative procedure;³¹² the 2007 report on the Former Yugoslav Republic of Macedonia criticises the lack of access to possibilities for appeals against acts and decisions by civil servants;³¹³ Croatia's 2011 report describes progress regarding access to justice in the area of administrative law, with the introduction of four first instance court as well as a Higher Administrative Court;³¹⁴ the 2014 report on the situation in the Former Yugoslav Republic of Macedonia goes as far as to examine actual physical access to the Basic Court in Skopje, in terms of lifts for people with special needs.³¹⁵

310 See Article 47 of the EU Charter of Fundamental Rights, which reads: '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.'

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. Legal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice.' Also see Article 6 and 13 ECHR.

311 1999 Poland Regular Report, p. 14.

312 2002 Romania Regular Report, p. 28.

313 2007 FYROM Progress Report, p. 12.

314 2011 Croatia Progress Report, p. 50.

315 2014 FYROM Progress Report, p. 42.

The second aspect of access to legal aid covers rather more issues than access to court. It includes the general set up of a free legal aid system in the applicant states³¹⁶ and the concomitant problem of lack of funding,³¹⁷ access to a lawyer in both criminal and civil cases,³¹⁸ difficulties with the realisation of legal aid in the rural areas of Turkey in particular,³¹⁹ problems with legal aid in a language other than the main language spoken in the country,³²⁰ as well as strengthening legal aid for particular groups of people, such as women and children,³²¹ minorities,³²² asylum seekers,³²³ victims of domestic abuse,³²⁴ trafficking,³²⁵ and war crimes.³²⁶

The second conclusion – the connection between the rule of law and human rights in the area of access to justice – is supported by the way the issue is addressed over the years and across reports and Accession/European Partnerships in the same year, *i.e.* the placement of the element under different headings. To start with, the 1999 and 2002 rounds of Accession Partnerships with the CEECs list ‘facilitat[ing] access to legal advice and representation’,³²⁷ ‘widen[ing] the availability of legal aid’,³²⁸ and ‘promot[ing] access to justice’,³²⁹ as priorities or short-term objectives under the political criteria of democracy and the rule of law, and more particularly, under judicial reform. However, most 2002 Regular Reports examine the situation in relation to the facilitation of legal aid within the section of civil and political rights under the Copenhagen political criteria of human rights and the protection of minorities. Indeed, Romania’s Report of that year even stresses the lack of legal aid in relation to certain crimes as a human

316 For example, 2005 Serbia and Montenegro Progress Report, p. 19; 2007 Albania Progress Report, p. 12; 2009 Croatia Progress Report, p. 12; 2009 Serbia Progress Report, p. 14; 2011 Montenegro Progress Report, p. 16; 2013 Bosnia and Herzegovina Progress Report, p. 13; 2016 Serbia Report, p. 4.

317 For example, 2011 Turkey Progress Report, p. 24; 2011 Kosovo Progress Report, p. 15; 2013 Albania Progress Report, p. 40; 2014 Montenegro Progress Report, p. 39.

318 For example, 2001 Turkey Regular Report, p. 16; 2002 Turkey Regular Report, p. 26; 2007 Turkey Progress Report, p. 14; 2009 Bosnia and Herzegovina Progress Report, p. 16.

319 2002 Turkey Regular Report, p. 27; 2007 Turkey Progress Report, p. 14; 2009 Turkey Progress Report, p. 16; 2011 Turkey Progress Report, p. 24.

320 2005 Turkey Progress Report, p. 23; 2013 Montenegro Progress Report, p. 38; 2014 Kosovo Progress Report, p. 14.

321 2011 Turkey Progress Report, p. 24; 2013 Kosovo Progress Report, p. 12; 2014 Turkey Progress Report, p. 47.

322 2001 Hungary Regular Report, p. 22.

323 2011 FYROM Progress Report, p. 16.

324 2011 Albania Progress Report, p. 16; 2013 Albania Progress Report, p. 40; 2014 Montenegro Progress Report, p. 39.

325 2013 Albania Progress Report, p. 40; 2013 Kosovo Progress Report, p. 12; 2014 Kosovo Progress Report, p. 14.

326 2015 Montenegro Report, p. 53.

327 1999 Accession Partnership Romania.

328 2002 Accession Partnership Lithuania; 2002 Accession Partnership Hungary; 2002 Accession Partnership Romania; 2002 Accession Partnership Estonia.

329 2002 Accession Partnership Latvia.

rights issue that needs to be tackled: 'In crimes where the maximum sanction is less than 5 years imprisonment, ... there is no mandatory legal aid provided. This is a limitation to the right to legal representation [and] is a human rights issue that needs to be addressed.'³³⁰

The later Accession and European Partnerships show a similar picture. The 2003 AP with Bulgaria includes ensuring 'implementation and sufficient budgetary resources to ensure access to justice and legal aid' under the heading of human rights and the protection of minorities,³³¹ the 2003 AP with Romania discusses the extension of access to free legal aid as a priority under judicial reform,³³² and Turkey's 2003 AP lists the further development of the legal aid system 'to ensure that all citizens enjoy access to justice' as a medium-term priority in the *acquis* section of justice and home affairs.³³³ While the 2004 European Partnerships discussed ensuring 'the viability of a comprehensive legal aid system'³³⁴ as an objective of reinforcing the judicial system under the political criteria of democracy and the rule of law, the 2006 and 2008 European Partnerships (and Accession Partnership in the case of Croatia, Turkey and the FYROM) again show the placement of access to justice under both the rule of law³³⁵ as well as the section on human rights.³³⁶ The 2008 European Partnership with Serbia including Kosovo is a case in point, with the strengthening of access to justice included as an objective for Serbia under civil and political rights, and as a target for Kosovo under the judicial system and the rule of law.³³⁷ The annual progress reports further blend the categorisation of this procedural element by not following the positioning outlined in the APs/EPs,³³⁸ switching the placement across years,³³⁹ and sometimes also mixing it up within a year.³⁴⁰ It should also be noted that the available screening reports on Chapter 23 demonstrate the same approach by dealing with the issue of access to justice and/or legal aid both under the rule of law, more par-

330 2002 Romania Regular Report, p. 32.

331 2003 Accession Partnership Bulgaria.

332 2003 Accession Partnership Romania.

333 2003 Accession Partnership Turkey.

334 2004 European Partnership Serbia and Montenegro including Kosovo. See also the 2004 European Partnership with the Former Yugoslav Republic of Macedonia; 2004 European Partnership Croatia.

335 See for example 2006 Accession Partnership Croatia; 2008 European Partnership Serbia including Kosovo.

336 See for example 2006 Accession Partnership Turkey; 2008 European Partnership Albania.

337 2008 European Partnership Serbia including Kosovo.

338 While the 2004 European Partnerships locate the objective under judicial reform, the 2004 and 2005 rounds of annual reports discuss the issue under civil and political rights. See for example 2004 Bulgaria Regular Report, p. 22 or 2005 Turkey Progress Report, p. 23.

339 For example, the annual reports of 2013 and 2014 clearly locate the analysis of access to justice under the heading of the functioning of the judiciary. However, the 2015 and 2016 reports more often than not examine the issue in the section on human rights.

340 In the 2011 round of annual reports access to justice is discussed under the heading of civil and political rights, however, FYROM's report addresses the issue under the section on the functioning of the judiciary. 2011 FYROM Progress Report, p. 60.

ticularly, the reform of the judiciary, as well as under fundamental rights.³⁴¹ In sum, the examination of the Accession and European Partnerships and the monitoring reports of both the CEECs and the SEECs, demonstrates an understanding by the Commission of the close interrelatedness of the rule of law and human rights in relation to this particular element. The lack of clear placement under either heading could have led to unequal treatment under the new approach and the Commission more recent commitment to the principle of 'fundamentals first'.³⁴² However, since Chapter 23 includes both the judiciary and fundamental rights, this has so far not been an issue.

Against this background, the focus will next turn to the third conclusion. It is argued here that the inclusion of access to justice as a procedural element of the conceptualisation of the rule of law in enlargement, is only in a supplementary manner. This conclusion is supported by the findings on the analysis of the way in which the Commission has reported on this issue over the years. To start with, access to justice only became an issue from 2000 onwards.³⁴³ Subsequently, after it had made its way into the Accession and European Partnerships and the reports, it is clear from the latter that the attention paid to it is uneven, with some years, such as 2002, 2005, and 2014 devoting quite some space to it, and other years, including 2007, 2011 and 2015 barely attributing more than a few lines to the examination of progress in relation to this element.

However, and more importantly, it is the way in which progress is analysed over the years that diminishes this element's significance. Simply put, year after year, the documents report on lack of progress, and demonstrate limited or simply no criticism of the situation. Moreover, no minimum standards are articulated in this area. To give some examples, 'there appears to be no improvement in the problems of access to legal aid'³⁴⁴ in Bulgaria in 2000, '[n]o changes have been made to the legal aid system during the reporting period'³⁴⁵ in Romania in 2002, and in Turkey 'in some town, no legal council is available'³⁴⁶ in the same reporting year. In relation to the countries in South-eastern Europe the picture remains the same: Serbia's 2005 report states that 'there is a lack of coherent planning and management of legal aid, with the result that laws are not being applied and there is no clear mechanism for ensuring the quality of legal aid'.³⁴⁷ Similarly '[a]ccess to justice is still hampered by the lack of a comprehensive system of legal aid'³⁴⁸ in Croatia in 2007, '[f]ree legal defence is not recognised in

341 See for example Serbia's screening report of Chapter 23 on pp. 17 (fair trial rights) and 24 (judiciary).

342 For the recent affirmation of the latter, see Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 1.

343 The issue is almost whole excluded from the 1998 and 1999 Accession Partnerships.

344 2000 Bulgaria Regular Report, p. 17.

345 2002 Romania Regular Report, p. 25.

346 2002 Turkey Regular Report, p. 27.

347 2005 Serbia and Montenegro Progress Report, p. 19.

348 2007 Croatia Progress Report, p. 11.

the High Court of Justice³⁴⁹ of Albania, and 'no progress has been made on adopting legislation and establishing a comprehensive system of legal aid'³⁵⁰ in Serbia in 2009. Turkey's 2011 report is especially damning: 'With respect to access to justice, the legal aid provided is of inadequate scope and quality. Budgetary provisions are inadequate. There is no effective monitoring mechanism that would remedy long-standing problems.'³⁵¹ In the same way, more recent reports also expand on lack of or limited improvement.³⁵² On the basis of the fact that even in the Comprehensive Monitoring Reports of the countries of the fifth,³⁵³ sixth³⁵⁴ and seventh³⁵⁵ enlargement round, drawn up half a year before the date of accession, progress on access to justice and legal aid is reported on as being 'under-developed',³⁵⁶ 'unsatisfactory',³⁵⁷ and 'rather restricted',³⁵⁸ the conclusion must be drawn that, even though access to justice is incorporated as a procedural rule of law element in enlargement, its treatment in the reports would suggest that it is not an element of prime importance.

3.2.5 *Conclusions*

In line with a number of the reports, in which it is stated that '[i]mpartiality, integrity and high standards of adjudication by the courts are essential for safeguarding the rule of law',³⁵⁹ this section of the chapter showed that impartiality has increasingly become recognised as a fundamental procedural element of the rule of law in enlargement. However, it was demonstrated that in spite of this recognition, the Commission has refrained from clearly outlining the notion, particularly in relation to judicial independence. Furthermore, it was argued that next to impartiality, the elements of judicial efficiency and quality have become major issues of concern in the Commission's assessment of the functioning of the judiciary. It was asserted that procedural effectiveness has been conceptualised in the reports mainly in terms of procedural obstacles, including such sub-elements as enforce-

349 2007 Albania Progress Report, p. 12.

350 2009 Serbia Progress Report, p. 14.

351 2011 Turkey Progress Report, p. 87.

352 See for example 2014 Albania Progress Report, p. 43; 2014 Bosnia and Herzegovina Progress Report, p. 14; 2015 Serbia Report, p. 4; 2016 Kosovo Report, p. 27.

353 See for example 2003 Latvia Comprehensive Monitoring Report, p. 13.

354 Romania's Monitoring Report states that '[t]he reform of the legal aid system needs to be carried out.' 2007 Romania Monitoring Report, p. 7.

355 Croatia's Monitoring Report simply states that '[t]he legal framework for free legal aid has to be improved to enable better access to legal aid and to foster the role of NGOs as legal aid providers.' 2012 Croatia Comprehensive Monitoring Report, p. 37.

356 2003 Poland Comprehensive Monitoring Report, p. 16.

357 2003 Lithuania Comprehensive Monitoring Report, p. 13.

358 2003 Hungary Comprehensive Monitoring Report, p. 14.

359 2005 Turkey Progress Report, p. 103. Also see the Analytical Report for the opinion on the application from the former Yugoslav Republic of Macedonia for EU membership, SEC(2005) 1425, 9 November 2005, p. 105.

ment, backlogs, length of proceedings, and general lack of procedural legislation. It was, however, also pointed out that the Commission has refrained from providing a detailed standard for the applicant countries to take into account in their improvements. Following this, the third element in this section highlighted the Commission's fragmented approach towards the element of judicial review. It was argued that the Copenhagen documents address this element from an institutional angle rather than an examination of how judicial review is organised in the candidate countries, *i.e.* judicial review is interpreted in terms of the organisation of courts, rather than the functioning of those courts. Finally, the section examined the element of access to justice, acknowledged as one of the preconditions for a fair trial. It was asserted that access to justice is mainly interpreted in two ways, access to court and access to legal aid. Furthermore, it was demonstrated that the Commission places this element both under the heading of rule of law as well as human rights, indicating an understanding of the close connection between both notions in relation to this element. The section concluded by arguing that even though the reports evidence the inclusion of access to justice as a rule of law element, the Commission's lack of critique in situations when there has been very little to no progress in the yearly monitoring reports, gives the impression that this element at the very least does not fulfil a central role as a procedural element in the understanding of the rule of law in enlargement.

3.3 Institutional elements of the rule of law

This section will focus on the assessment of the EU's practice in enlargement in order to substantiate the third category of institutional rule of law elements of the analytical framework established in Part I. It will be argued that the EU's understanding of the rule of law in its accession policy is largely oriented towards institutional reform measures. More particularly, it will be demonstrated that rule of law reform is envisaged as judicial reform, mainly in terms of the proper functioning of courts. It will be asserted that this institutional approach is reflected both in the legal framework and in the Copenhagen documents underlying the enlargement policy. Moreover, in relation to the separation of powers – found in chapters 1 and 2 as the notion through which the power-balance of the three branches of government is levelled and the rule of law is reinforced – it will be shown that while the Copenhagen documents seem to be structured in such a way as to support the doctrine, in actual fact they do not provide any insight into the Commission's ideas on this *per se*. Instead, it will be demonstrated that in early reports, the three branches of government are addressed individually, without regard to how they interrelate.

Subsequently, turning to the issue of judicial independence, it will be demonstrated that within the EU's institution-centric approach, the element of judicial independence is one of the main components of the rule of law in the pre-accession process. More particularly, it will be shown that the

Commission, despite frequently mentioning the existence of 'European standards' in this area, has failed to articulate a detailed comprehensive common standard on this issue. Instead it has chosen to address it along the rudimentary lines of institutional and personal independence. Furthermore, the reports show that judicial independence is increasingly combined with judicial accountability, whereby it will be demonstrated that in relation to the latter, the Commission has adopted a one-dimensional approach that focuses on sub-elements that can be easily quantified, such as the number of cases in a particular area, rather than tackling the question of whether the judiciary is also perceived to be accountable. Finally, the section on judicial independence will conclude by addressing the question whether the understanding of these rule of law elements in enlargement in such an elementary way has in actual fact provided the applicant states with the opportunity to grapple to some extent with their own ideas of protecting the independence of the judiciary and its judges, allowing them to develop models of independence of their own. In the light of the findings in chapter 1, where it was argued that the constitutional traditions of the Member States have shaped their own particular model of judicial independence, it will be asserted that the Commission's approach might, however unintentionally, be more in line with the rule of law than hitherto perceived in the literature.

3.3.1 *The pervasive institutional rule of law approach: the EU's understanding of the rule of law as judicial reform*

The legacy of the EU's earlier attempt at providing clarity on the rule of law as a condition for accession to the Union by the applicant states, *i.e.* the *stability of institutions that guarantee ... the rule of law*,³⁶⁰ is not to be underestimated. Conceived by the European Council in 1993, this original formulation has permeated the EU's conception of the rule of law in enlargement from the beginning, so much so, in fact, that the rule of law in enlargement has come to be synonymous with institutional reform ('a great deal of institution building is required')³⁶¹, and more specifically judicial reform. Furthermore, the often pre-modern state of the judicial system in the countries of central and Eastern Europe, whereby several countries did not even have the basic judicial structure required by their own newly adopted Constitutions, enhanced the perceived necessity of the institutional focus. The legal framework as well as the Copenhagen documents, *i.e.* the Commission's Enlargement Strategies and the country specific reports, support this argument, as will be further explained below.

After the 1994 Essen European Council had designated PHARE as the main financial instrument in the pre-accession strategy,³⁶² the Commission

360 Presidency Conclusions, European Council Copenhagen, 21-22 June 1993.

361 2001 Poland Regular Report, p. 110.

362 Presidency Conclusions, Essen European Council, 9-10 December 1994. Also see the Presidency Conclusions, Amsterdam European Council, 16-17 June 1997.

introduced a refocusing of the financial programme.³⁶³ In its Guidelines for PHARE Programme Implementation, the Commission identified 'institution building'³⁶⁴ as the first of two priorities (the other being 'investment in the *acquis*'³⁶⁵), since 'the reinforcement of institutional and administrative capacity of candidate countries is a key requirement of enlargement, if the countries are to be in a position to adopt, implement and enforce the *acquis* as required by membership of the Union.'³⁶⁶ More particularly, the Commission outlined that this will require modernisation of the judiciary.³⁶⁷ The same institutional focus is also discernible in the CARDS Regulation,³⁶⁸ as well as in the later IPA Regulations.³⁶⁹ Where the legal framework in rela-

363 See Commission Communication on Agenda 2000: For a Stronger and Wider Union, COM(97) 2000 final, 15 July 1997, pp. 52-53.

364 Defined in the Guidelines as 'helping the candidate countries to develop the structures, human resources and management skills needed to put in place economic, social and regulatory systems equal to the task required for approximation of laws and implementation of the *acquis communautaire*, and an inclusive democratic civil society capable of fulfilling the requirements of the 'Copenhagen Criteria'.' Commission Decision on the Guidelines for PHARE Programme Implementation in Candidate Countries, 1998-1999, SEC(1998) 1012 final, 15 June 1998, p. 5. Also see Commission Decision on the Guidelines for the PHARE Programme Implementation in Candidate Countries for the Period 2000-2006, in Application of Article 8 of Regulation 3906/89, SEC(1999) 1596 final, 13 October 1999; Commission 2002 Report on PHARE and the pre-accession instruments for Cyprus, Malta and Turkey, COM(2003) 497 final, 11 August 2003.

365 This second priority is meant essentially that the candidate countries need to invest in adapting their enterprises and main infrastructure to respect Community norms. According to the Guidelines, 'the only alternative to long transitional periods is a major investment effort by the applicant countries to adapt to Community norms and standards.' Commission Decision on the Guidelines for PHARE Programme Implementation in Candidate Countries, 1998-1999, SEC(1998) 1012 final, 15 June 1998 p. 9.

366 *Ibid.*, p. 9.

367 *Ibid.*, p. 5.

368 According to Article 2(2) of Council Regulation (EC) No 2666/2000, financial aid is aimed at 'the creation of an institutional and legislative framework to underpin ... the rule of law.' Moreover, the assistance shall be implemented by financing investment and institution-building programmes.

369 According to para. 13 of the Preamble of IPA I Regulation (EC) No 1085/2006, assistance for candidate countries should 'be targeted at supporting a wide range of institution-building measures. Accordingly, Article 2 stipulates that the scope of assistance covers the 'strengthening of democratic institutions, as well as the rule of law, including its enforcement', which, according to Article 3, shall be implemented by *inter alia* institution building. The IPA II Regulation (EU) No 231/2014 has the same institutional focus (Article 3), and lists as its specific objective not only the strengthening of institutions, but highlights at the same time that, in the case of the rule of law, this implies 'an independent and efficient justice system' (Article 2(1)(a)(i) and 2(2)(a)). Not only that, in Annex II, covering the thematic priorities for assistance, the Regulation stipulates that in relation to the rule of law the following priorities will be addressed: 'Establishing and promoting from an early stage the proper functioning of the institutions necessary in order to secure the rule of law. Interventions in this area shall aim at: establishing independent, accountable and efficient judicial systems, including transparent and merit-based recruitment, evaluation and promotion systems and effective disciplinary procedures in case of wrongdoing.'

tion to the fifth enlargement round gave little 'actual substance'³⁷⁰ to the rule of law,³⁷¹ more effort was put into outlining the notion in relation to the countries in South-eastern Europe. Hence, in its 1997 Conclusions, the General Affairs Council indicated the elements of examination for compliance with the rule of law as well as the other political criteria in order to advance the countries' bilateral relation with the EU in the context of the Stabilisation and Association Process. For the rule of law (taken together with human rights) there is a clear focus on the judicial process, as it is stipulated that countries need to demonstrate effective means of redress against administrative decisions, access to courts and the right to fair trial, equality before the law and equal protection by the law, and freedom from inhuman or degrading treatment and arbitrary arrest.³⁷² Furthermore, the Stabilisation and Association Agreements, as already outlined previously,³⁷³ epitomise the institutional judicial focus of the notion by including as an aim of cooperation the consolidation of the rule of law through the 'reinforcement of institutions', including *inter alia* the strengthening of independence of the judiciary and improving its efficiency, and improving the functioning of the police and other law enforcement bodies.³⁷⁴

The Commission's own approach of rule of law reform as institutional reform, and more specifically as judicial reform, is seen clearly throughout its Enlargement Strategies. Arguing for the necessity of its institutional emphasis in 1999 – 'institution building helps the candidates meet the importance challenge of strengthening their ... judicial capacity to enforce and implement the *acquis*'³⁷⁵ – the Commission tied this focus explicitly to the rule of law, amongst others in its 2006 Strategy, by stating that it will pay 'particular attention to the establishment of the structures needed to ensure the rule of law. This includes administrative and judicial capacity...'.³⁷⁶ In line with these intentions, also the later strategies confirm that reinforcing the rule of law is seen not only as institution-building in general, but as judicial reform in particular. In the words of the 2014 and 2015 strategies: 'Strengthening the rule of law is a key challenge for most of the countries in

370 Päivi Leino 'Rights, Rules and Democracy in the EU Enlargement Process: Between Universalism and Identity' 7 *Austrian Review of International and European Law* (2002), pp. 53-90 at 81.

371 Marks has criticised the Commission's attempt at outlining what it would look for in the Copenhagen political criteria in Agenda 2000 as a 'simplistic sum', see Susan Marks *The Riddle of All Constitutions. International Law, Democracy and the Critique of Ideology* Oxford: Oxford University Press (2000), p. 74.

372 Council Conclusions 'The Application of Conditionality with a view to developing a Coherent EU-Strategy for the Relations with the Countries in the Region', Annex to Annex III, 2203rd General Affairs Council, 29-30 April 1997.

373 See section 2.3.

374 See for example Article 80 Stabilisation and Association Agreement Montenegro.

375 Commission Composite Paper – Reports on Progress towards Accession by Each of the Candidate States, COM(1999) 500 final, 13 October 1999, p. 9.

376 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2006, p. 22.

the enlargement process, in particular in terms of improving the functioning and independence of the *judiciary*.³⁷⁷

Additional support for this line of argumentation can be found in the regular and progress reports. From the first reporting round onwards, the Commission has tackled the analysis of the Copenhagen political criteria in two parts, democracy and the rule of law on the one hand, human rights and the protection of minorities on the other. Under the former, the examination has been divided into four sections: parliament, executive, judiciary, and anti-corruption matters.³⁷⁸ It is submitted that the Commission's rule of law analysis is concentrated solely on the judiciary branch.³⁷⁹ Indeed, in the 2015 and 2016 reports, in which the Commission has addressed for the first time democracy and the rule of law separately, the evaluation of the rule of law section focused almost exclusively on the functioning of the judiciary.³⁸⁰ Additionally, while the structure of this section has changed marginally over the years,³⁸¹ the basic analysis and the elements contained therein has not.

Next to the Copenhagen European Council's institutional formulation of the rule of law, the necessity of creating a basic institutional judicial environment even before the question of judicial reform could be tackled, added to the institutional-centric focus of the Commission's rule of law conceptualisation. Several of the applicant states' Constitutions stipulated a lay out of a judicial system that had yet to materialise, both in terms of the creation as well as the abolishment of judicial bodies. To name a few example in order to provide an insight into the magnitude of this undertaking, in Bulgaria, a three-tier jurisdiction, courts of appeal throughout the country and the supreme court of appeal, as well as the supreme administrative court were introduced.³⁸² In the Czech Republic a supreme administrative court needed to be created.³⁸³ In Hungary a fourth level of courts, the high courts

377 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 5, [emphasis added]. The Communication moreover continues further down the same page that '[t]here have been some positive developments on the rule of law over the past years. This has been primarily in terms of putting in place legal frameworks and institutional structures. Also see Commission Communication on EU Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 11.

378 See for example, 1999 Slovenia Regular Report.

379 For the argument that anti-corruption matters should not be understood to form part of the Commission's rule of law conceptualization, see section 4.3.

380 See for example 2016 FYROM Report, pp. 12-19; 2015 Montenegro Report, pp. 12-19.

381 In relation to the countries in South-eastern Europe, the basis breakdown of parliament, government, public administration, judicial system, and anti-corruption policy, has only expanded in the 2013 and 2014 reporting rounds.

382 1998 Bulgaria Regular Report, 8; 2000 Bulgaria Regular Report, p. 16.

383 In accordance with Article 91 of the Czech Constitution. 1998 Czech Regular Report, p. 9. Much to the annoyance of the Commission, the supreme administrative court as foreseen by the Constitution, did not materialise; rather, a system of administrative senates in regional courts was initiated. 1999 Czech Regular Report, p. 13.

of justice, was to be inserted between regional courts and the Supreme Court.³⁸⁴ In Lithuania, apart from a four-tier judicial system that was introduced, special arbitration tribunals were set up and the Commercial Court was abolished.³⁸⁵ In Poland, a new layer of jurisdiction was introduced dealing with petty cases, in order to unburden the backlogged system.³⁸⁶ In the light of these examples it becomes apparent that the frequent lack of a basic judicial court structure has intensified the Commission's emphasis on the institutional set-up in the applicant states, even before it could start to discuss the functioning of these institutions.

Against this background of the Commission's understanding of the rule of law as judicial reform, the rest of this section will further dissect the institutional elements of the rule of law.

3.3.2 *The lack of articulation of the element of separation of powers*

For an institution so much vested in state-building, it is striking to note that the Commission, at the strategic level, has not put forward its understanding on the doctrine of the separation of powers.³⁸⁷ Notwithstanding the fact that the structure of the analysis of the political criteria of democracy and the rule of law in the annual reports followed the separation of powers rationale,³⁸⁸ *i.e.* the subdivision of parliament, executive, and judiciary, this structural approach has not provided any insights into the Commission's idea of the doctrine *per se*. Since within each sub-section the analysis concentrated on the developments of that particular topic only, without providing an assessment of the ways in which these branches of government interrelate or how their separation is organised in practice, such an analysis does not actually cover the separation of powers. After all, the fact that they are analysed separately does not support the conclusion of their actual separation in the legal systems in question.³⁸⁹

384 1998 Hungaria Regular Report, p. 9.

385 1998 Lithuania Regular Report, pp. 8-9; 1999 Lithuania Regular Report, p. 12.

386 2000 Poland Regular Report, p. 17.

387 Of course, at the internal level of the EU there is the principle of institutional balance, as recognized by the Court as a fundamental principle of the EU legal order. See the line of case-law starting with Case 9/56 *Meroni & Co., Industrie Metallurgische, SpA v High Authority* [1958] ECR 11. Despite the fact that it has been argued that this principle corresponds to the separation of powers recognized in the constitutional orders of the Member States, one should not be confused with the other. See Jean-Paul Jacqué 'The Principle of Institutional Balance' 41 *Common Market Law Review* (2004), pp. 383-391. Further, see Alexander Fritzsche 'Discretion, Scope of Judicial Review and Institutional Balance in European Law' 47 *Common Market Law Review* (2010), pp. 361-403; Sasha Prechal 'Institutional Balance: A Fragile Principle with Uncertain Contents' in Ton Heukels, Niels Blokker & Marcel Brus (eds) *The European Union after Amsterdam – A Legal Analysis* The Hague: Kluwer Law International (1998) pp. 273-294; Koen Lenaerts 'Some Reflections on the Separation of Powers in the European Community' 28 *Common Market Law Review* (1991), pp. 11-35.

388 Kochenov (2008), p. 112.

389 *Ibid.*, p. 113.

Examining the legal and strategic framework as well as the annual reports, it is evident that the Commission barely touches upon the separation of powers and the interrelation of the three branches of government. None of the Agreements, financial instruments, strategies or reports confront the issue, let alone provide a definition. To give an example, the 2012-2013 Enlargement Strategy, which is the Commission's main strategy document in terms of 'putting the rule of law at the centre of enlargement policy', appears to tackle the separation of powers by addressing the three branches of government. According to the Strategy, the applicant states 'have to establish and promote from an early stage the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national parliament through government and the judicial system....'³⁹⁰ However, no actual explanation of the separation of powers is provided, *i.e.* an answer to the question what is meant by the 'proper functioning' of the institutions, what their scope of competences ideally should be, or how their interactions should be shaped and defined.

It is submitted that the Copenhagen documents do not provide clarity on this issue either. The Commission's Opinions on the application for membership do not go beyond a pithy statement in line with the formulation of the Copenhagen political criteria. For example in the case of one of the Baltic States, the Commission's *avis* states that 'Latvia's political institutions function properly and in conditions of stability.'³⁹¹ Similarly, in the case of Croatia, focussing on the functioning of Parliament, the Opinion offers that the institutions 'functions satisfactorily, its powers are respected....'³⁹² The annual reports related to the countries in central and Eastern Europe merely supply their assessment of progress on the basis of the aforementioned sub-division: the parliament and the legislative process, the executive and public administration reform, and the functioning of the judicial system and processes.³⁹³ Their interrelation is not taken into account.

While the annual reporting rounds on the countries in central and Eastern Europe revealed almost nothing on the Commission's interpretation of the doctrine of the separation of powers,³⁹⁴ the reports on the Western Balkans are more forthcoming, if only in relation to the problem of undue political interference. Although the Commission does not set out any preferences for the organisation of the separation of powers of the various institutions, it heavily criticises the instances of political interference in the other branches. For example, in the 2007 Report on Croatia, such involvement in the public administration is condemned: 'The civil service continues to be

390 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

391 Commission Opinion on Latvia's Application for Membership of the European Union, COM(1997) 2005 final, 15 July 1997.

392 Commission Opinion on Croatia's Application for Membership of the European Union, COM(2004) 257 final, 20 April 2004, p. 13.

393 See for example 2002 Slovenia Regular Report, pp. 19-23.

394 For one of the few examples, see the 2002 Romania Regular Report, p. 25.

politicised. Policy implementation often remains in the hands of political advisors. Undue political influence, even in the recruitment of technical staff continues.³⁹⁵ Analysis of the reports shows that political interference in the other branches of government is a particularly endemic problem in most of the countries in the Western Balkans. The 2016 Report on the situation in Kosovo serves as just one illustration: 'The recent allegations of political interference in recruitment to and decision-making processes in public bodies, based on leaked telephone intercepts, raise concern and should be fully investigated.'³⁹⁶

Two closely related arguments can be made to mitigate the Commission's lack of specificity in relation to the separation of powers. First, the nature of the doctrine does not lend itself to an easy breakdown into elements. As it was argued in chapter 1, all three national rule of law traditions require some form of a separation of powers in order to ensure that the government is bound by the law alone. It was furthermore shown that there are many differences in the ways in which the division of tasks between the judicial, legislative, and executive branches can be organised, allowing for institutional leeway in the EU Member States, and thus, one would expect, also in the applicant states. As it was argued in chapter 2,³⁹⁷ even though it is a collective 'desideratum',³⁹⁸ there is no commonly agreed-on institutional design.³⁹⁹ Accordingly, it is doubtful whether 'the doctrine is specific enough to be a useful constitutional standard.'⁴⁰⁰ In a way, by addressing the separation of powers only marginally and by concentrating on the functioning of the three branches in their own right, *i.e.* separately, the Commission seems to allow for the separation of powers to develop over time in each of the applicant states, while at the same time providing guidance by criticising the instances in which it is clear that one of the governmental branches has abused its powers. While this seems far from ideal, addressing the legislature, executive, and judiciary separately might be the only way in which the Commission has found it possible to formulate quantifiable benchmarks; which leads to the second point.

Secondly, the methodology of enlargement can hardly be said to be suited to the promotion and/or consolidation of the doctrine of the separation of powers. In the light of the domestic room for manoeuvre, it should be pointed out that, particularly for such a malleable concept as the separation of powers, there is an inherent paradox embedded in the EU's

395 2007 Croatia Progress Report, p. 8.

396 2016 Kosovo Report, p. 8. Also see 2016 Serbia Report, p. 11.

397 See chapter 2, section 4.

398 Robert S. Summers 'Legal Institutions in Professor H.L.A. Hart's Concept of Law' 75 *Notre Dame Law Review* (2000), pp. 1807-1828 at 1814.

399 Martin Krygier 'Rule of Law' in N.J. Smelser & P.B. Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* New York: Elsevier (2001), pp. 13404-13408 at 13404.

400 William B. Gwyn *The Meaning of the Separation of Powers: An Analysis of the Doctrine from Its Origin to the Adoption of the United States Constitution* The Hague: Martinus Nijhoff (1965), p. 128.

enlargement policy based on the methodology of conditionality. Progression towards accession, and the accompanying financial assistance,⁴⁰¹ is based on headway made towards achievement of the objectives set out, amongst others, in the Accession Partnerships, which, according to Article 2(2) of the IPA II Regulation, 'shall be monitored and assessed on the basis of pre-defined, clear, transparent and, where appropriate, country-specific and measurable indicators.'⁴⁰² This methodology plainly requires at the very least the setting of minimum benchmarks. However, while the ideal of the separation of powers could be formulated as a rule of law related objective, common benchmarks that apply to all applicant states in order to measure progress on how to achieve this are very difficult to set. Furthermore, it was argued in section 3.1 on the missing rule of law element of legality, that enlargement's methodology of quantitative progress measurements has undermined a number of the requirements of legality itself. Here, it is submitted that the EU's enlargement methodology has forced the Commission to concentrate only on those issues of the rule of law for which benchmarks could be formulated.⁴⁰³ Clearly, in relation to the general doctrine of the separation of powers, benchmarks or minimum requirements have not been articulated. The reports address the institutions related to the three branches but fail to also include standards in relation to the question of how the EU sees these branches should interconnect.

In sum, the above analysis has demonstrated that in its enlargement policy, the EU assesses the separation of powers only marginally. Judging from the analysis of the Reports, it does not see the doctrine *per se* as an element of the rule of law.

3.3.3 *The emphasis on the element of judicial independence and the later addition of judicial accountability*

As demonstrated above, the doctrine of the separation of powers is largely absent from the enlargement framework. At this point, it should, however, be recalled that it was argued in chapter 2 on the common features of the rule of law in legal theory, that, notwithstanding their acknowledgement of the importance of the separation of powers for the proper functioning of the rule of law, legal scholars have concentrated almost exclusively on what the doctrine prescribes for the functioning of the legal institutions, namely the particular issue of judicial independence. It seems that the Commission has done the same.

401 Article 4 Regulation (EU) No 231/2014.

402 Article 2(2) Regulation (EU) No 231/2014.

403 See for example the 2010 Enlargement Strategy, in which it is stated that '[t]he use of benchmarks in the accession negotiations serves as an important catalyst for reforms and gives a clear message that rule of law issues must be addressed seriously before accession. Commission Communication on Enlargement Strategy and Main Challenges 2010-2011, COM(2010) 660, 9 November 2010, p. 7.

Since the Commission's understanding of the rule of law is informed by the institutional angle, and, more particularly, the perspective of judicial reform,⁴⁰⁴ this is hardly surprising. Judicial independence is one of the few specific rule of law elements mentioned in the legal framework⁴⁰⁵ and can be found as an objective throughout all rounds of the Accession and European Partnerships.⁴⁰⁶ Its relevance is highlighted across all years, albeit in fairly generic terms, in the Enlargement Strategies,⁴⁰⁷ and the annual reports allocate a significant amount of space to the assessment of progress in this area.

As rightly noted by Scott, only if the judiciary is independent from the other branches of government, 'can we say that we live in a society where the rule of law is able to flourish.'⁴⁰⁸ Indeed, for any society to be based on the rule of law, there must be an institution charged with the responsibility of ensuring that it is the law that rules.⁴⁰⁹ As seen in chapter 1, Dicey argued that it is the role of the courts to keep the state, and its citizens, from arbitrary government, and to ensure equality by law.⁴¹⁰ The notion of judicial independence is widely accepted and Article 6 ECHR enshrines the right to a fair trial by an independent and impartial tribunal established by law.⁴¹¹ In the *Sunday Times* case, the ECtHR described the relationship between this right and the rule of law, by stating that Article 6 'reflects the fundamental principle of the rule of law.'⁴¹²

404 See section 3.3.1.

405 As was already analysed above, the Europe Agreements provide no substantive input for the EU's definition of the rule of law. The Stabilisation and Association Agreements, however, in their institutional approach on the rule of law, zoom in on judicial independence. See for example Article 74 of the Stabilisation and Association Agreement with the Former Yugoslav Republic of Macedonia. See also Article 2(2)(a) of Regulation (EU) No 231/2014.

406 See for example the 1999 Accession Partnership Bulgaria; 2002 Accession Partnership Slovakia; 2003 Accession Partnership Romania; 2008 European Partnership Serbia including Kosovo.

407 See for example the 2006 Strategy, in which it is stated that the Commission 'is promoting greater awareness of how best to ensure the independence, impartiality and effectiveness of the judiciary and to prevent corruption.' Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649, 8 November 2006, p. 5.

408 Richard J. Scott 'Accountability and Independence' 45 *University of New Brunswick Law Journal* (1996), pp.27-36 at 27. Further, see Simon Shetreet & Jules Deschênes (eds) *Judicial Independence – the Contemporary Debate* Dordrecht: Martinus Nijhoff (1985), p. xv; John Reitz 'Export of the Rule of Law' 13 *Transnational Law & Contemporary Problems* (2003), pp. 429-486 at 437.

409 Antonio Lamer 'The Rule of Law and Judicial Independence: Protecting Core Values in Times of Change' 45 *University of New Brunswick Law Journal* (1996), pp. 3-18 at 6.

410 Albert Venn Dicey *An Introduction to the Study of the Law of the Constitution* London: MacMillan Press (1959).

411 See for example ECtHR *Lauko v. Slovakia*, Appl. No. 4/1998/907/1119, para. 63.

412 ECtHR *Sunday Times v. United Kingdom*, Appl. No. 6538/74, para. 55. See also ECtHR *Stan Greek refineries v. Greece*, Appl. No. 13427/87, para. 46; ECtHR *Salbiaku v. France*, Appl. No. 10519/83, para. 28.

Within the EU's institution-centric approach, the promotion of judicial independence was, and is, one of the main issues addressed by the Commission in the pre-accession process.⁴¹³ The 2015 Enlargement Strategy formulates the consolidation of the rule of law particularly in terms of 'improving the functioning and independence of judiciary....'⁴¹⁴ Considering the cultural and historical context of the applicant countries, both for the countries in central and Eastern Europe⁴¹⁵ and the Western Balkans,⁴¹⁶ strong institutional guarantees of judicial independence are required. However, even though various legal instruments acknowledge the importance of judicial independence,⁴¹⁷ it was already pointed out in the previous case-study⁴¹⁸ that there is an abundance of legal and political documents,⁴¹⁹ including those by the UN Human Rights Committee,⁴²⁰ the International Bar Association (IBA),⁴²¹ the International Commission of Jurists,⁴²² and

413 It can be found as an objective in a great number of Accession and European Partnerships, see for example 2003 Accession Partnership Bulgaria; 2003 Accession Partnership Turkey; 2002 Accession Partnership Estonia. Also see the 2008 European Partnership Bosnia and Herzegovina; 2008 European Partnership with Albania.

414 Commission Communication on EU Enlargement Strategy, COM(2015) 611, 10 November 2015, p. 5.

415 See the Report of the Open Society Institute on Judicial Capacity, in which it is stated that '[i]n the candidate States in particular, the legacy of the judiciary's subordination and dependence and, more broadly, the lasting cultural effects of political dictatorship, may require institutional separation and institutional guarantees of judicial independence that are more far-reaching than in countries with an entrenched culture of judges' independence or a tradition of decision-making based on consensus and negotiation.' Open Society Institute (2002) *Monitoring the EU Accession Process: Judicial Capacity*, p. 15, available at: https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacity_full_20030101_0.pdf.

416 See the analysis of the legacies of the past as obstacles to EU rule of law promotion in Kmezić (2017), pp. 39-47.

417 See for example Article 14 ICCPR. Further, see the Council of Europe, European Charter on the Statute for Judges, DOC(98) 23, July 1998, available at: <https://rm.coe.int/16807473ef>; Council of Europe Recommendation No. (94) 12, on the Independence, Efficiency and Role of Judges, 13 October 1994.

418 See section 3.3.3.

419 See the overview compiled by the International Commission of Jurists, available at: <https://www.icj.org/themes/centre-for-the-independence-of-judges-and-lawyers/international-standards/>.

420 United Nations Human Rights Committee, General Comment No. 13: Article 14 (Administration of Justice) Equality before the Court and the Right to a Fair and Public Hearing by an Independent Court Established by Law, 13 April 1984, para. 3, available at: <http://www.refworld.org/docid/453883f90.html>.

421 International Bar Association, Minimum Standards of Judicial Independence, adopted in 1982, available at: https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf.

422 International Commission of Jurists, Policy Framework for Preventing and Eliminating Corruption and Ensuring Impartiality of the Judicial System, available at: <https://www.icj.org/wp-content/uploads/2015/04/CIJL-Policy-Framework-for-preventing-and-eliminating-corruption-and-ensuring-impartiality-of-the-judicial-system-2000.pdf>.

the European Network of Councils for the Judiciary (ENCJ).⁴²³ These documents approach judicial independence from various angles and present rather diverse views of the notions substance, making it difficult to rely on one standard over another.

Notwithstanding the fact that the Council of Europe has produced a number of key (non-binding) documents on the topic,⁴²⁴ which, together with the ECtHR's case law on Article 6 ECHR, provides an insight to its own understanding of judicial independence, it is submitted that neither the EU nor the Council of Europe has a clearly defined, precise, clear-cut standard on judicial independence which is applied in the enlargement process. Indeed, as Smilov has argued, among the Member States of both there is a plurality of models of judicial independence, with 'no prospect of convergence among them on the key issues.'⁴²⁵

The Court of Justice of the European Union itself has provided a generic view of judicial independence in its case-law when it stated that '[i]t should be remembered that the expression 'court or tribunal' is a concept of Community law, which, by its very nature, can only mean an authority acting as a third party in relation to the authority which adopted the decision forming the subject-matter of the proceedings.'⁴²⁶ Later case-law has added, *inter alia*, that a tribunal or court should give judgement without receiving any instructions, giving it a *status aparte* from the authorities that took the decision under appeal.⁴²⁷ Or, in the words of the Court in the recent case *Associação Sindical dos Juizes Portugueses*,⁴²⁸

423 European Network of Councils for the Judiciary, Report on Independence and Accountability of the Judiciary 2013-2014, available at: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_2014_disclaimer.pdf.

424 See for example Council of Europe, European Charter on the Statute for Judges, DOC(98) 23, July 1998, available at: <https://rm.coe.int/16807473ef>; Council of Europe Recommendation No. (94) 12 of 13 October 1994 on the Independence, Efficiency and Role of Judges. Also see the important work of two of its other bodies, the Venice Commission (European Commission for Democracy through Law) and the Commission for the Efficiency of Justice (CEPEJ).

425 Daniel Smilov 'EU Enlargement and the Constitutional Principle of Judicial Independence' in Wojciech Sadurski, Adam Czarnota & Martin Krygier *Spreading Democracy and the Rule of Law?* Dordrecht: Springer (2006), pp. 313-334 at 314. For a comparative study on the institutionalisation of judicial independence see Carlo Guarnieri & Patrizia Pedersoli *The Power of Judges: A Comparative Study of Courts and Democracy* Oxford: Oxford University Press (2002).

426 Case C-24/96 *Corbiau* [1993] ECR I-1277, para. 15. See further, Case C-393/92 *Almelo v Energiemaatschappij IJsselmij* [1994] ECR I-1277 para. 21; Case 109/88 *Handels-og Kontorfunktionærernes Forbund i Danmark v Dansk Arbejdsgiverforening* [1989] ECR 3199, paras. 7-8; Case 14/86 *Pretore di Salò* [1987] ECR 2545, para. 7; Case 338/85 *Fratelli Pardini* [1988] ECR 2041, para. 9.

427 Case C-407/98 *Abrahamsson* [2000] ECR I-5539, paras. 36-37.

428 Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018, para. 44.

The concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is just protected against external interventions or pressures liable to impair the independent judgment of its members and to influence their decisions.

It must be pointed out that the CJEU's rudimentary view of judicial independence has been informed by the legal framework in which it pronounced on the question, that of the preliminary reference procedure (Article 267 TFEU). This was reiterated in the abovementioned case, in which the importance of judicial independence and its relationship to the rule of law was explicitly placed in the context of the role of Member State courts in ensuring effective judicial review for individual parties in fields covered by EU law.⁴²⁹ Furthermore, the independence of national courts and tribunals is, according to the Court, particularly 'essential to the proper working of the judicial cooperation system embodied by the preliminary ruling mechanism...', in that 'that mechanism may be activated only by a body responsible for applying EU law which satisfies, *inter alia*, that criterion of independence.'⁴³⁰ However, while this limited formulation provides enough guidance to assess whether referring courts and tribunals are entitled to ask a preliminary reference, it clearly falls short of providing a comprehensive standard on the issue. Turning to Strasbourg's human rights protection system, judging from the line of case law on the topic, including the case of *Holm v Sweden*⁴³¹ which combined both personal and institutional guarantees, it can be said that judicial independence is interpreted broadly, covering a variety of difference components.⁴³² As it has been analysed in the literature,⁴³³ the latter has as a consequence that

429 *Ibid.*, paras. 34, 42.

430 *Ibid.*, para. 43.

431 The European Commission on Human Rights ruled that '[i]n determining whether a body can be considered to be an independent tribunal, regards must be had to the manner of appointment of its members and the duration of their term of office, the existence of regulations governing their removal or guarantees for their irremovability, law prohibiting their being given instructions by the executive in their adjudicatory role, the existence of legal guarantees against outside pressures, the question whether the body presents an appearance of independence and the attendance of members of the judiciary in the proceedings.' European Commission on Human Rights *Holm v. Sweden* Application Nos. 6878/75 and 7238/75, para. 55.

432 See for example the *Langborger* case in which the Commission held that '[i]n order to establish whether a body can be considered 'independent' regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, to the existence of guarantees against outside pressures and to the question whether the body presents an appearance of independence.' ECtHR, *Langborger v. Sweden*, Appl. No. 11179/84, para. 32. See further ECtHR, *Procola and others v. Luxembourg*, Appl. No. 14570/89, para. 43; ECtHR, *Bryan v. United Kingdom*, Appl. No. 19178/91, para. 37; ECtHR, *Steel and Morris v. United Kingdom*, Appl. No. 68416/01, para. 73.

433 Martin Kuijer *The Blindfold of Lady Justice: Judicial Independence and Impartiality in Light of the Requirements of Article 6 ECHR* Leiden: E.M.C. Meijers Instituut (2004), p. 213.

the Strasbourg case-law is context-based and flexible, without, however, providing a comprehensive clear-cut standard.

It would go beyond the scope of this thesis to go into a detailed, lengthy, and critical analysis of the Commission's assessment of judicial independence throughout the reports in order to point out all the divergences. Such analysis of the effectiveness and consistency of the Commission's evaluations has already been undertaken in the existing literature, both in relation to the countries in central and Eastern Europe,⁴³⁴ and to the Western Balkans.⁴³⁵ Nonetheless, on the conceptualisation of this particular element in enlargement across the documents regarding all the applicant countries concerned, three points should be made in relation to judicial independence and the rule of law.

First, the Commission has organised its assessment of judicial independence mainly along the lines of the prevailing approach⁴³⁶ of institutional and personal independence,⁴³⁷ or, in the words of the ENCJ's report on Independence and Accountability, the independence of the judiciary as a whole and the independence of the individual judge.⁴³⁸ The 2001 Regular Report on Estonia serves a good example of the Commission's assessment since it demonstrates both aspects of judicial independence.

All judges are appointed for life and the Constitution and legislation explicitly safeguard the independence of judges. However, there is a need to further reinforce the institutional independence of the courts particularly in the context of the ongoing court reform. The close administration of the courts (with the exception of the Supreme Court) by the executive (Ministry of Justice), and the courts' limited financial autonomy, threaten judicial independence.⁴³⁹

434 For an analysis of judicial independence in the reports of the fifth round of enlargement in the light of conditionality and the questionable coherence of the Commission's approach see Kochenov (2008), pp. 252-275; Smilov (2006), pp. 313-334.

435 For a normative and empirical analysis of judicial independence in the Western Balkans, see Kmezcic (2017), pp. 65-84.

436 Shetreet has stated that 'a modern conception of judicial independence cannot be confined to the individual judge and to his substantive and personal independence, but must include collective independence of the judiciary as a whole.' Shimon Shetreet 'The Emerging Transnational Jurisprudence on Judicial Independence: The IBA Standards and Montreal Declaration' in Shimon Shetreet & Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* The Hague: Martinus Nijhoff (1985), pp. 393-402 at 393.

437 This division is rather rudimentary; there are diverging views on the placement of sub-elements within this divide, such as the question whether the arrangements for selecting, appointing, evaluating, and disciplining of judges is part of either institutional independence, or individual independence. However, considering the differences in the various instruments, for present purposes it is not necessary to go into a more detailed outline.

438 European Network of Council's for the Judiciary 'Independence and Accountability of the Judiciary – ENCJ Report 2013-2014' adopted in Rome, 13 July 2014, available at: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_adopted_version_sept_2014.pdf.

439 2001 Estonia Regular Report, p. 18.

In relation to institutional independence, the Commission's focus included (in relation to the CEECs), and includes (regarding the SEECS), the following sub-elements: the existence of a legal framework that guarantees and regulates judicial independence; the governance structure in terms of self-regulation; and the budgetary arrangements both in terms of quantity and level of independence in allocation. Whereas the reports on the countries in central and Eastern Europe demonstrate that the first sub-element of Constitutional guarantees is little more than a legislative check,⁴⁴⁰ in relation to the countries in the Western Balkans the assessment takes the actual application of the rules in practice into account. Indeed, as the Montenegro Screening Report of Chapter 23 shows, the Commission, after evaluating the relevant Constitutional provisions, warns that 'existing rules present a number of shortcoming and create risks for undue political influence.'⁴⁴¹ This shows that in the area of judicial independence the Commission increasingly found ways to go past legislative window-dressing, in order to address the actual application of rules.

On the second sub-element of the governance structure, the assessment focuses mainly on the underlying legal framework allowing judicial self-government, the composition of the self-governing body, *i.e.* the Judicial/Prosecutorial Council, and the relations with the Minister/Ministry of Justice. According to the 2002 authoritative report by the Open Society Institute on judicial capacity in relation to the countries in central and Eastern Europe, self-governance has become one of the focal points of judicial reform, since an autonomous judiciary 'will better be able to respond with flexibility to its perceived needs than will one that is directed by an external authority.'⁴⁴² The underlying idea is that judges who feel that they are responsible for or can influence the administration of their own affairs have more incentive for acting independently and protecting their independence.⁴⁴³ However, the problem of insufficient institutional independence was, and still is,⁴⁴⁴ acute in the applicant states and the Commission has actively promoted a greater degree of independence in the organisation of the judicial sector's self-governance, criticising too much involvement of the

440 The early reports included simply the check whether the Constitution provides for both institutional and personal independence of judges, see for example 2001 Poland Regular Report, p. 20; 2001 Hungary Regular Report, p. 16.

441 Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 18.

442 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 41, available at: https://www.opensocietyfoundations.org/sites/default/files/1judicialcapacityfull_20030101_0.pdf.

443 Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), p. 23, available at: https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf.

444 Commission Communication on 2016 Communication on Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 3.

executive and legislature,⁴⁴⁵ the failure to adopt the necessary legislation,⁴⁴⁶ and the composition of the Judicial Councils.⁴⁴⁷

In relation to the budgetary arrangements, while the ultimate power may lay with the legislature, it is vital that the judiciary itself participates in the drafting and application of its own budget in order to ensure that the judges' legitimate interests are protected from indirect economic pressure.⁴⁴⁸ This is all the more so in the case of the applicant countries where the courts came from a situation of underfunding and executive opposition to budget increases. Accordingly, the Commission has criticised decreases in the judiciary budget in terms of amount/percentage GDP,⁴⁴⁹ but also in terms of executive intervention in the budget adoption procedure.⁴⁵⁰ From the phrasing of the reports, it is apparent that the Commission must have had some general judiciary budgetary standards in mind – '[t]he number of judges and prosecutors in Montenegro is above the EU average in relation to the size of the population, as is the percentage of the budget spent on staff.'⁴⁵¹ However, the reports do not indicate what these percentages are and how salary expenses relate to the overall expense of judicial build-up and reform. Thus, even though budgetary management is clearly included as a sub-element of institutional judicial independence, the Commission has refrained from offering a minimum standard.

On the issue of personal independence, the comments here can be brief. The Commission looked at the same elements across all the years, both in relation to the CEECs and SEECs. These include appointment and irremovability,⁴⁵² transfer,⁴⁵³ probation,⁴⁵⁴ selection proceedings,⁴⁵⁵ and remuneration.⁴⁵⁶ It is interesting to see, however, that only in some of the later reports concern is expressed over the need to ensure protection mechanisms of both external (external pressure on individual judges in relation to their individual decision-making) and internal (judicial peer pressure) independence of judges, a subdivision of personal judicial independence

445 See for example 2001 Estonia Regular Report, p. 18; 2001 Latvia Regular Report, p. 19; 2002 Latvia Regular Report, p. 21; 2012 Serbia Progress Report, p. 10.

446 See for example 1998 Bulgaria Regular Report, p. 8; 2001 Slovakia Regular Report, p. 17; 2008 Montenegro Progress Report, p. 11.

447 See for example 2001 Romania Regular Report, p. 20; 2008 Montenegro Progress Report, p. 11; 2012 FYROM Progress Report, p. 10.

448 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 46.

449 See for example 2001 Hungary Regular Report, p. 17; 2002 Hungary Regular Report, p. 25; 2016 Montenegro Report, p. 14.

450 See for example 2002 Bulgaria Regular Report, p. 24; 2016 Serbia Report, p. 13.

451 2016 Montenegro Report, p. 14.

452 See for example 2001 Hungary Regular Report, p. 16; 2001 Bulgaria Regular Report, p. 18; 2008 Montenegro Progress Report, p. 11.

453 See for example 2016 Turkey Report, p. 64.

454 See for example 2008 Croatia Progress Report, p. 51; 2010 Turkey Progress Report, 14; 2010 Iceland Progress Report, p. 7.

455 See for example 2006 Croatia Progress Report, p. 49; 2016 Serbia Report, p. 55.

456 See for example 2001 Lithuania Regular Report, p. 18.

as proposed in the ENCJ Report on the Independence and Accountability of the Judiciary.⁴⁵⁷ Thus, for example in FYROM's 2016 Report, the Commission condemns the situation that although high ranking judicial officials have pointed publicly to the need to respect the independence of the judiciary, 'there is no framework in place to protect judges against external pressures.'⁴⁵⁸ Furthermore, as an illustration of internal personal independence, Montenegro's 2015 report highlights the Commission's awareness of the fact that such independence may be undermined by the Supreme Court's possibility to adopt legal positions of principle and by the supervisory powers of higher courts *vis-à-vis* lower courts.⁴⁵⁹

The second point that should be made in relation to judicial independence is the fact that it is increasingly mentioned in combination with judicial accountability. While the latter is hardly a matter of concern in the reports on the fifth enlargement round, it is clearly on the agenda in the reports on the Western Balkans, as, for example, the 2014-2015 Enlargement Strategy demonstrates.⁴⁶⁰

[N]umerous challenges remain. Independence of state judicial councils needs to be ensured, more sound procedures for the appointment of judges and prosecutors put in place and judicial independence needs to be safeguarded whilst ensuring accountability.

The addition of judicial accountability comes in recognition of the fact that judicial independence and judicial accountability are complementary concepts.⁴⁶¹ After all, as was already pointed out in the previous case study, the judiciary has been granted a limited measure of autonomy for a particular common purpose, and an independent judiciary must therefore be accountable for its decisions and operations.⁴⁶²

457 European Network of Council's for the Judiciary 'Independence and Accountability of the Judiciary – ENCJ Report 2013-2014' adopted in Rome, 13 July 2014, pp. 11-12.

458 2016 FYROM Report, p. 13.

459 2015 Montenegro Report, p. 13.

460 Commission Communication on Enlargement Strategy and Main Challenges 2014-2015, COM(2014) 700 final, 8 October 2014, p. 11.

461 In the previous case study in the concomitant section, it was pointed out that, although they are intertwined, judicial independence and judicial accountability are two distinct concepts, describing competing visions of the relationship of the judiciary/judges to the rest of society. It was highlighted that judicial independence covers both institutional and decisional independence, keeping the judiciary separate from other branches of government and judicial decision-making free from undue influence. Judicial accountability describes the ideal that the judiciary, much like the legislature and the executive, should be held accountable for their work. Also see Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), pp. 18-19; Kmezić (2017), p. 84.

462 See section 3.3.3. Further, see Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 16.

The Commission has not indicated what it means by judicial accountability, however, most of the reports concentrate on the existence and functioning of a disciplinary system for judges and prosecutors⁴⁶³ and the issue of immunities.⁴⁶⁴ While the formulation of the assessment occasionally indicates that stronger procedures need to be put into place – '[t]he current system of disciplinary responsibility for judge and prosecutors result mostly in mild disciplinary sanctions and therefore fails to produce a deterrent effect'⁴⁶⁵ – the Commission does not outline its own particular standards, often merely providing a quantitative overview of the number of cases against judges and prosecutors in a reporting year.⁴⁶⁶ Moreover, the Commission pays very little attention to issues of transparency, for example by way of freely accessible data that could enhance accountability,⁴⁶⁷ thereby demonstrating that it has a one-dimensional approach that focuses on quantitative specifics, rather than tackling the question of whether the judiciary is also perceived to be accountable. In order for the rule of law to exist, citizens' faith in the judicial system and its workings is of the utmost importance;⁴⁶⁸ only concentrating on the functioning of an institution will not necessarily generate such confidence as a corollary.

Thirdly, in relation to judicial independence, the Commission has been heavily criticised for relying on 'European standards' in this area,⁴⁶⁹ without clarifying what this concept entails.⁴⁷⁰ Taking this argument one step further, Smilov has argued that the Commission has wilfully developed a 'myth of a common European theory of judicial independence'⁴⁷¹ since the advancement of such a theory served the EU's own interests for

463 See for example 2012 Serbia Progress Report, p. 10; 2014 Kosovo Progress Report, p. 13.

464 2005 Croatia Progress Report, p. 84; 2012 Montenegro Progress Report, p. 45.

465 Serbia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12003/14, 16 July 2014, p. 23. See for a similar formulation on judicial immunity ('the scope of application of these provisions and the procedures for removing functional immunity are not fully clear and need to be reviewed to ensure full accountability of judges and prosecutors under criminal law') Montenegro's Screening Report, Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, p. 20.

466 See for example 2012 FYROM Progress Report, p. 50; 2014 Montenegro Progress Report, p. 37; 2015 FYROM Report, p. 52.

467 One of the few exceptions is the 2016 Albania Report, p. 58.

468 As Krygier has noted, 'successful attainment of the rule of law is a social outcome, not a merely legal one', Martin Krygier 'The Rule of Law: Legality, Teleology, Sociology' in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2008), pp. 51-79 at 64.

469 See for example 2011 Bosnia and Herzegovina Progress Report, p. 13; 2014 FYROM Progress Report, p. 40.

470 Kochenov (2008), pp. 256-257; Denis Preshova, Ivan Damjanovski & Zoran Nechev 'The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms' *Cleer Paper* No.1 (2017).

471 Smilov (2006) p. 314.

bureaucratic, normative, and pragmatic reasons. After all, the whole process of measuring progress on the basis of standards and other benchmarks is dependent on the existence of these; the myth is instrumental in the self-creation of the EU as a polity based on common principles and standards; and during negotiations the existence of a 'common European standard' forms an almost unbeatable argument for reform.⁴⁷²

The critique is right in stating that the Commission has repeatedly failed to formulate a 'European standard' in the area of judicial independence. However, the argument put forward here is more nuanced. What the literature fails to take into account in its considerations is the fact that the rule of law has an inherent flexibility in its institutional design, which undercuts the idea of a common European standard. As it was argued in chapters 1 and 2, the rule of law does not come with an institutional blueprint and allows for many different ways through which it can be guaranteed.⁴⁷³ Accordingly, the critique is misguided in attempting to push the Commission to formulate common standards regarding this particular rule of law element, *i.e.* to put flesh on the bones of the 'European standards' in the area of judicial reform. Rather, it is argued here that it would be more in line with the rule of law to acknowledge the fact that there are very few generally applicable standards in this area. Indeed, as already outlined above, the Commission would have been hard pressed to provide an overview of common sub-elements, since such a consistent set of common standards concerning judicial independence does not exist, neither in the various instruments and documents mentioned, nor in the EU Member States. To be sure, the Report on Judicial Capacity of the Open Society Institute states that judicial reform will 'inevitably always have a highly particular, national character, given the strongly domestic focus and divergent traditions of different States' legal systems. Indeed, ... there will always be broad scope for choice in how States wish to organise their judiciaries – even to the point

472 *Ibid.*, pp. 326-330.

473 On the different models of judicial independence generally, see Shimon Shetreet 'Judicial Independence: New Conceptual Dimensions and Contemporary Challenges' in Shimon Shetreet & Jules Deschênes *Judicial Independence: The Contemporary Debate* The Hague: Martinus Nijhoff (1985), pp. 590- 681 at 644; Sergio Bartole 'Alternative Models of Judicial Independence: Organizing Judiciary in Central and Eastern Europe' 7 *East European Constitutional Review* (1998), pp. 62-69 at 62.

On the issue of self-governance see the 2002 Open Society Report on Judicial Capacity which highlights at least three models of self-governing ranging from total independence to increasingly hybrid forms of executive involvement in the CEECs: the independent model (autonomous governance by the judiciary); the power-sharing model (the governance and administration of the judiciary are to a certain degree shared between an autonomous judicial council and another executive body); the executive-centred model (the judiciary is not a separate entity, but rather an agency subordinated to the Ministry of Justice). Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), pp. 42-46. Also see the Open Society Institute's report on *Monitoring the EU Accession Process: Judicial Independence* (2001).

that what may be seen as essential to a just system in one may be thought antithetical to justice in another.⁴⁷⁴ This is particularly the case for such a pliable concept as judicial independence. Moreover, the legacy of communism and the unsettled political transition may require solutions that would be unacceptable in the Member States⁴⁷⁵ – stretching the boundaries of the element of judicial independence even further.

This does not mean that the EU should not put forward a minimum standard of judicial independence – the creation of a union of shared values necessitates the articulation of the minimum standards of the various rule of law elements which membership requires – candidate states cannot reasonably be expected to align their judiciaries to standards that are themselves not defined. However, it does imply that the Commission's uneven approach towards reforms in the area of judicial independence has given the applicant states the opportunity to grapple to some extent with their own ideas of protecting the independence of the judiciary and its judges – bringing the pre-accession practice, however unintentionally, to some extent in line with the rule of law. The point is that by focussing on the Commission's approach in the light of its puzzling emphasis on non-existent 'European standards', the critique displays in its analysis an unjustified tendency to precarious generalization⁴⁷⁶ – instead of allowing for national specificity there is a trend to generalise to all countries against the background of a predisposition to find proof of Europeanisation as a success story.⁴⁷⁷ By doing so, it has bypassed the actual room for manoeuvre the Commission has afforded the individual applicant states. Indeed, the actual practice debunks the Commission's own narrative of 'European standards' while, at the same time, allowing room for more organic approaches by the candidate states to the development of this element – in line with the flexibility inherent in the concept of the rule of law. The advantage of this perspective change is that it shifts the focus in the area of judicial reform

474 Open Society Institute *Monitoring the EU Accession Process: Judicial Capacity* (2002), p. 21.

475 Open Society Institute *Monitoring the EU Accession Process: Judicial Independence* (2001), p. 28.

476 Cf. Georgi Dimitrov 'The Europeanization of the Countries in South-East Europe through Enhancement of the Rule of Law: A Mission in Progress' 39 *Southeastern Europe* (2015), pp. 277-293 at 288; Michael Hein 'Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (Oxford 2012: Oxford University Press). A Comment' 39 *Southeastern Europe* (2015) pp. 421-430.

477 See, for example, Antoaneta Dimitrova 'The New Member States of the EU in the Aftermath of Enlargement: Do New European Rules Remain Empty Shells?' 17 *Journal of European Public Policy* (2010), pp. 137-148; Antoaneta Dimitrova (ed) *Driven to Change: The European Union's Enlargement Viewed from the East* Manchester: Manchester University Press (2004); Heather Grabbe *The EU's Transformative Power. Europeanization through Conditionality in Central and Eastern Europe* New York: Palgrave Macmillan (2006); James Hughes, Gwendolyn Sasse & Claire Gordon (eds) *Europeanization and Regionalization in the EU's Enlargement to Central and Eastern Europe. The Myth of Conditionality* New York: Palgrave Macmillan (2005).

from the exact delineation of standards applicable in the pre-accession process to all candidate states, to the question of what is necessary in order to consolidate judicial independence in the candidate states. This more nuanced understanding, allows for a better insight into the effectiveness of the consolidation of the rule of law in the acceding states.⁴⁷⁸

3.3.4 Conclusions

This section explored to what extent the legal framework and practice of the EU's enlargement policy confirmed the institutional rule of law elements established in the previous chapters. It was demonstrated that following the formulation of the Copenhagen political criteria, the rule of law is perceived in terms of reform of the rule of law institutions. Following this, it was asserted in relation to the doctrine of the separation of powers that the Commission, by addressing the three branches of government separately in the annual reports, has omitted setting out its thoughts on the doctrine *per se*. However, it was demonstrated that the reports show a particular focus on judicial independence, thereby confirming the findings of chapters 1 and 2 on this topic. More particularly, it was asserted that the legal framework and the reports manifest a focus on judicial independence, making it one of the main institutional elements addressed in the pre-accession process.

3.4 Interim conclusions

This part of the chapter tested the analytical framework of the three categories of rule of law elements against the EU's legal framework and practice in its enlargement policy. For each of the three categories, the question was examined whether, and if so to what extent, the elements established previ-

478 In the literature on the Western Balkans in particular, it has been highlighted that progress on the issue of the effective consolidation of judicial independence in the applicant states has so far been quite problematic. In the light of the recent developments in Poland, Hungary, and Romania – the Member States have come under close scrutiny related to judicial independence and the rule of law. It is apparent that the strengthening of the rule of law, at least in the area of judicial independence, leaves a lot to be desired. However, further research into the effectiveness of the EU's rule of law promotion efforts fall outside the ambit of this thesis. For an analysis of issues related to the EU's promotion of judicial independence in the Western Balkans, see for example Kmezić (2017), pp. 65-84; Denis Preshova, Ivan Damjanovski & Zoran Nechev 'The Effectiveness of the 'European Model' of Judicial Independence in the Western Balkans: Judicial Councils as a Solution or a New Cause of Concern for Judicial Reforms' *Cleer Paper* No.1 (2017). On the Member State mentioned, see Commission Recommendation of 20 December 2017 regarding the rule of law in Poland, complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C(2017) 9050 final, particularly section 2; European Parliament resolution of 16 December 2015 on the situation in Hungary, 2015/2935(RSP), pnt. F; Joint Statement of European Commission President Juncker and First Vice-President Timmermans on the latest developments in Romania, 24 January 2018, STATEMENT/18/423.

ously were reflected in practice. It was shown that the formal element of legality, which lies at the heart of the rule of law debate of legal scholars, does not appear in the legal and policy framework and is hardly considered by the Commission in its reporting. Instead, the examination demonstrated that, because of the chosen enlargement methodology, which quantifies progress in the legislative approximation process instead of also focussing on legislative quality, legality is actually undermined. More particularly, the findings in the reports attest to the fact that by stressing quantity over quality, problems have arisen in relation to various requirements of legality including stability, generality, and coherence. This was shown to be the case across all enlargement rounds and also in the current enlargement process regarding the Western Balkan countries.

Furthermore, it was asserted that four particular procedural elements have been fleshed out in the Commission's reporting during the pre-accession period, namely impartiality, judicial efficiency and quality, and access to justice. With regard to the first element, it was argued that in spite of impartiality's increasing importance from one enlargement round to the other, the documents display a distinct lack of clarity of the notion in relation to the institutional element of judicial independence. On the issues of judicial efficiency and quality, it was demonstrated that they have been conceptualised mostly in terms of their underlying obstacles, including problems of enforcement, low clearance rates and backlogs, and excessive length of proceedings. In relation to the third element of judicial review, it was argued that the Commission views this rule of law element mostly through an institutional lens, interpreting it in terms of the organisation of courts and their capacity, instead of focussing on the ways these bodies function and what are the necessary steps in order to strengthen this. In relation to the fourth element of access to justice, it was asserted that this element is mainly interpreted in terms of access to court and access to legal aid. Furthermore, it was shown that the evaluation of this element takes place under the headings of both the functioning of the judiciary and fundamental rights. The section concluded by arguing that even though the reports evidence the inclusion of access to justice as a rule of law element, the Commission's lack of critique in situations when there has been very little progress in the yearly monitoring reports, gives the impression that this element is not at the core of the procedural elements in the understanding of the rule of law in enlargement.

Lastly, it was argued that the EU perceives the rule of law in its accession policy mainly in terms of institutional reform, more particularly judicial reform. It was shown that this conclusion is supported by both the legal and the policy framework. Moreover, it was demonstrated that judicial independence, as the main component of the separation of powers, has been acknowledged as a main element through which the rule of law is guaranteed, lending evidentiary force to the findings on this issue in the first two chapters of the thesis.

4. GENERAL FINDINGS

In this section, the general findings on the EU's conceptualisation of the rule of law in the pre-accession process will be discussed. As already explained in the previous case study, these are the findings in relation to the conceptualisation of the rule of law in enlargement that transcend the individual categories of the analytical framework. More particularly, the general findings are concerned with the overall picture of the definition of the rule of law in this policy area. The first section of the general findings will outline the definition of the rule of law in this policy area, weighing the elements in each of the three categories, as well as analysing the relative weight of each of the categories individually. It will be shown that the conceptualisation of the rule of law in enlargement, while largely devoid of the formal element of legality, relies heavily on both procedural and institutional elements. More particularly, it will be demonstrated that the strong institutional focus of the policy has led to an emphasis on judicial reform, which, in turn, has also influenced the understanding of some of the procedural elements, such as, for example, judicial review. Furthermore, it will be asserted that, regarding the evolution of the conceptualisation of the rule of law across the enlargement rounds and the current pre-accession process, it is apparent from the examination conducted throughout this chapter that most of the elements appear in the accession rounds under review. However, for three of these, the *procedural* element of judicial impartiality, and the *institutional* elements of the separation of powers and judicial independence and accountability, the analysis will demonstrate a slight change of focus, or rather, a more nuanced understanding which has taken place during the pre-accession process in relation to the Western Balkans.

The chapter will continue by offering an explanation for the EU's particular focus on judicial reform. It will be argued that in its conceptualisation of the rule of law in enlargement, the EU tends to interpret its strengthening efforts in this area in the applicant states mostly in the light of their role and functioning as future Member States. More particularly, it will be shown that the EU's rule of law efforts centre around judicial reform because of the pivotal role of national courts in the EU legal order. Next to this, the section will turn to a last observation stemming from the analysis undertaken in part 3 of this chapter. From the examination of rule of law elements undertaken in section 3 it is apparent that there is an overlap in the monitoring reports between the two sections dealing with the rule of law, *i.e.* the rule of law under the first of the Copenhagen criteria and the rule of law under Chapter 23. This last section will examine the question whether the rule of law as a value is interpreted differently from the rule of law as part of Chapter 23 of the *acquis*. For reasons outlined below, it will be demonstrated that a trend can be established in the reports towards increasing substantive overlap of rule of law elements and analysis thereof to the extent that it can be said that the part of Chapter 23 concerned with the functioning of the judiciary to a large extent codifies the political criterion of the rule of

law. Moreover, it will be demonstrated that the recent rounds of reporting confirm this trend.

4.1 The conceptualisation of the rule of law in enlargement: strong emphasis on judicial reform

The above examination has shown that the rule of law increasingly occupies a central place in the EU's enlargement policy. Starting with its inclusion as one of the Copenhagen political criteria, demonstration of progress in this area has been steadily pushed to the forefront of the pre-accession process, from the renewed consensus on enlargement⁴⁷⁹ and the Commission's 'new approach'⁴⁸⁰ to the strategy of 'fundamentals first'.⁴⁸¹ Addressing reforms in the area of the rule of law 'remains the most pressing issue' and is 'a key benchmark'⁴⁸² for the enlargement countries. From the outset, the treatment of the rule of law has been done in a rather opaque manner, by evaluating the developments together with one of the other Copenhagen political criteria, either democracy or fundamental rights. However, having analysed the various Europe Agreements, Stabilisation and Associations Agreements, Accession and European Partnerships, Enlargement Strategies, Council Conclusions, and Parliamentary reports and resolutions, the yearly rounds of monitoring reports have provided the most insight into the EU's conceptualisation of the rule of law. Below, the definition of the rule of law in this policy area will be addressed, and the relative weight of the elements within each of three categories (*formal*, *procedural*, and *institutional*), and these categories in relation to each other, will be assessed. In the various sections the interpretation of the various rule of law elements in the enlargement rounds (the countries of Central and Eastern Europe) and the current pre-accession process (the Western Balkan countries) was highlighted. While not repeating the comparative analysis, this section, in so far as possible, will set out to provide an overview of those similarities and difference in order to paint the overall picture of the possible evolvement of the rule of law in enlargement.

The analysis of the *formal* rule of law elements in section 3.1, has made it immediately apparent that the all-important issue of the consolidation of legality is largely absent from the enlargement framework and monitoring reports, both in relation to the big bang enlargement of 2004 and in the pre-accession process thereafter. It was shown that in the field of legal approximation, the adopted methodology has led to a quantitative evaluation of

479 Commission Communication on 2005 enlargement strategy paper, COM(2005) 561 final, 9 November 2005.

480 Commission Communication on Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, p. 5.

481 Commission Communication on Enlargement Strategy and Main Challenges 2013-2014, COM(2013) 700 final, 16 October 2013.

482 Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 2.

progress with regard to further alignment with the *acquis*. Moreover, it was posited that because of the particular nature of the *acquis* as a ready-made corpus of rules which the applicant states have to adopt without much negotiating space, there is only a small margin for local engagement with those rules. More particularly, it was asserted that this approach has had an impact on various sub-elements of legality, with examples across all enlargement rounds demonstrating the detrimental effect on such issues as legislative quality and stability.

Turning to the *procedural* category of the rule of law, the following four elements were examined: judicial impartiality, judicial efficiency and quality, judicial review, and access to justice. Three general findings can be observed. First, in relation to their relative weight, it was shown that the elements of judicial efficiency and access to justice have been part and parcel of the pre-accession process from the very beginning. However, while judicial impartiality has made its appearance particularly in the pre-accession process from 2005 onward, it was asserted that the EU's approach towards judicial review has been fragmented at best. Unlike the previous case study, wherein it was argued that access to justice is omnipresent throughout the legal framework and reports, none of the *procedural* elements presented in this chapter has been found to be present to that same extent.

Secondly, regarding a number of these elements and various of their sub-elements, it was argued that a general lack of articulation can be detected. In other words, neither in the legal framework, nor in the Commission's Enlargement Strategies or Council Conclusions can clear comprehensive definitions be found from which possible benchmarks could be deducted. For example, in section 3.2.1 on judicial impartiality, it was shown that in spite of the many available definitions, the EU has failed to indicate a preference for one of them, outline its own, or even to divulge whether it relies on the existing standards under Article 6 ECHR. In relation to judicial review, the lack of articulation has led the Commission to adopt a largely institution-based approach in which the focus has been put on the capacity and effectiveness of judicial organs, rather than an evaluation of the actual practice of judicial review.⁴⁸³ Also regarding a number of sub-elements of judicial efficiency, such as backlog and enforcement, the lack of definition has led to unclarity concerning the data on which the Commission has based its progress assessment and has led to inconsistent findings across the years. Interestingly, it was demonstrated that, in contrast to the element of judicial impartiality, in relation to the sub-element of length of proceeding/reasonable time, the Commission relies on the standards found in the caselaw of the ECtHR in its critique of developments.⁴⁸⁴

Thirdly, in relation to two of the *procedural* elements identified in this chapter, namely judicial efficiency and access to justice, the Commission has adopted the somewhat paradoxical approach whereby the lack of progress

483 See section 3.2.3.

484 See section 3.2.2.

has not prevented the applicant states from signing their accession treaties. For example, in the Comprehensive Monitoring Reports of the countries of the fifth,⁴⁸⁵ sixth⁴⁸⁶ and seventh⁴⁸⁷ enlargement round, drawn up half a year before the date of accession, progress on access to justice and legal aid is reported on as being 'under-developed',⁴⁸⁸ 'unsatisfactory',⁴⁸⁹ and 'rather restricted'.⁴⁹⁰ However, even with such a bad track record, the countries still acceded to the EU according to plan. Since none of the Western Balkan countries are in their final stages of negotiation it is as yet unclear whether, and if so to what extent, the same approach will be adopted in relation to them. While this certainly does not exclude the elements from being included in the EU's rule of law definition, it does somewhat diminish their importance, pushing them away from the core understanding of the notion in this policy area.

The examination of the third category of *institutional* elements, included judicial reform, the separation of powers, and judicial independence and judicial accountability. It was shown that the EU's strong focus on institution building follows from the objectives outlined in the Europe Agreement, the Stabilisation Agreements, as well as in the financial framework, which all prioritise the reinforcement of institutions in relation to the consolidation of the rule of law.⁴⁹¹ Following this, it was demonstrated that the Enlargement Strategies place a heavy emphasis on the development of judicial structures and capacity-building needed to ensure this. It was, furthermore, argued that in the EU's enlargement policy, the prominence of institution-building in which the rule of law has been continuously cloaked, has given rise to a prominent focus on judicial reform; a finding that was confirmed by the structure of the monitoring reports from the inception of the rule of law as one of the Copenhagen political criteria until the current rounds.

Interestingly, and comparable to the findings on the conceptualisation of the *institutional* rule of law elements under the previous case study, this pervasive judicial-institutional focus has not resulted in a clear articulation of the EU's understanding in the identified areas. Neither in relation to the separation of powers, nor to judicial independence or judicial accountability has it been clarified what standards will be relied on, or what, for example, the minimum requirements for the various sub-elements are. In the case of judicial independence, it was shown that, for instance, one of the results has been that the monitoring reports frequently demonstrate a level of

485 See for example 2003 Latvia Comprehensive Monitoring Report, p. 13.

486 Romania's Monitoring Report states that '[t]he reform of the legal aid system needs to be carried out.' 2007 Romania Monitoring Report, p. 7.

487 Croatia's Monitoring Report simply states that '[t]he legal framework for free legal aid has to be improved to enable better access to legal aid and to foster the role of NGOs as legal aid providers.' 2012 Croatia Comprehensive Monitoring Report, p. 37.

488 2003 Poland Comprehensive Monitoring Report, p. 16.

489 2003 Lithuania Comprehensive Monitoring Report, p. 13.

490 2003 Hungary Comprehensive Monitoring Report, p. 14.

491 See section 3.3.1.

conceptual confusion with the *procedural* element of judicial impartiality.⁴⁹² Regarding the separation of powers, it was put forward that the lack of articulation has been amplified by the chosen structure and treatment of the Copenhagen political criteria in the monitoring reports, which follow the separation of powers-rationale by focussing on the three branches individually. Thus, instead of approaching the doctrine from the premise of how the three branches interact together, the emphasis is on their separate structure and capacity, mostly in isolation and without outlining minimum standards how to shape their balance of powers. However, it was subsequently also shown that this approach has somewhat evolved during the current pre-accession process by providing criticism in those instances where there has been evidence of undue political interference in the independence of the judiciary.⁴⁹³

In relation to the evolution of the rule of law elements over time, across the pre-accession monitoring rounds, a note has to be made on the EU's modification of its methodology. As was shown in section 2.2 on the increasing importance of the rule of law in the enlargement policy framework, the institutions have consistently underlined 'the importance of placing the rule of law even more at the heart of enlargement policy.'⁴⁹⁴ As argued at the start of this section, this has resulted in the 'new approach' and, more recently, on a strategy of 'fundamentals first', which both place a high value on addressing the rule of law at the early stages of the process in order to afford candidates the opportunity to 'demonstrate their ability to strengthen the practical realisation of the values on which the Union is based at all stages of the accession process.'⁴⁹⁵ While this has led, amongst others, to additional moments for measuring progress, for example, by way of interim benchmarks (next to the opening and closing benchmarks), the rule of law elements themselves, have, by and large, not substantively changed, other than the changes indicated above. Additionally, in 2015, the Commission introduced a strengthened approach to its assessments in the annual reports, with additional emphasis put on the state of play in the countries and where they stand in terms of preparedness on the basis of harmonised assessment scales.⁴⁹⁶ The 'new style of reporting'⁴⁹⁷ also includes guidance

492 See section 3.2.1.

493 See sections 3.3.2 and 3.3.3.

494 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4. Also see, for example, Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. No.17604/12, 11 December 2012, pnt. 37, as well as the Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5

495 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

496 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, Annex 2.

497 *Ibid.*, p. 4.

on what the countries are expected to do for the following year. However, even though it has been indicated that these changes should not be understood as a narrow set of technical negotiations, but, rather, that they 'reflect more clearly that the European integration efforts of the enlargement countries should entail a steady and thorough process of political and economic reforms',⁴⁹⁸ the elements on the basis of which progress is determined in the area of the rule of law have largely remained the same.⁴⁹⁹ As has, in spite of its promises, the Commission's assessment.

In the light of the foregoing, it is clear that the conceptualisation of the rule of law in enlargement relies heavily on those elements of a *procedural* and *institutional* nature. It was argued that a number of elements of both these categories lack a clearly defined expression giving rise to some conceptual uncertainty, but also opening the door to a more institutionally-oriented approach, for example, in relation to the *procedural* element of judicial review, than is warranted. Furthermore, it was argued that not only are *formal* elements largely absent from the legal and policy framework, the specific nature of enlargement and the EU's adopted methodology in this policy area were shown to have had a detrimental effect on the quality and stability of national laws and regulations. Finally, in relation to the evolution of the conceptualisation of the rule of law in enlargement, the analysis made it clear that most of the elements make their appearance in all the accession rounds under review. However, regarding three of them, the *procedural* element of judicial impartiality, and the *institutional* elements of the separation of powers and judicial independence and accountability, some change has taken place starting with the pre-accession in relation to the Western Balkans, be it in terms of visibility (impartiality) or in terms of a widening of the existing interpretation (separation of powers and judicial accountability).

4.2 The judicial focus of the rule of law in enlargement explained: the EU's understanding of the rule of law in the light of the applicant states' future role as Member States

From the previous section it is clear that the EU understands the rule of law in its enlargement policy predominantly in terms of reform of the judicial sector. As a possible explanation for this, it is argued here that the Union seems to be very much focussed on establishing the necessary judicial

⁴⁹⁸ Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 8

⁴⁹⁹ The 2018 Council Conclusions on Enlargement serve as an interesting example in this context. As one of the Council's most elaborate statements on the enlargement process to date, it actually offers only limited insights into the conceptualisation of the rule of law. While the value is highlighted as lying at the core of the EU's accession policy, the only element discussed is that of an independent, impartial, accountable and efficient judiciary. Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, Doc. 10555/18, 26 June 2018, pnt. 5.

machinery in the applicant states needed for their future role as Member States, thereby failing to consider other rule of law elements that are needed to ensure that the notion is truly embedded.

The EU's enlargement policy lays bare the difficulty of distinguishing between rule of law reform in the applicant states at the domestic level, and reforms which the states need to implement in preparation of their role as future Member States for the sake of the functioning of the EU itself. In its enlargement policy, the EU should primarily be concerned with strengthening and consolidating the rule of law domestically in the applicant states. Indeed, the states have to establish and promote 'the proper functioning of the core institutions necessary for democratic governance and the rule of law, from the national Parliament, through Government and the judicial system, including the courts and public prosecutor, and law enforcement agencies.'⁵⁰⁰ However, that is not the only thing the Union is concerned with. As countries aspiring to join the Union, they 'must demonstrate their ability to strengthen the practical realisation of the values on which the Union is based.'⁵⁰¹ In relation to the rule of law, as it was argued in section 3.1.2 of the introduction on the function of the rule of law 'common to the Member States', this is so because of the EU legal order's dependence on mutual recognition and mutual trust between the Member States, as well as the all-affected principle. More particularly, as was asserted in the section on the procedural element of judicial efficiency,⁵⁰² the functioning of the domestic legal order and the role of courts within that, is crucial for upholding EU law within the Union. The EU is dependent on the effective operation of domestic courts because of the obligation to refer,⁵⁰³ the doctrine of direct effect,⁵⁰⁴ and the principle of sincere cooperation.⁵⁰⁵ In the words of the Commission: '...[T]he actual implementation and enforcement on the ground of [EU] law, whether it is directly applicable in the Member States or transposed into national legislation, is based on the existence of appropriate judicial and administrative machinery in the Member States.'⁵⁰⁶ Thus, the rationale of enlargement incorporates the fact that the aspiring Member States must adhere to the European Council's Copenhagen criteria not only for their own sake, but also with view to 'contributing to the well-

500 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

501 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

502 See section 3.2.2.

503 Case 16/65 *Firma G. Schwarze v Einfuhr- und Vorratstelle für Getreide und Futtermittel* [1965] ECR 877.

504 Case 26/62 *NV Algemene Transport- en Expeditie Onderneming Van Gend en Loos v Nederlandse Administratie der Belastingen* [1963] ECR 1.

505 Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para. 42.

506 Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final, 3 May 1995, p. 16.

functioning of the Union as a whole.⁵⁰⁷ This dual construct gives rise to the following observation: in its conceptualisation of the rule of law in enlargement, the EU interprets the strengthening of the rule of law in the applicant states mostly in the light of their role and functioning as future participants in the collective of Member States. In other words, when attempting to consolidate the rule of law in the applicant states, it approaches rule of law reform from the perspective of the EU and what the EU requires of its Member States, with a particular emphasis on judicial reform.

In a way, this observation addresses the rationale of the rule of law under the first and third Copenhagen criteria. While the requirement to take on the obligations of membership by way of the effective implementation of the *acquis* clearly revolves around the functioning of the EU, the requirement of the stability of institutions guaranteeing the rule of law seems to be concerned with the performance of domestic institutions that need to buttress the rule of law at the national level. However, whereas according to Article 49 TEU, '[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union', the values referred to in Article 2 TEU are not just values, these are values that are 'common to the Member States' which must be respected in order to keep Membership rights intact.⁵⁰⁸ Moreover, these are values that have inspired the EU's creation, which it intends to safeguard (Article 21 TEU). Accordingly, in the context of enlargement the EU has positioned the rule of law as a value that should be consolidated at the domestic level, but also as a common value of the EU edifice. The functioning of the EU as a legal and political system relies on the veracity of the assumption that its component parts are in compliance of these values.⁵⁰⁹ As the Court of Justice put it, the Union is 'based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded...'.⁵¹⁰ After all, the EU is a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States, and its Member States with each other.⁵¹¹ In the light of this, it becomes apparent that during the pre-accession procedure, the EU

507 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015.

508 Ronald Janse 'The Evolution of the Political Criteria for Accession to the European Community, 1957-1973' 24 *European Law Journal* (2018), pp. 57-76 at 75; Christophe Hillion 'Overseeing the Rule of Law in the EU: Legal Mandate and Means' in Carlos Closa & Dimitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* Cambridge: Cambridge University Press (2016), pp. 59-81 at 60.

509 Amichai Magen 'Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU' 5 *Journal of Common Market Studies* (2016) 5, pp. 1050-1061 at 1055.

510 Opinion 2/13 *ECHR II*, EU:C:2006:81, 18 December 2014, para. 168.

511 *Ibid.*, para. 167; Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018, para. 30.

focuses in particular on a conception of the rule of law with a view to the applicants' accession that will make them part of this interconnected and mutually dependent construct.⁵¹² After all, European integration has led to a 'Community based on the rule of law',⁵¹³ which, at the very least, requires that the effectiveness of EU law is similar, if not the same, as that of domestic law in all the EU Member States.⁵¹⁴

Against this background, the findings of section 3, and in particular section 3.1 and 3.3, lend further support to the argument that the EU has approached its rule of law activities primarily from the perspective of the requirements of its own functioning. In section 3.1 on the element of legality, it was demonstrated that the EU's main focus is on the implementation of the *acquis*, not on the quality of the domestic legislation and the adoption process. More particularly, it was shown that the EU's quantitative approach has actually undermined legality and has given rise to problems in terms of stability and generality of law. Furthermore, in section 3.3 on the institutional elements of the rule of law, it was asserted that the EU has framed its conceptualisation of the rule of law in enlargement predominantly in terms of institutional reform, notably reform of the judiciary. In the light of the importance of the role of national courts as EU courts this emphasis is understandable. As the early reports demonstrate in the section on judicial capacity,⁵¹⁵ improvements in the judiciary sector are needed not only for the applicants states themselves, but more so because of their role in the application of EU law. According to the 1998 Composite Paper on progress in enlargement, a well-developed judiciary is central to the candidate countries, and '[i]n order to effectively implement and enforce the *acquis*, existing institutions need to be strengthened and new institutions created.'⁵¹⁶ The Regular Reports show that the initial separate section on the assessment of judicial capacity (1999 round) has been merged with the section on judicial reform under the section on Democracy and the Rule of Law (2000 round onwards), thereby demonstrating that the Commission understands the rule of law in terms of judicial institutions and capacity-building. Not just because the rule of law dictates this at the domestic level of the applicant

512 In light of the principle of sincere cooperation enshrined in Article 4(3) TEU, ensuring respect for the rule of law and being committed to its promotion in order to 'facilitate the achievement of the Union's tasks' will be incumbent on the applicant states from the moment of their accession.

513 Case 294/83 *Parti écologiste 'Les Verts' v European Parliament* [1986] ECR 1339, para. 23.

514 Armin von Bogdandy & Michael Ioannidis 'Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done' 51 *Common Market Law Review* (2014), pp. 59-96 at 63.

515 As highlighted in section 2, judicial and administrative capacity were added as an additional membership requirement by the 1995 Madrid European Council. Presidency Conclusions, Madrid European Council, 15-16 December 1995.

516 Commission Composite Paper – Reports on Progress Towards Accession by Each of the Candidate Countries, COM(1998) 712 final, 17 December 1998, p. 16.

states, but primarily because this is necessitated by the particular nature of the EU, since without it there can be no legal interdependence between the Member States.

In the light of the above, it becomes legitimate to pose the question to what extent the EU has actually been involved in domestic rule of law reform, or rather in Member State building in the name of rule of law reform. Regular reporting appears not to contain a general analysis of the state of the rule of law in the candidate states, but almost exclusively the analysis of the adaptation to the *acquis*.⁵¹⁷ Furthermore, the latest reporting rounds show that more institution and capacity building in the judicial sector has not necessarily lead to more or better rule of law,⁵¹⁸ and that 'structural shortcomings persist, notably in the key areas of rule of law'.⁵¹⁹ The situation in Montenegro in 2016 is particularly telling in this regard: 'The legal framework in the area of rule of law is largely complete and the institutional set-up is in place. The entire rule of law system now needs to deliver more results'.⁵²⁰ This indicates that the EU seems to consider that from its own primary requirements, *i.e.* the adoption of legislation and the building of a judicial system, the rule of law will naturally follow. However, to consolidate and strengthen the latter is, as highlighted throughout this case study, far more complicated. This is also recognised more fully in the 2018 Western Balkan Strategy, which states that the rule of law must be strengthened significantly, as well as the fact that addressing reforms in this area 'remains the most pressing issue for the Western Balkans'.⁵²¹ As long as the Union approaches the rule of law primarily from its own vantage point and its own requirements that flow from EU Membership (*i.e.* the rule of law as a means to an end), without adjusting its conceptualisation to incorporate a more domestically oriented rule of law focus, the annual reports might not get more optimistic in tone.

517 Dimitry Kochenov 'Why the Promotion of the *Acquis* Is Not the Same as the Promotion of Democracy and What Can Be Done In Order to Also Promote Democracy Instead of Just Promoting the *Acquis*' 2 *Hanse Law Review* (2006), pp. 171-195 at 172-173. Cf. Kleinfeld who argued that '[w]hen the EU pushes acceding countries to adopt the entire legal *acquis communautaire* [sic], it is not building the rule of law through all these legal changes; it is simply helping them create a legal system that can mesh with its own.' Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad – In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), p. 57.

518 FYROM's 2016 report is just one of the reports, which state that in the area of judicial reform there has been either no progress or backsliding, 2016 FYROM Report, p. 12.

519 Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 2.

520 *Ibid.*, p.11.

521 Commission Communication on A Credible Enlargement Perspective for and Enhanced Engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, p. 4.

4.3 The lack of conceptual differentiation between the rule of law as a political criterion and as part of Chapter 23 of the *acquis* under the third of the Copenhagen criteria

In section 2.2 it was shown that the EU's policy framework on enlargement has seen the addition of Chapters 23 and 24 of the *acquis* as 'rule of law-chapters'⁵²² during the negotiating process with Croatia and Turkey. In the light of the rule of law as one of the political conditions established by the European Council at Copenhagen, this addition gives rise to a particular question in relation to the pre-accession process concerning the Western Balkan countries: whether, and if so to what extent, has the Union, by introducing and relabelling Chapter 23 and 24, respectively, as rule of law-chapters, articulated in its enlargement policy different conceptions of the rule of law under the first (the rule of law as part of the political criteria) and third Copenhagen criteria (the rule of law as part of the *acquis*)? This issue consists of two sub-questions: that of scope – is the rule of law under the Copenhagen political conditions in the current pre-accession process more or less broadly defined than under the *acquis* chapters? – and that of substance – if similar rule of law elements exist under both conditions, are they approached and analysed in an identical manner, *i.e.* are they substantively similar? Below, these two sub-questions will be discussed in turn.

4.3.1 *The scope of the rule of law under the first and third Copenhagen criteria*

From the outset, it seems that the scope of Chapters 23 and 24 is broader than what is tackled in the reports under the rule of law as a political condition. For a start, Chapter 23 includes, next to the functioning of the judiciary, which covers the *procedural* and *institutional* elements as discussed in section 3, sub-sections on anti-corruption measures and on fundamental rights. Chapter 24 covers issues of justice, freedom, and security. Whereas anti-corruption measures overlap with what is discussed under the Copenhagen political criteria in the section on Democracy and the Rule of Law, and the assessment of fundamental rights shows commonalities with the section on Human Rights and the Protection of Minorities, the topics contained in Chapter 24 do not have such complementing sections under the political criteria.

At first glance, this would suggest a widening of scope of the understanding of the rule of law. However, the argument advanced here is that the scope of the rule of law under both criteria is the same. Two arguments will be discussed to support this. Firstly, the labelling of both chapters as

522 On the Commission's interpretation of these two specific chapters as 'rule of law-chapters' see for example Commission Communication on Enlargement Strategy and Main Challenges 2011-2012, COM(2011) 666 final, 12 October 2011, pp. 4-5; Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

'rule of law-chapters'⁵²³ is a misnomer; the pairing of elements in Chapter 23 and 24 should not be seen as a broadening of scope of the rule of law, but rather testifies to the Commission's instrumental usage of the term 'rule of law' within the broader enlargement strategy. It was shown that, taking the experiences with the enlargements of Bulgaria and Romania, and Croatia, on board, the EU thought it prudent to address the functioning of the judiciary and human rights as early on in the negotiations as possible in order to allow the candidate states maximum time for their implementation.⁵²⁴ This approach was thereafter reaffirmed by the enlargement strategy principle of 'fundamentals first' – prioritising reforms in the key areas of the rule of law, including the topics found in Chapters 23 and 24.⁵²⁵ Declaring the components of justice, freedom, and security also as 'rule of law-topics' has allowed the Commission to strategically position these on the same exceptional pedestal alongside the functioning of the judiciary and human rights. From the fact that the EU has addressed Chapters 23 and 24 in this manner in the pre-accession process for strategic reasons, it cannot be concluded that it includes all of the elements mentioned therein in its understanding of the rule of law.

Secondly, looking in turn at the elements of human rights and justice, freedom, and security, there are a number of additional arguments supporting the conclusion that the EU has not broadened its scope of the rule of law under the third Copenhagen criterion. To start with human rights, the Copenhagen criteria related documents do not testify to a conceptual understanding of the rule of law that includes fundamental rights, and freedom, security, and justice issues. The protection of human rights is treated as a category in its own right under the Copenhagen political criteria. This finding is not diminished by the fact that the rule of law's connection to human rights is one of enabling, support and enforcement – the scope of the rule of law includes mechanisms set up to protect fundamental rights and the activities of bodies established to enforce this protection,⁵²⁶ as was shown, *inter alia*, in the sections on the *procedural* rule of law elements of

523 See for example the Commission 2012-2013 Strategy in which it discusses its new approach to enlargement and the 'screening of the key rule of law chapters' 23 and 24; Commission Communication on Enlargement Strategy 2012-2013, COM(2012) 600 final, p. 6. Further, see the Commission Communication on Enlargement strategy 2011-2012, COM(2011) 666 final, pp. 4-5; Commission Communication on Enlargement strategy 2013-2014, COM(2013) 700 final, pp. 6-7; Commission Communication on Enlargement strategy 2014-2015, COM(2014) 700 final, p. 2; Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, p. 2.

524 Commission Communication 'Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, pp. 2-3.

525 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p. 3.

526 Sergio Carrera, Elspeth Guild & Nicholas Hernanz 'The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU – Towards an EU Copenhagen Mechanism' *CEPS* (2013), p. 21.

judicial review and access to justice.⁵²⁷ Moreover, neither the structure of Chapter 23, within which the two elements are treated separately, nor the substance of the analysis of either topic, give rise to the impression that the Commission has actively broadened the material scope of the rule of law in enlargement to include human rights.

In relation to the issues covered by Chapter 24, including, amongst others, migration, asylum, visa policy, police cooperation and the fight against organised crime, the fight against terrorism, and cooperation in the field of drugs, the point should be made that during the 2004 negotiations, (then) Chapter 24, which overlaps substantively with the current Chapter 24, has never been addressed within the context of the rule of law.⁵²⁸ Furthermore, there is evidence stemming from other policy areas that the EU understands the relationship between the rule of law and issues of freedom, security, and justice to be of a causal nature rather than one of substantive overlap. The causality between the two is expressed, for example, in the 2003 European Security Strategy:⁵²⁹

Europe is a prime target for organised crime. This internal threat to our security has an important external dimension: cross-border trafficking in drugs, women, illegal migrants and weapons accounts for a large part of the activities of criminal gangs. It can have links with terrorism. Such criminal activities are often associated with weak or failing states. Revenues from drugs have fueled the weakening of state structures in several drug-producing countries. Revenues from trade in gemstones, timber and small arms, fuel conflict in other parts of the world. All these activities undermine both the rule of law and social order itself.

From this paragraph it is clear that security issues undermine the rule of law. Conversely, as was argued in the introductory section on the four functions of the rule of law in the Union, the EU attempts to tackle security issues through the strengthening of the rule of law.⁵³⁰ Ever since the development and consolidation of the rule of law was a specific intention of the CFSP (ex Article 11 EU), the Union has connected, and as is asserted here, conflated, the strengthening of the rule of law to such issues as security, and the fight against terrorism and organised crime, *i.e.* the rule of law is understood as a means to the realisation of these security-related ends.⁵³¹

527 See sections 3.2.3 and 3.2.4 respectively.

528 See for example Poland's Regular Report of 2000, pp. 72-77.

529 European Council 'European Security Strategy – A Secure Europe in a Better World' 12 December 2003, p. 4.

530 Introduction, section 3.1.4.

531 Neil Walker 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2009), p. 120. For a wide-ranging discussion of the growth of legal instrumentalism, see Brian Z. Tamanaha *Law as a Means to an End: Threat to the Rule of Law* Cambridge: Cambridge University Press (2006).

This dual causal link, however, should not lead to the conclusion that the EU has extended its material scope of the rule of law to also include all those issues covered in Chapter 24 which either threaten the rule of law, or could be better tackled by strengthening the rule of law.

4.3.2 *The converging substantive assessment of the rule of law under the first and third Copenhagen criteria*

Turning next to the second sub-question, the issue under examination is whether similar rule of law elements exist under the first and the third Copenhagen criteria and if so, whether there can be said to be substantive overlap. The analysis undertaken in part 3 of this chapter, shows that both sections deal with the elements of the functioning of the judiciary. In relation to this issue, it is submitted that a trend can be established towards increasing overlap of sub-elements and analysis thereof under both the Copenhagen political criteria and Chapter 23, without a clear distinction being drawn between the two. Since 2005 the rounds of monitoring reports include cross-references in the section on the political criteria to the specific chapters of the *acquis*. For example, the 2005 Regular Report on Turkey states in the section on the political criteria that it provides an assessment of developments in Turkey, 'seen from the perspective of the Copenhagen political criteria, including the overall functioning of the country's ... judicial system.' Indicating the connection between progress in these areas and the ability to implement the corresponding *acquis*, the report goes on to state that '[s]pecific information on progress in implementing the *acquis* in these fields can be found in ... Chapter 23 (Judiciary and fundamental rights) ... of the section dealing with the ability of Turkey to assume the obligations of membership.'⁵³² Similar cross-referencing is also apparent in Chapter 23 itself of reports across the years, which, in its progress overview, refers back to the analysis of developments under the Copenhagen political criteria.⁵³³ The cross-referencing indicates that there is, at the very least, a substantive overlap of topics under both sections.

Moreover, having examined the sections on the functioning of the judiciary under the Copenhagen criteria and Chapter 23 in section 3, it is difficult to single out differences of assessment in the sub-topics covered in each section. Whereas the analysis of the functioning of the judiciary in Chapter 23 will, in general, be (a little) more elaborate, the same issues are covered in both sections including the institutional as well as the procedural

⁵³² 2005 Turkey Regular Report, p. 10.

⁵³³ Particularly in relation to Chapter 23. See for example 2012 FYROM Progress Report, p. 49. Similar cross-references can also be found in the Accession/European Partnerships. See for example Croatia's 2008 Accession Partnership in which the section listing the priorities for Chapter 23, to be implemented and completed for the next few years, directly links back to the priorities set out under the section on the political criteria.

elements identified and analysed above.⁵³⁴ This demonstrates that not only are the elements in both sections the same, the progress assessment undertaken in both sections actually overlaps to the extent that it can be said that the part of Chapter 23 concerned with the functioning of the judiciary to a large extent codifies the political criterion of the rule of law.⁵³⁵

The 2015 and 2016 progress reports provide further evidence of the approach of increasing convergence of assessment. Following the Commission's proposal for a more structured assessment,⁵³⁶ the section on the rule of law under the Copenhagen political criteria and chapter 23 follow the exact same composition.⁵³⁷ In their discussion on the functioning of the judiciary, both sections discuss the state of play in addition to shortcomings, revision, and areas of progress. Finally, the 2018 enlargement reporting round does away with the distinction altogether. Chapter 23 is removed from its place in between the other chapters of the *acquis* and discussed under the heading of the political criteria at the beginning of the reports – in line with the policy's priority of its 'fundamentals'.⁵³⁸ This further supports the conclusion that the Commission has not only refrained from articulating a specific conceptualisation of the rule of law under the Copenhagen political criteria on the one hand, and under the third Copenhagen criteria on the other, but, moreover, that it has actually converged its analysis of the functioning of the judiciary as part of the rule of law under both sections.

5. CONCLUSION

This chapter examined the EU's definition of the rule of law in the EU's enlargement policy, by testing the analytical framework established in Part I of the thesis against the Union's practice in this area. After an introduction on the accessions to date, the legal framework and the relevant policy strategies were discussed in order to frame the analysis in the following sections. The chapter continued by focussing on the three categories of

534 See for example 2011 FYROM Progress Report, pp. 11-13 and 58-60.

535 Cf. Ann-Kristin Jonasson *The EU's Democracy Promotion and the Mediterranean Neighbours* (New York: Routledge (2013), p. 137.

536 The 2015 Enlargement Strategy provides that [t] Commission has introduced ... a strengthened approach to its assessment in the annual reports. In addition to reporting on progress, much more emphasis is put on the state of play in the countries and where they stand in terms of preparedness for taking on the obligations of membership.' The reports are supposed to provide 'even clearer guidance for what the countries are expected to do in both the short and long term.' To this end, harmonised assessment scales will be used to assess both the state of play and the level of progress, in order to increase comparability between the countries and provide greater transparency in the process. Commission Communication on EU Enlargement Strategy 2015, COM(2015) 611 final, 10 November 2015, p. 4.

537 Namely, strategic documents, management bodies, independence and impartiality, accountability, professionalism and competence, quality of justice, and efficiency.

538 See for example 2018 Montenegro Report, pp. 13-18; 2018 Turkey Report, pp. 22-27.

formal, procedural, and institutional rule of law elements. It was demonstrated that little attention has been paid to the element of legality, in spite of the fact that it forms the core of the rule debate in legal theory. Moreover, it was pointed out that the methodology of enlargement in relation to the process of legislative approximation is based on a mostly quantitative demonstration of progress. It was shown that as a consequence of this, legality's qualitative requirements (such as legal stability and coherence) have actually been undermined. Next, it was asserted that the elements of impartiality and judicial efficiency have increasingly been addressed in the annual reports as forming core procedural elements of the rule of law. However, it was highlighted that this has not led to a clearer articulation of EU standards in these areas, thereby actually making the assessment of whether the applicant states comply with these elements more difficult. Following this, it was shown 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 was shown that the rule of law is conceptualised in terms of judicial reform with an emphasis on the structure and functioning of the courts. It was furthermore asserted that this has resulted in a particular emphasis on the institutional element of judicial independence.

The chapter continued by turning to the general findings of the rule of law elements in enlargement and three overall conclusions were drawn. First, it was concluded that the EU's conceptualisation of the rule of law in enlargement is strongly geared towards both procedural and institutional elements, with an almost total absence of the formal element of legality. It was shown that the extensive institutional focus of the policy has led to an emphasis on judicial reform, which has also permeated a number of the procedural elements, such as judicial review. Furthermore, it was demonstrated that there has been only a limited evolution of rule of law elements across the enlargement rounds, including the current pre-accession process. Secondly, it was argued that, 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. It was further asserted that this has resulted in neglecting certain rule of law elements (legality) and disproportionately emphasising others (judicial independence). Finally, it was concluded that 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, that it 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.

Conclusions: the influence of the policy area on the EU's conceptualisation of the rule of law in its external relations

1. INTRODUCTION

The analysis undertaken in both case studies showed that the EU views the strengthening of the rule of law as a central element in both development cooperation¹ and enlargement.² Both case studies, however, also demonstrated that the Union has not put forward a comprehensive conceptual understanding of the rule of law in its external relations. As it was argued in chapters 3 and 4, while the EU's commitment to the rule of law is beyond reproach and often repeated, it has proven hard to identify a comprehensive definition of the concept. The case studies showed a number of commonalities regarding the EU's understanding of the rule of law in relation to the three categories of formal, procedural, and institutional elements. However, whereas the conclusion can be drawn that the EU's conceptualisation of the rule of law in both areas is largely identical, it can also be pointed out that both policy areas favour some elements over others. This chapter will argue that these similarities and differences can be explained on the basis of the particularities found in the policy areas themselves.

The chapter will start by shedding light on the reasons underpinning the case studies' focus on judicial reform (section 2.1) as well as the lack of the formal rule of law element of legality (section 2.2). It will then focus on the reasons behind the different emphasis given to different elements belonging to the procedural and to the institutional categories (section 2.3). Next, the chapter will elucidate the assumptions underlying the EU's use of the rule of law as a means to other ends that have led to a limited articulation of several rule of law elements (section 2.4). Against this background the chapter will then turn to the EU's conceptualisation of the rule of law as it was identified in the case studies and compare it with the core rule of

1 See, for example, the New Consensus on Development, which states that the EU and its Member States will promote the rule of law because it is 'a precondition' for sustainable development and stability; Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ[2017] C210/1, pnt. 61.

2 See, for example, the Commission's 2018 Strategy on Enlargement, which discusses 'the growing focus on rule of law reform'; Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 2.

law elements identified in the national rule of law conceptualisation in the three Member States. The chapter argues that there is a glaring discrepancy between the two and that this discrepancy is problematic on the following grounds. First, it will be asserted that even though the rule of law is a rather flexible concept that comes in many different domestic manifestations, this flexibility does not imply that the EU may leave out core components of the rule of law such as formal legality. Secondly, it will be claimed that since the financial instruments underpinning development cooperation and enlargement require clarity and transparency, the EU should be more explicit regarding its rule of law definition.

The last section of the chapter will address the way forward and will provide three insights for rule of law reform stemming from the findings of the research undertaken in this thesis. First, it will be asserted that, although a comprehensive approach to rule of law is welcome, this does not negate the need to understand (and thus define) the individual components of the rule of law and how these interrelate. It will be shown that in this way, lacunae can be detected, imbalances can be prevented, and lack of articulation can be forestalled. Secondly, it will be argued that the EU should acknowledge that developments within a policy area also influence the weight attributed to different elements within that particular area; thus, any shift in policy might bring along a shift of emphasis on different rule of law elements. By understanding these influences on its rule of law definition, the EU can make more conscious choices about its rule of law reform and the elements it wishes to emphasise therein instead of being pushed into a particular direction on grounds of policy considerations. Finally, it will be demonstrated that the Union should become cognizant of certain assumptions underlying its instrumental use-value approach to the rule of law. It will be shown that the EU relies on the rule of law as a means to various other ends, which have led to a strong emphasis on various end goals (such as economic growth, the protection of human rights) and a subsequent lack of attention to precisely what rule of law elements are needed to achieve what specific ends. By realising this cognitive bias, the EU should be in a better position to distinguish between *what* it wants to achieve and *how* it will get there – which necessarily requires a clearer articulation of the rule of law.

2. THE EU'S CONCEPTUALISATION OF THE RULE OF LAW IN DEVELOPMENT COOPERATION AND ENLARGEMENT: INFLUENCES AND EXPLANATIONS

The following section will discuss the findings regarding the EU's conceptualisation of the rule of law in development cooperation and enlargement from a comparative perspective. Additionally, the last sub-section will consider this conceptualisation in the light of the fact that it was established in chapter 1 that the rule of law is indeed a concept with elements that are 'common to the Member States'.

2.1 Strong institutional bias: the reasons behind the rule of law as judicial reform

The general findings of the previous two chapters showed that the EU, in both policy areas, conceives of the rule of law strongly in terms of judicial reform, translating the notion more often than not into an institutional checklist. Indeed, in both external areas the initial appearance of the rule of law was put explicitly within this institutional frame of reference. This is, *inter alia*, evidenced by the 1995 Lomé IVbis Convention's specific objective of cooperation of support for institutional reform measures with a view to consolidating the rule of law³ and the 1993 Copenhagen criteria's well-known articulation of the rule of law in terms of the stability of institutions that guarantee the notion's taking root in the candidate states.⁴ Following this, the case studies showed that in the financial instruments applicable to the policy areas under review, a similar institutional orientation in relation to the rule of law's promotional activities has been expressed, from their initial formulation until the recent revision of the instruments in the context of the multiannual financial budget for 2014-2020.⁵ This has furthermore been buttressed by the strategic policy documents, such as the Agenda for Change (in which the rule of law is explicitly tied to the functioning of

3 Articles 5 and 224(m) Lomé IVbis Convention.

4 Presidency Conclusions, Copenhagen European Council, 21-22 June 1993.

5 For development cooperation: See Article 5(2)(f) Regulation (EC) No 1905/2006 in which it is stated that reform activities in the area of the rule of law include capacity building and strengthening the institutional and legislative framework. According to Article 3(3) and Annex I(B)(IV)(c) on cooperation with Central Asia of the follow-up DCI Regulation 233/2014, specific attention shall be paid to the rule of law as a cross-cutting issue of development cooperation, particularly in terms of institution building. In the same vein, the EIDHR regulations put forward similar institutionally-geared objectives of cooperation regarding the rule of law, see Article 2(2)(b) Regulation (EC) No 975/1999, Article 2(1)(a)(ii) Regulation (EC) No 1889/2006, and Article 2(1)(a)(ii) Regulation (EU) No 235/2014. Also the European Development Funds have allocated means towards institutional development and capacity building, in line with the objectives of the Cotonou Agreement (Article 9(4) and 33(1)(c)).

For enlargement: See the Decision of the Commission on the Guidelines for PHARE Programme Implementation in Candidate Countries, 1998-1999, SEC(1998) 1012 final, 15 June 1998, p. 5; Commission Decision Guidelines for the PHARE Programme Implementation in Candidate Countries for the Period 2000-2006, in Application of Article 8 of Regulation 3906/89, SEC(1999) 1596 final, 13 October 1999; Article 2(2) of Council Regulation (EC) No 2666/2000; Article 2 and 3 Regulation (EC) No 1085/2006; Article 2, 3, and Annex II Regulation (EU) No 231/2014. For more detail, see section 3.3.1 of each case study.

judicial systems in developing countries⁶), and the Enlargement Strategies ('[t]he Commission will pay particular attention to the establishment of the structures needed to ensure the rule of law'⁷, including, *inter alia*, 'efforts to modernise legal frameworks and infrastructure'⁸) and Council Conclusions (regarding rule of law reform, 'key challenges that require particular and urgent attention include, in particular, judicial reform'⁹) in that area.

In fact, it was argued that this institutional understanding is so pervasive that a number of procedural elements were conceived of in terms of judicial reform instead of their role in, and effective execution of, the administration of the law. This can be illustrated by way of the example of the procedural element of judicial review, which enables the duly authorised institutions, the judiciary, to assess and make binding judgements about whether and to what extent government action complies with the procedural and/or substantive requirements embodied in the relevant constitution and other relevant legislation. In both external policy areas, it was pointed out that the focus was on the structure of the judiciary and the people working therein (*inter alia* staffing of courts, the training of judges) rather than on the assessment process itself or the contours of the types of judicial review (administrative acts, individual rights).

This section argues that, while both policy areas showcase the EU's institutional understanding regarding the consolidation of the rule of law, they do so for different reasons. For development cooperation, these relate to the international framework within which the EU's policy takes place, and the influence of the two cross-cutting policy areas of good governance and security.

The first case study demonstrated that the EU's development cooperation policy takes place within the confines of the international aid agenda, most importantly, the UN's 2030 Agenda and Sustainable Development Goals (SDGs) and the work undertaken by the OECD,¹⁰ which form the

6 Commission Communication on Increasing the Impact of EU Development Policy: an Agenda for Change, COM(2011) 637 final, 13 October 2011, p. 6. Also see for example the Commission's Communication on the EU's development policy of 2000, in which the rule of law is put in the context of institutional capacity building: 'Institutional capacity building must be a key element in the fight against poverty. In this context, good governance and the rule of law are key element [sic] in ensuring social peace and stability as well as economic growth.' Commission Communication on The European Community's Development Policy, COM(2000) 212 final, 26 April 2000, p. 27.

7 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2007, p. 22.

8 Commission Communication on 2016 Communication on EU Enlargement Policy, COM(2016) 715 final, 9 November 2016, p. 3.

9 Council Conclusions 'Enlargement and Stabilisation and Association Process', General Affairs Council, 16 December 2014, pnt. 5.

10 See, amongst others, the 2005 Paris Declaration on Aid Effectiveness and Accra Agenda for Action, available at: <http://www.oecd.org/dac/effectiveness/34428351.pdf>, and the follow-up 2011 Busan Partnership Agreement, available at: <http://www.oecd.org/dac/effectiveness/49650173.pdf>.

international framework for poverty elimination and sustainable development. While this policy background sets the goals for sustainable development globally, it has also set specific sub-targets. It was pointed out that the Agenda and SDGs firmly link the promotion of the rule of law in developing countries to the strengthening of institutions;¹¹ the predominant view being that '[e]ffective institutions and policies are essential for sustainable development. Institutions fulfilling core state functions should, were necessary, be further strengthened.'¹² Furthermore, it was demonstrated that the EU, in the implementation of the international framework, has pushed forward the need for an increased focus on improving existing institutional capacity in developing countries.¹³ With the SDGs' translation of its rule of law sub-target in terms of access to justice,¹⁴ the translation of the overall persistent institutional orientation has led to a clear focus on the judicial sector, and has given rise to the articulation of rule of law reform in terms of judicial reform.

Furthermore, it was shown that this particular understanding has been further strengthened by the fact that the EU's development cooperation policy is intersected by a number of other (external) concerns, most prominently good governance and security, which have each added their own institutional priorities with a particular emphasis on judicial reform. To start with the former, it was sketched out in section 4.2.2 of the relevant case study, that since the early 2000s the EU has considerably broadened its understanding of good governance in relation to development cooperation.¹⁵ In its Communications on the topic (endorsed by the Council¹⁶), the Commission has steadily stressed the link between governance and the rule of law in terms of institutional reform and capacity building, and more

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- 11 The Resolution in which the Agenda is set out, states that the need to build peaceful, just and inclusive societies is recognised, that 'provide equal access to justice and that are based on respect for human rights (including the right to development), on effective rule of law and good governance at all levels and on transparent, *effective and accountable institutions*.' General Assembly Resolution 70/1 'Transforming our world: the 2030 Agenda for Sustainable Development', A/70/L.1, 25 September 2015, pnt. 35 [emphasis added].
 - 12 2011 Busan Partnership Agreement, pnt. 29.
 - 13 See European Court of Auditors' Special Report No 6 of 2007 on the effectiveness of technical assistance in the context of capacity development, OJ[2007] C312/02, pnts. 9-11; EuropeAid 'Reforming Technical Cooperation and Project Implementation Units for External Aid provided by the European Commission - A Backbone Strategy' July 2008 p. 13.
 - 14 See sub-target 16.3, which provides as its goal to 'promote the rule of law at the national and international levels and ensure equal access to justice for all.'
 - 15 Tanja A. Börzel & Thomas Risse 'Venus Approaching Mars? The European Union's Approaches to Democracy Promotion' in Amichai Magen, Thomas Risse & Michael McFaul (eds) *Democracy Promotion in the US and the EU Compared* Houndsmills: Palgrave Macmillan (2009), pp. 34-60.
 - 16 See, *inter alia*, Council Conclusions 'Governance in the context of development cooperation', Doc. 14773/03, 13 November 2003.

particularly, judicial reform.¹⁷ Moreover, both the former as well as the new Consensus on Development reflect this emphasis. Accordingly, the 2006 Consensus framed the need for 'an *institutional* environment that upholds human rights, democratic principles and the rule of law' in terms of the reform of the judicial system.¹⁸ In the same vein, the 2017 New Consensus highlights the promotion of independent and impartial courts as rule of law related '[e]ffective governance institutions and systems that are responsive to public needs'.¹⁹

The way that security has entered into development cooperation has also geared the EU's understanding of the rule of law towards judicial reform. The case study showed that the EU conceives of development and security as 'important and complementary aspects'²⁰ of its relations with third countries. They are mutually reinforcing and the Union has asserted that there cannot be the one without the other.²¹ Security is stressed as a 'first condition for development'²² and, *vice versa*, 'sustainable development lies at the heart of a resilient state'.²³ In the case study on development cooperation, the argument was presented that, in ways similar to good governance, this security angle brings with it a particular insistence on institution and capacity-building, which, when linked to the promotion of the rule of

17 The 2003 Communication on Governance and Development stressed that: 'Governance is a key component of policies and reforms for poverty reduction, democratisation and global security. This is why institutional capacity-building, particularly in the area of good governance and the rule of law is one of the six priority areas for EC development policy....' Commission Communication on Governance and Development, COM(2003) 615 final, 20 October 2003, p. 3. Further, see Commission Communication on Governance in the European Consensus on Development, COM(2006) 421 final, 30 August 2006, p. 1; Commission Communication on Increasing the Impact of EU Development Policy: An Agenda for Change, COM(2011) 637 final, 13 October 2011, p. 6.

18 Joint Statement by the Council and the Representatives of the Governments of the Member States meeting within the Council, the European Parliament and the Commission on European Union Development Policy, 'The European Consensus', OJ[2006] C46/1, 22 November 2005, pnt 86.

19 Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ[2017] C210/1, p. 32.

20 European Consensus on Development (2006), pnt. 37.

21 In the words of the Commission: 'There cannot be sustainable development without peace and security, and without development and poverty eradication there will be no sustainable peace.' Joint Communication of the Commission and the High Representative on A Renewed Partnership with the Countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52 final, 22 November 2016, p. 8. Also see Commission Communication on Governance and Development, COM(2003) 615 final, p. 7; Community Communication on Conflict prevention, COM(2001) 211, 11 April 2001, p. 5; Council Conclusions, 2622nd External Relations Council, Doc. 12724/04, 22-23 November 2004, p. 27.

22 European Council 'European Security Strategy – A Secure Europe in a Better World' 12 December 2003, p. 13.

23 'A Global Strategy for the European Union's Foreign and Security Policy – Shared Vision, Common Action: A Stronger Europe', June 2016, p. 24.

law, has, more often than not, been interpreted as judicial reform. Thus, the fragility of developing, conflict-prone states is to be addressed through 'the rule of law ... and the building of viable institutions'.²⁴ Moreover, in post-conflict settings, 'a nationally-owned transitional justice and rule of law system, engaging official and non-governmental institutions is fundamental.'²⁵ More particularly, the establishment of independent, transparent and effective institutions is considered by the EU to be essential for building trust in a country in transition, for creating a basis for development, and for fighting crime. These issues all require an independent judiciary to solve disputes, a well-equipped police force to fight crime, and, more generally, respect for the rule of law.²⁶ Since the security sector is so closely related to the justice sector, with both sectors sharing functional duties (securing the rights of individuals and/against the state),²⁷ consolidation of the rule of law is understood as the strengthening of the institutions in that sector,²⁸ with the judiciary at its centre as both a mechanism for holding the state accountable and a security provider itself.²⁹

Turning now towards the enlargement policy, the analysis undertaken in chapter 4 showed that the EU's practice in the area of rule of law reform has focused largely on judicial reform, with both sections in the monitoring reports on the rule of law under the Copenhagen criteria³⁰ as well as under Chapter 23 aimed at the applicant states' progress regarding the functioning of the judicial sector.³¹ The reason for this lies in the fact that domestic courts fulfil a central role in the implementation of the *acquis* before accession and in the application of EU law thereafter; both are necessary for the operation of the Union.

As put forward by the Commission in its 2012-2013 Enlargement Strategy, countries aspiring to join the EU must demonstrate their ability to strengthen 'the practical realisation of the values on which the Union

24 European Consensus on Development (2006), pnt. 20.

25 Commission Communication on Towards an EU response to situations of fragility - engaging in difficult environments for sustainable development, stability and peace, COM(2007) 643 final, 25 October 2007, p. 9.

26 Joint Communication of the Commission and the High Representative on EU Support for Sustainable Change in Transition Societies, JOIN(2012) 27 final, 3 October 2012, p. 7.

27 Joint Communication of the Commission and the High Representative on Elements for an EU-wide Strategic Framework to Support Security Sector Reform, JOIN(2016) 31 final, 5 July 2016, p. 6; Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 17.

28 Tools and Methods Series Reference Document No. 9 'Support for Justice Reform in ACP Countries' EuropeAid (2010), p. 12.

29 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law - The judicial system within the broader justice sector context (2009), p. 5.

30 For an example of a progress report in relation to the CEECs, see for example, 2002 Slovenia Regular Report, pp. 21-23.

31 See, for example, 2014 Montenegro Progress Report, pp. 35-39.

is based at all stages of the accession process.³² In relation to the rule of law this has meant, according to the same Communication, the 'proper functioning of the core institutions'³³ necessary for the rule of law, namely the judicial system, including the courts and public prosecutor, and law enforcement agencies. The introduction (section 3.1.2) as well as the enlargement case-study (section 4.2) pointed out that there is ample case law³⁴ and scholarly literature³⁵ on the importance of Member State courts in upholding the EU legal edifice. Recently, this was reiterated by the CJEU when it stated that 'Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.'³⁶ Consequently, national courts, together with the CJEU, 'fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is

32 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 4.

33 *Ibid.*, p. 4.

34 Case C-64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018; Opinion 1/09 *Agreement creating a Unified Patent Litigation System*, [2011] ECR I-01137; Case C- 583/11 P *Inuit Tapiriit Katanami and Others v Parliament and Council*, EU:C:2013:625, 3 October 2013; C-456/13 P *T&L Sugars and Sidul Açúcares v Commission*, EU:C:2015:284, 28 April 2015; Case C-216/18 *PPU LM*, EU:C:2018:585, 25 July 2018.

35 See, for example, Michal Bobek 'The Court of Justice, the National Courts, and the Spirit of Cooperation: Between Dichtung and Wahrheit' in Adam Łazowski & Steven Blockmans *Research Handbook on EU Institutional Law* London: Edward Elgar (2016), pp. 353-378; Urszula Jaremba 'The Role of National Courts in the Process of Legal Integration in the European Union: Retrospective and Prospective' in Flora Goudappel & Ernst Hirsch Ballin (eds) *Democracy and the Rule of Law in the European Union* The Hague: T.M.C. Asser Press (2016), pp. 49-62; John Bell *Judiciaries Within Europe: A Comparative Review* Cambridge: Cambridge University Press (2006); Zdeněk Kühn 'The Application of European Law in the New Member States: Several (Early) Predictions' 6 *German Law Journal* (2005), pp. 563-582; Xavier Groussot 'The Role of the National Courts in the European Union – A Future Perspective' *SIEPS* No. 10 (2005); George Tridimas & Takis Tridimas 'National Courts and the European Court of Justice: A Public Choice Analysis of the Preliminary Reference Procedure' 24 *International Review of Law and Economics* (2004), pp. 125-145; Francis G. Jacobs 'The Evolution of the European Legal Order' 41 *Common Market Law Review* (2004), pp. 303-316; John Temple Lang 'Developments, Issues and New Remedies – The Duties of National Authorities and Courts under Article 10 of the EC Treaty' 27 *Fordham International Law Journal* (2004), pp. 1904-1939; Takis Tridimas 'Knocking on Heaven's Door: Fragmentation, Efficiency and Defiance in the Preliminary Reference Procedure' 40 *Common Market Law Review* (2003), pp. 9-50; Karen Alter *Establishing the Supremacy of European Law. The Making of an International Rule of Law in Europe* Oxford: Oxford University Press (2001); Anne Marie Slaughter, Alec Stone Sweet & Joseph H.H. Weiler (eds) *European Court and National Courts – Doctrine and Jurisprudence* Oxford: Hart Publishing (1997).

36 Case C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*, ECLI:EU:C:2018:117, para. 32.

observed.³⁷ In relation to the Union's accession policy, the interdependence of the national courts in the Member States, in combination with their role in the implementation of the enlargement *acquis*, has led the Commission, in its White Paper on the preparation of the CEECs for integration into the internal market of 1995, to remark on the necessity of 'the existence of appropriate judicial and administrative machinery' in the aspiring Member States.³⁸ As it was argued in the general findings on the conceptualisation of the rule of law in enlargement (section 4.1), there is ample evidence to show that this focus on judicial reform has stayed the same in all enlargement rounds under review and is also being followed in the current pre-accession process regarding the countries in the Western Balkans.

In sum, it was shown that from the earliest conceptualisation of the rule of law in development cooperation and in enlargement, the EU has come to understand rule of law reform as judicial reform. For both policy areas this has meant a full focus on the functioning of the institutions (and their staff) within the judicial sector. It was, however, also asserted that while both external areas thus attach similar weight to judicial reform, they do so on the basis of different rationales.

2.2 Lack of the formal element of legality explained on the basis of policy characteristics

Both case studies showed that neither legal framework has incorporated formal legality, *i.e.* the requirements regarding the validity and quality of laws, as an element of the rule of law. In relation to development cooperation, with the formulation of the rule of law-related cooperation objectives in the Cotonou Agreement³⁹ and further cooperation agreements,⁴⁰ and

37 Case C-64/16, para. 33. Also Opinion 1/09 (*Agreement creating a Unified Patent Litigation System*), EU:C:2011:123, para. 6; Case C-583/11P *Inuit Tapiriit Kanatami and Others v Parliament and Council*, EU:C:2013:625, para. 99.

38 Commission White Paper on Preparation of the Associated Countries of Central and Eastern Europe for Integration into the Internal Market of the Union, COM(95) 163 final, 3 May 1995, p. 16. Also see Commission Communication on Composite Paper - Reports on Progress Towards Accession by Each of the Candidate Countries, COM(1998) 712 final, 17 December 1998, p. 16.

39 For the rule of law as an essential element of the agreement, see Article 9 Cotonou Agreement. For the rule of law as a cross-cutting theme of cooperation, see Article 33 Cotonou Agreement.

40 See for example, Articles 2 and 65 Agreement on Trade, Development and Cooperation between the European Community and its Member States, of the one part, and the Republic of South Africa, of the other part, OJ [1999] L311/3; Articles 1 and 8 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Republics of Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua and Panama, of the other part, OJ [2014] L111/6; Articles 1 and 2(2)(f) Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2013] L20/2.

in the financial instruments⁴¹ primarily based on institutional and procedural elements of, *inter alia* judicial independence and access to justice,⁴² considerations of legislative quality seem to have been left out altogether. Regarding the EU's policy of enlargement, it was demonstrated that formal legality is (largely) absent as a rule of law related element from the Europe Agreements with the CEECs,⁴³ the Association Agreements covering the relations with Cyprus, Malta, and Turkey, as well as from the Stability and Association Agreements with the Western Balkan countries.⁴⁴ Furthermore, the financial instruments advance an institutional understanding of its rule of law aims⁴⁵ similar to the one found in the framework related to development cooperation. It is also here that the argument can be made that the policy area itself has impacted the EU's conceptualisation of this particular element of the rule of law; both policy areas will be discussed in turn below.

The development cooperation case study showed that the EU, in its legal and policy framework, understands the strengthening of the rule of law predominantly through an institutional lens. This institutional-centric orientation has resulted in a rather 'anatomical approach' regarding the rule of law with a focus on legal institutions and norms; listing the attributes of the judiciary is presented as 'adding up to the rule of law'.⁴⁶ In contrast, it was argued that neither the policy and legal framework, nor the practice on the ground, examined by way of the monitoring documents, seem to include formal legality, or (a number of) its sub-elements, as a core element of the rule of law. The various reports of the programming cycles do not go much further than some general statements on 'improving the legal and

41 Article 1(2)(b)(ii) 11th EDF implementation Regulation (EU) 2015/322; Article 2(1)(ii) Regulation (EU) No 233/2014; Article 2(1)(a)(ii) Regulation (EU) No 235/2014.

42 See, for example, Annex I of Regulation (EU) No 233/2014 which outlines the objective of 'strengthening of the rule of law and the independence of judicial and protection systems and ensuring unhindered and equal access of justice for all', Annex I A(I)(a)(ii) Regulation (EU) No 233/2014.

43 In all but the earliest Europe Agreements, there is merely a single reference to the rule of law in the Preamble. See for example, Europe Agreement establishing an association between the EC and the Republic of Latvia, OJ[1998] L26/3.

44 As outlined in section 2.3 of the enlargement case-study, in the SAAs, the rule of law is mentioned in the Preamble and included as an essential element. Furthermore, support to efforts to strengthen the rule of law is framed in terms of the reinforcement of the institutions concerned with the administration of justice and law enforcement. See for example Article 80 Stabilisation and Association Agreement with Montenegro.

45 In Article 2(2)(a) of IPA II, the specific objectives of cooperation include: 'progress in the areas of strengthening democracy, the rule of law and an independent and efficient justice system....' Further, see, Article 3(1)(a) Regulation (EU) No 231/2014; Article 2(3) PHARE Regulation 1266/99; Article 2(3) CARDS Regulation 2666/2000.

46 Martin Krygier 'The Rule of law: Legality, Teleology, Sociology' in Gianluigi Palombella & Neil Walker *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 45-69 at 48.

regulatory framework'⁴⁷ by filling gaps in the legislation in various areas,⁴⁸ without providing standards against which reforms can be measured.

However, in the EU's development cooperation policy, the element of legality has been affected in a particular way. Whereas formal legality receives scant attention, it is argued that substantive legality does, particularly in the light of recent policy developments. The documents show that it is apparent that the Union pushes hard for substantive legality by way of alignment of national legislation with human rights standards and best-practices, instead of concentrating on formal legality. The protection and promotion of human rights has been, in the joint words of the Commission and the High Representative 'a silver thread running through all EU action both at home and abroad,'⁴⁹ with the human rights and development cooperation agendas having been closely interlinked;⁵⁰ the EU has a longstanding commitment to ensure that respect for human rights is mainstreamed across development cooperation.⁵¹ More recently, following the 2012 Strategic Framework on Human Rights and Democracy,⁵² it was shown that the EU has committed to the rights based approach for development cooperation. As it was explained in the relevant chapter, via this approach the Union aims to integrate human rights principles into its operational activities for development cooperation.⁵³ According to the Commission's 'Toolbox' in which the rights-based approach is further elucidated, one of the underlying working principles ties the framework explicitly to the rule of law. Under the heading of 'Accountability and access to the rule of law' the fourth principle connects the rule of law to alignment of national legislation with legal human rights obligations and an institutional understanding of

47 Malawi Joint Annual Report 2008, p. 22; Commission Report on The implementation of measures intended to promote observance of human rights and democratic principles in external relation for 1996-1999, COM(2000) 726 final 14 November 2000, p. 12; and its 1995 counterpart Commission Report on the implementation of measures intended to promote observance of human rights and democratic principles (for 1995), COM(1996) 672 final, 17 January 1996, pp. 8-9.

48 See for example the Regional Multiannual Indicative Programme of Central Asia 2014-2020, which includes as one of the rule of law related focal areas: 'support to development of the legal framework: Constitutional Law and/or the Administrative Law and/or Criminal Law', pp. 4-5. Further, Malawi Joint Annual Report 2008, p. 22. See also the Commission Report on The implementation of measures intended to promote observance of human rights and democratic principles in external relation for 1996-1999, COM(2000) 726 final 14 November 2000, p. 12.

49 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 final, 12 December 2011, p. 4.

50 Commission Communication on Increasing the Impact of EU Development Policy: An Agenda For Change, COM(2011) 637 final, 13 October 2011, p. 5.

51 The 2006 European Consensus on Development identifies the promotion of human rights as one of the cross-cutting issues, *ibid.* 101.

52 EU Strategic Framework and Action Plan on Human Rights and Democracy, Doc. 11855/12, 25 June 2012.

53 See section 3.2.2.1 of chapter 3.

access to justice. Indeed, the application of this principle should lead to the 'identification of the lack of capacity of the state to fulfil its obligations' and demands that 'legal services are accessible'.⁵⁴ Consequently, since according to the first principle of 'Applying all rights' all beneficiaries are entitled to all human rights,⁵⁵ there has been an intensified attempt to promote the ratification and effective implementation of human rights treaties, including regional human rights instruments, in developing countries. This emphasis is also reflected in the Action plan on Human Rights and Democracy attached to the 2012 Strategic Framework⁵⁶ and its successor Action Plan 2015-2019.⁵⁷ Moreover, the DCI covering the period of 2014-2020 has freed up funds in order to 'promote a rights based approach encompassing all human rights' in order to assist partner countries 'in implementing their international human rights obligations and to support the right holders, with a focus on poor and vulnerable groups, in claiming their rights'.⁵⁸ Thus, interestingly, it can be concluded that the EU has focussed on substantive legality while paying little attention to formal legality.

Turning now to the enlargement chapter, it was shown that the lack of formal legality in the Enlargement Strategies and monitoring documents across the accession rounds can be explained on the basis of the characteristics of the policy area itself. In ways similar to the policy on development cooperation, there is a pronounced emphasis on rule of law reform by way of judicial reform. However, and more importantly regarding formal legality, the policy showcases the necessity of legislative approximation in combination with the particular exclusionary nature of the *acquis* and the quantitative methodology underlying progress monitoring during the pre-accession process, which, as was asserted, have led to negative reinforcing effects regarding legality's sub-elements,⁵⁹ such as coherence, generality, and stability.⁶⁰

The *acquis* represents a ready-made corpus of legal rules that have to be implemented and enforced at the domestic level of the applicant states. It was argued that there is limited space for engagement with the EU's legal template by the applicant states; in point of fact, there is evidence that in

54 Commission Staff Working Document on Tool-Box – A Rights-Based Approach, Encompassing All Human Rights for EU Development Cooperation, SWD(2014) 152 final, 30 April 2014, p. 18.

55 *Ibid.*, p. 16.

56 EU Strategic Framework and Action Plan on Human Rights and Democracy, Doc. 11855/12, 25 June 2012, outcome II.

57 Joint Communication of the Commission and the High Representative on Action Plan on Human Rights and Democracy (2015-2019) – Keeping Human Rights at the Heart of the EU Agenda JOIN(2015) 16 final, 28 April 2015.

58 Article 3(8)(b) Regulation (EU) No 233/2014.

59 See sections 3.1.2 and 3.1.3 of chapter 4.

60 As was shown in chapter 2, these sub-elements are part and parcel of Fuller's list of eight conditions for the validity of law; a body of legal rules needs to constitute a coherent whole and remain stable or unchanged for a period of time long enough to provide the necessary predictability and constraints for decision makers.

cases where key legal definitions are highly specific, the EU considers a literal translation of EU text desirable.⁶¹ Moreover, as a 'sacred' EU concept⁶² – even 'the holiest cow of all'⁶³ – the *acquis* constitutes a body of rules whose scope, trajectory and interpretation remains exclusively within the EU's own control.⁶⁴ As the non-national, shared patrimony of 28 Member States who adhere to it themselves, the *acquis* enjoys a high degree of legitimacy, integrity, but also inviolability. Consequently, the particular nature of the *acquis* has precipitated a lack of local engagement with those rules, giving rise to quality issues as well as problems of enforcement. Furthermore, there is evidence that the EU's methodology in the pre-accession process, which directly links *acquis* approximation to progress on the road to accession by completing *acquis*-chapters in the negotiation, with the yearly monitoring reports adding time-pressure, has resulted in additional detrimental effects in relation to legality's requirements of laws. Enactment of EU-related laws is often fast-tracked with little parliamentary discussions and with the executive controlling the process throughout,⁶⁵ allowing governments 'to by-pass parliament and to justify the centralisation of decision-making by the emergency-like circumstance',⁶⁶ in order to meet formal indicators of compliance. Next to an erosion of democratic procedures, the lack of substantive debate about legislation and the most appropriate aims ways to achieve their aims in the domestic context has not been beneficial to

61 Ulrich Sedelmeier 'After Conditionality: Post-Accession Compliance with EU Law in East Central Europe' 15 *Journal of European Public Policy* (2008), pp. 806-825 at 821. Also, Frank Schimmelfennig & Ulrich Sedelmeier 'Introduction: Conceptualizing the Europeanization of Central and Eastern Europe' in Frank Schimmelfennig & Ulrich Sedelmeier (eds) *The Europeanization of Central and Eastern Europe* Ithaca, NY: Cornell University Press (2005), pp. 1-28.

62 Philippe C. Schmitter 'Imagining the Future of the Euro-Polity with the Help of New Concepts' in Gary Marks, Fritz W. Scharpf, Philippe C. Schmitter & Wolfgang Streeck (eds) *Governance in the European Union* London: Sage Publishing (1996), pp. 121-165 at 162 fn 110.

63 Joseph H.H. Weiler 'The Reformation of European Constitutionalism' 35 *Journal of Common Market Studies* (1997), pp. 97-131 at 98.

64 With the CJEU as its ultimate authoritative interpreter. Amichai Magen 'Transformative Engagement through Law: The *Acquis Communautaire* as an Instrument of EU External Influence' 3 *European Journal of Law Reform* (2007), pp. 361-392 at 386.

65 On this point generally, see Heather Grabbe 'How Does Europeanisation Affect CEE Governance? Conditionality, Diffusion and Diversity' 8 *Journal of European Public Policy* (2001), pp. 1013-1031.

66 Wojciech Sadurski 'Introduction: The Law and Institutions of New Member States in Year One' in Wojciech Sadurski, Jacques Ziller & Karolina Zurek (eds) *Après Enlargement: Legal and Political Responses in Central and Eastern Europe* Florence: European University Institute (2006), pp. 3-18 at 7.

legislative quality, even undermining formal legality.⁶⁷ It was argued in the section on the rule of law's category of formal elements, that although the Commission seems to recognise the drawbacks of its approach in a number of the monitoring reports covering the previous enlargement rounds as well as the current pre-accession process, it has refrained from adjusting it.

Having shown in the case studies that formal legality is a missing element of the EU's rule of law conceptualisation both in its development cooperation and enlargement policy, this section proceeded to explain the little weight attributed to formal legality on the basis of particularities related to the policymaking domains. The chapter now turns to the elements within the procedural and institutional categories and the reasons underpinning the emphasis on some of them.

2.3 The reasons underpinning the focus on different elements in development cooperation and enlargement

Looking through a comparative lens, the previous sections showed that for both policy areas there is a manifest understanding of the rule of law in terms of institutional reform and capacity building – albeit for separate reasons. In addition to that, the different reasons were explained on the grounds that little to no attention is paid in development cooperation and enlargement to considerations of the validity and quality of laws, *i.e.* formal legality as it is found on the first category of rule of law elements. However, the case studies also showed that in the EU's understanding of the rule of law some of the elements within the procedural and institutional categories receive more attention and are, thus, more prominently featured than others. This holds true for the legal and policy framework as much as for the practice on the ground. This section will provide the different rationales underpinning the policies' focus.

67 It is interesting to note that in the literature on post-accession behaviour of states it is pointed out that, contrary to popular belief that compliance with EU law would deteriorate after accession particularly in the case of the eight Member States involved in the 2004 big-bang enlargement, this is not the case. In fact, it is argued that the experiences with pre-accession conditionality – the biggest factor undermining formal legality – has compelled the applicant states to build up legislative capacity. Indeed, many countries made institutional investments to increase the effectiveness of national arrangements for the adoption of EU law, which allowed them to transpose a massive amount of *acquis* into national legislation within a short period of time. This, in turn, has aided the new Member States, after their accession in 2004, to maintain some of the established procedures, which increased their capacity for timely and correct transposition of EU directives into national law. Ulrich Sedelmeier 'Compliance After Conditionality: Why Are the European Union's New Member States So Good?' *MAXCAP Working Paper Series* No. 22 (2016); Radoslaw Zubek 'Complying with Transposition Commitments in Poland: Collective Dilemmas, Core Executive and Legislative Outcomes' 28 *West European Politics* (2005), pp. 592-619; Ulrich Sedelmeier 'After Conditionality: Post-Accession Compliance with EU Law in East Central Europe' 15 *Journal of European Public Policy* (2008), pp. 806-825 at 820-821.

2.3.1 *Explaining the prominence of certain rule of law elements in the procedural category*

To start with the procedural category, in the development cooperation case study it was put forward that unlike the underarticulated elements of judicial review and enforcement, the element of access to justice runs like a red thread through the EU's understanding in this external area. It is the only procedural elements mentioned consistently at all levels; as a specific objective of cooperation in the ACP context⁶⁸ and in a number of other cooperation agreements,⁶⁹ as a focal point for EU financial assistance in the DCI⁷⁰ and EIDHR⁷¹ regulations, as well as in many strategic policy documents throughout the years.⁷² There are two reasons that support its prominence and both relate to the nature of the policy area. First, access to justice has increasingly come to the fore in the international framework of development cooperation, culminating in its inclusion as the only explicit rule of law related goal of the UN Sustainable Development Goals.⁷³ This international focus on access to justice, in turn, has been translated into the EU's own development cooperation policy agenda.⁷⁴ Both the Council and the Commission have done so in such a way as to highlight the central role of access to justice in achieving this. For example, in its conclusions on the implementation of the post-2015 development agenda and the SDGs, the Council has stated that effective and inclusive institutions need to be promoted, based on the rule of law, in order to foster the legal empowerment

68 Articles 9 and 33 Cotonou Agreement.

69 See for example Article 102 Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, OJ[2012] L204/20; Article 30 on cooperation in the field of the rule of law of the Framework Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ [2013] L20/2.

70 Annex I section A(I)(a)(ii) of Regulation (EU) No 233/2014. See Articles 3(3) and 5(2)(f) of the previous DCI, Regulation (EC) No 1905/2006.

71 Article 2(1)(a)(ii) of Regulation (EU) No 235/2014.

72 See, for example, Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(1998) 146 final, 12 March 1998, p. 4; European Parliament Resolution on the EU and the global development framework after 2015, (2014/2143(INI)), 17 November 2014, pnt. 29; Council Conclusions 'A new global partnership for poverty eradication and sustainable development after 2015', Doc. 9241/15, 26 May 2015; Joint statement by the Council and the representatives of the governments of the Member States meeting within the Council, the European Parliament and the Commission 'The New European Consensus on Development – Our World, Our Dignity, Our Future' OJ[2017] C210/1, pnt. 61.

73 Sustainable Development Goal No 16.3, available at <https://www.un.org/sustainabledevelopment/peace-justice/>.

74 New Consensus on Development (2017), pnt. 61. For the ACP context more particularly, see the Joint Communication of the Commission and the High Representative on A Renewed Partnership with the Countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52 final, 22 November 2016, p. 19.

of woman as well as accountability. Accordingly, promoting access to justice for all 'is an essential means of implementation of the agenda and an important objective in itself.'⁷⁵ In a similar vein, the Commission has expressed its desire that countries promote effective and responsive institutions, which should include 'providing fair and predictable legal frameworks that promote and protect human rights.'⁷⁶

The second reason for the distinction of access to justice as the most visible procedural rule of law element follows from the fact that this element lies at the cusp of the intersecting lines of good governance, the protection of human rights, and the strengthening of the rule of law in the EU's development cooperation policy. This means that it has received attention through all these policy strands, since improving it boosts all policy objectives. Indeed, as the Council spelled out in its May 2012 Conclusions, the promotion of human rights, the rule of law and good governance, and of inclusive and sustainable growth are the two mutually reinforcing basic pillars of the EU's development policy.⁷⁷ For this reason, a rights-based approach, 'promoting in particular the right to universal and non-discriminatory access to basic services, ... justice and the rule of law' should feature more prominently.⁷⁸ For the EU, respect for the rule of law, including access to justice and the right to a fair trial, is essential for the protection of human rights,⁷⁹ particularly those of poor and vulnerable groups.⁸⁰ Not only that, there is a governance and an economic aspect to access to justice as well, since the reliable operation on courts 'is an absolute requirement for judicial certainty without which investors may turn away from the country and in which case its development is doomed to failure.'⁸¹ Accordingly, access to justice is a *sine qua non* condition both for poverty reduction and for economic development. Furthermore, as it was pointed out in the section on access to justice in the development cooperation case study,⁸² this rule

75 Council Conclusions 'A new global partnership for poverty eradication and sustainable development after 2015', Doc. 9241/15, 26 May 2015, pnt. 11.

76 Commission Communication on A Global Partnership for Poverty Eradication and Sustainable Development after 2015, COM(2015) 44 final, 5 February 2015, p. 4.

77 Council Conclusions 'Increasing the Impact of EU Development Policy: an Agenda for Change' 3166th Foreign Affairs Council, 14 May 2012, pnt. 6.

78 *Ibid.*, pnt. 7.

79 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 final, 12 December 2011, p. 7; Commission Communication on A Global Partnership for Poverty Eradication and Sustainable Development After 2015, COM(2015) 44 final, 5 February 2015, p. 4.

80 Joint Staff Working Document of the Commission and the High Representative on Gender Equality and Women's Empowerment: Transforming the Lives of Girls and Women through EU External Relations 2016-2020, SWD(2015) 182, 21 September 2015, p. 7; Commission Staff Working Document 'EU Plan of Action on Gender Equality and Women's Empowerment in Development 2010-2015, SEC(2010) 265 final, 8 March 2010, p. 3.

81 Tools and Methods Series Reference Document No. 9 'Support for Justice Reform in ACP Countries' EuropeAid (2010), p. 8.

82 See chapter 3, section 3.2.2.1.

of law element also follows in the slipstream of the EU's focus on judicial reform (see section 2.1 of this chapter) in combination with the rights-based approach. After all, empowering rights holders to claiming their rights, obtaining redress, or settling disputes is moot without courts (and other non-state forms of justice) to turn to, thus necessitating the strengthening of institutional capacity of the judicial sector.⁸³ *Vice versa*, the rights-based approach is designed to ensure that justice reform programmes do not focus exclusively on capacity-building within the judiciary, but also take into account the rights and access of the end-users of the justice system.⁸⁴

In contrast to development cooperation, it was demonstrated in the case study on enlargement that access to justice does not nearly receive the same level of attention as it does in development cooperation. Instead, two other procedural rule of law elements come to the fore,⁸⁵ namely impartiality (including its sub-elements ethical standards, rules on the random allocation of cases, rules regulating withdrawal/recusal, disciplinary proceedings, and dismissal), and judicial efficiency and quality (including its sub-elements backlogs, length of proceedings, enforcement, training of staff, case management, electronic availability decisions, and availability alternative dispute resolution mechanisms). The reason for their prominence is threefold. First, the EU's persistent emphasis on judicial reform has, as a corollary, turned the focus on the people working within the institutions, as well as the effectiveness and quality of the judicial process, as evidence, for instance by the EU's 2000 Enlargement Strategy in which the strengthening of the judiciary is formulated in terms of the training of judges,⁸⁶ and by the 2006 Strategy, in which the Commission voiced the need for greater awareness of judicial effectiveness.⁸⁷ Secondly, as highlighted above, the functioning of the EU legal order is dependent on the effectiveness and quality of Member State courts, as well as the mutual trust between Member States,⁸⁸ emphasising the need for reform in these areas. Thirdly, impartiality and

83 Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 14.

84 Commission Staff Working Document on Tool-Box – A Rights-Based Approach, Encompassing All Human Rights for EU Development Cooperation, SWD(2014) 152 final, 30 April 2014, p. 6.

85 Both procedural elements are also included as interim benchmarks of Chapter 23 of both Serbia and Montenegro, see European Union Common Position, Chapter 23: Judiciary and Fundamental Rights Montenegro, AD 17/13, 12 December 2013; European Union Common Position, Chapter 23: Judiciary and Fundamental Rights Serbia, AD 20/16, 8 July 2016.

86 Commission Enlargement on Strategy Paper & Report on progress towards accession by each of the candidate countries, COM(2000) 700 final, 8 November 2000, p. 16.

87 Commission Communication on Enlargement Strategy and Main Challenges 2006-2007, COM(2006) 649 final, 8 November 2007, p. 5.

88 Dimitry Kochenov *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* The Hague: Kluwer Law International (2008), p. 228. Case C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*, EU:C:2018:117, 27 February 2018, para. 33.

judicial efficiency are emphasised in enlargement, because these procedural elements flow from the requirements that stem from Article 47 of the Charter of Fundamental Rights and Article 6 ECHR and that need to be adhered to.⁸⁹ In relation to the latter, as Members of the Council of Europe, having ratified the ECHR they need to act in accordance with its standards, already during the pre-accession process. In the case of the former, the applicant states will have to abide by the Charter and protect the rights enshrined therein after accession. In fact, as it was argued in the case study,⁹⁰ regarding the efficiency sub-element of reasonable time, the ECtHR's growing case load on violations of the right to a speedy trial,⁹¹ *i.e.* the problem of extensive delays in court proceedings, against the applicant states, made this topic from the very beginning of the fifth enlargement round of the countries of central and Eastern Europe one of the prime rule of law sub-elements to be considered in the reports.⁹²

2.3.2 *Explaining the prominence of certain rule of law elements in the institutional category*

Turning now to the institutional category, in both case studies the conclusion was drawn that judicial independence is the central institutional rule of law element. In their treatment of this notion, the case studies show some similarities. First, the legal framework of both development cooperation and enlargement specifically mention judicial independence as an important precondition for the rule of law to exist. Accordingly, the essential elements clause of the Cotonou Agreement specifies that the rule of law will entail an independent legal system;⁹³ a number of cooperation agree-

89 In this regard, Turkey's screening report of Chapter 23 is quite insightful: 'The rule of law principle and the right to a fair trial, as enshrined in Article 6 of the European Convention on Human Rights (ECHR) and Article 47 of the Charter of Fundamental Rights of the European Union, provide that the judiciary must be independent and impartial. The content of these notions has been clarified in the jurisprudence of the European Court of Human Rights (ECtHR), which is an accepted reference for the EU *acquis* under Article 6 (2) of the EU Treaty. In particular, Courts must be established by law; there shall be no discrimination in the appointment procedures of judges; the judiciary must not be influenced in its decision-making by either the executive or the legislature; judges must act impartially and be seen to do so; their conditions of tenure must be adequately ensured by law; the grounds for disciplinary action or removal from the post must be limited and laid down in the law.' Screening Report Turkey, Chapter 23 – Judiciary and Fundamental Rights, 27 June 2007.

90 See chapter 4, section 3.2.2.

91 On the requirement of 'reasonable time' as mentioned in Article 6 ECHR in relation to the applicant states, see, for example, ECtHR, *Tričković v. Slovenia*, Appl. No. 39914/98; ECtHR, *Bočvarska v. The Former Yugoslav Republic of Macedonia*, Appl. No. 27865/02; ECtHR, *Oršuš and Others v. Croatia*, Appl. No. 5766/03.

92 See, for example, 1999 Poland Regular Report, p. 14; 2000 Slovakia Regular Report, p. 17; 2006 FYROM Progress Report, p. 12; 2006 Croatia Progress Report, p. 8.

93 Article 9(2) Cotonou Agreement. Also see Article 33(1)(c) of the same Agreement.

ments⁹⁴ and Stabilisation and Association Agreements⁹⁵ include the notion as a component of the rule of law; and the financial instrument applicable to development cooperation⁹⁶ and enlargement⁹⁷ all explicitly include it as a rule of law element. Furthermore, it is frequently mentioned throughout the various Strategic documents,⁹⁸ and, in the case of development cooperation, it can be found throughout the multiannual and/or national indicative programmes.⁹⁹ In relation to enlargement, judicial independence is included as an objective throughout all rounds of the Accession and Euro-

94 See, for example, Article 102 Partnership and Cooperation Agreement between the European Union and its Member States, of the one part, and the Republic of Iraq, of the other part, OJ[2012] L204/20; Article 8 Political Dialogue and Cooperation Agreement between the European Community and its Member States, of the one part, and the Andean Community and its Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela), of the other part, 15 December 2003.

95 As mentioned in the case study on enlargement, the Europe Agreements provide no substantive input for the EU's definition of the rule of law. The Stabilisation and Association Agreements, however, in their institutional approach on the rule of law, zoom in on judicial independence. See Article 74 Stabilisation and Association Agreement with the former Yugoslav Republic of Macedonia, OJ[2004] L84/13; Article 80 Stabilisation and Association Agreement with the Republic of Montenegro, OJ[2010] L108/3; Article 80 Stabilisation and Association Agreement with the Republic of Serbia, OJ[2013] L278/16; Article 78 Stabilisation and Association Agreement with the Republic of Albania, OJ[2009] L107/166; Article 83 Stabilisation and Association Agreement with Kosovo*, OJ[2016] L 71/3; Article 75 Stabilisation and Association Agreement with the Republic of Croatia, OJ[2005] L26/3.

96 In the Development Cooperation Instrument, judicial independence is an element under the common areas of cooperation, see Annex I(A)(I)(a)(ii) Regulation (EU) No 233/2014. Also see Article 2(1)(a)(ii) Regulation (EU) No 235/2014.

97 Judicial independence is included in the current Instrument for Pre-accession Assistance twice as a specific objective (Article 2(1)(a)(i) and 2(2)(a)), and as a thematic priority of assistance in Annex II(b) Regulation (EU) No 231/2014.

98 For development cooperation, see, for example, Commission Communication on Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: The Challenges of the Partnership between the European Union and the ACP States, COM(98) 146 final, 12 March 1998, p. 4; Commission Communication on Human Rights, Democracy and Development Cooperation Policy, SEC(91) 61 final, 25 March 1991, p. 6; New European Consensus on Development (2017), pnt. 61.

In relation to enlargement, to highlight just a few Communication, see Commission Communication on Composite Paper - Reports on Progress Towards Accession by Each of the Candidate Countries, COM(98) 712 final, 17 December 1998, p. 3; Commission Communication on Strategy Paper & Report on the progress towards accession by each of the candidate countries 'Making a Success of Enlargement', COM(2001) 700 final, 13 November 2001, p. 10; Commission Communication on 2005 enlargement strategy paper, COM(2005) 561 final, 9 November 2005, p. 8; Commission Communication 'Enlargement Strategy and Main Challenges 2010-2011' COM(2010) 660, 9 November 2010, p. 5; Commission Communication on Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, p. 5; Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 2.

99 See, for example, the Philippines Multiannual Indicative Programme 2014-2020, p. 5.

pean Partnerships,¹⁰⁰ it is an element covered in the annual reports of the previous accession rounds as well as those of the current pre-accession process,¹⁰¹ it is highlighted in the screening reports of chapter 23,¹⁰² and progress in strengthening it is included as an interim benchmark of that same chapter.¹⁰³

The reasons for its prominence are interrelated, twofold and valid for both external policy areas. First, the EU's understanding of the rule of law in terms of institutional reform and, more particularly, judicial reform, as pointed out at the start of this chapter, ensures that its focus is firmly on the flaws within the traditional institutions of justice – the courts and its judges.¹⁰⁴ Since judicial independence is such a core notion within this context, its emphasis is only logical. This is evidenced more generally by its extensive treatment in the ECtHR's case law on Article 6 ECHR,¹⁰⁵ as well as it being a focal point in many indicator list regarding the rule of law and judicial independence drawn up by various other international organisations, such as the UN Basic Principles on the Independence of the Judiciary,¹⁰⁶ the Performance Indicators on Independence, Accountability and Quality of the Judiciary drawn up by the European Network of Councils for the Judiciary,¹⁰⁷ and the International Principles on the

100 See, for example, the 1999 Accession Partnership Bulgaria; 2002 Accession Partnership Slovakia; 2003 Accession Partnership Romania; 2008 European Partnership Serbia including Kosovo.

101 See, for example, 2001 Poland Regular Report, p. 20; 2001 Hungary Regular Report, p. 16; 2001 Romania Regular Report, p. 20; 2008 Montenegro Progress Report, p.11; 2012 FYROM Progress Report, p. 10.

102 See Serbia Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12003/14, 16 July 2014, pp. 4-5; Montenegro Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 17785/12, 14 December 2012, pp. 3-5; Iceland Outcome of screening for Chapter 23: Judiciary and fundamental rights, Doc. 12975/11, 19 July 2011, pp. 3-4; Turkey's Chapter 23 Screening Report, 27 June 2007, pp. 4-5.

103 European Union Common Position, Chapter 23: Judiciary and Fundamental Rights Montenegro, AD 17/13, 12 December 2013, pp. 19-20; European Union Common Position, Chapter 23: Judiciary and Fundamental Rights Serbia, AD 20/16, 8 July 2016, p. 22.

104 For the purposes of this section, courts and their staff are highlighted, however, as shown throughout the case studies, judicial reform encompasses also the policy, prisons, and lawyers.

105 For an extensive overview, see the ECtHR's own guide to its interpretation of Article 6, both in relation to the civil limb (https://www.echr.coe.int/Documents/Guide_Art_6_ENG.pdf) as well as the criminal limb (https://www.echr.coe.int/Documents/Guide_Art_6_criminal_ENG.pdf).

106 These principles, formulated in 1985 to assist Member States in their task of securing and promoting the independence of the judiciary, are available at: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/IndependenceJudiciary.aspx>.

107 European Network of Councils for the Judiciary, Independence, Accountability and Quality of the Judiciary – ENCJ Report 2016-2017, 9 June 2017, available at: https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_ia_ga_adapted_ga_13_6.pdf.

Independence and Accountability of Judges, Lawyers and Prosecutors of the International Commission of Jurists.¹⁰⁸

Secondly, judicial independence has come to the fore as one of the main ways of ensuring the separation of powers. As it was pointed out in chapters 1 and 2, restraint of governmental power is one of the core tenets of the rule of law; it guarantees that governments rule through law and are themselves bound by it.¹⁰⁹ It was also shown that in order to achieve this, the doctrine of the separation of powers was developed to attempt to ensure that power is divided into different component parts, whereby certain parts of government bind other parts of that same government to the law.¹¹⁰ However, in the section on the rule of law element of the separation of powers, the understanding of this doctrine in both case studies showed that the EU has chosen to approach this doctrine mainly through an emphasis on the independence of the judiciary branch.¹¹¹ Both in development cooperation and in enlargement, the main focus in either policy area is not on the doctrine *per se*, *i.e.* on how the three branches interrelate and power is balanced, but rather on the sole element of judicial independence, hence the strong emphasis on the latter.

2.4 The reason explaining the limited articulation of procedural and institutional elements

The previous section showed that in relation to the procedural rule of law elements, the EU favours the element of access to justice in its development cooperation policy. In contrast, in enlargement, it has emphasised judicial impartiality and the effectiveness and quality of the judiciary. Several explanatory reasons were provided of why this is the case. In a similar fashion, the institutional element of judicial independence was shown to be the outstanding institutional element in both policy areas. Next, the chapter turns to the general finding of the case studies that a number of the procedural and institutional rule of law elements suffer from a lack of articulation and general vagueness. The section will show that the EU's focus on the rule of law as a means to an end has led to a strong emphasis on the end goals of the rule of law, *i.e.* what strengthening the rule of law is meant to achieve, rather than on the articulation of the rule of law itself.

Throughout the case studies it was noted that the precise articulation of a number of rule of law elements identified therein left much to be desired and in some cases led to conceptual confusion. For instance, it

108 International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners guide No. 1* (2007), available at: <http://icj2.wpengine.com/wp-content/uploads/2012/06/Principles-independence-lawyers-publication-2007.pdf>.

109 See chapter 1, section 2; chapter 2, section 2.

110 See chapter 1, section 3; chapter 2, section 4.

111 See chapter 3, section 3.3.2.; chapter 4, section 3.3.2.

was asserted in the chapter on the EU's development cooperation policy, that the procedural element of judicial review has not been fleshed out in detail. It was shown that mention is made of the fact that the judiciary 'must control the interpretation and the application of the law',¹¹² however, nothing further is provided regarding minimum standards or required types of review. Instead, the case studies showed that the EU has adopted a rather anatomical approach whereby various requirements for a well-functioning judicial system are outlined, such as an independent judiciary, effective and accessible legal services, equality before the law, and an effective executive capable of enforcing the law,¹¹³ but that little is advanced on how some of these aspects need to come together in order for the judiciary to actually fulfil its role of review, *i.e.* to assess and make binding judgments about whether and to what extent a government action complies with procedural and substantive requirement embodied in the law.

Similarly, in the enlargement case study, as far as the procedural element of judicial impartiality is concerned, it was highlighted that the EU has frequently failed to delineate between this notion, and the closely linked concept of judicial independence, thereby demonstrating conceptual confusion. The analysis presented in the case study drew attention to the fact that impartiality is often mentioned together with judicial independence, as shown by references throughout the monitoring documents such as the following: 'The principles of impartiality and judicial independence are set out in the Constitutions and reflected in the laws on the governance of the judiciary and on the status of judges and prosecutors.'¹¹⁴ More particularly, it was argued that impartiality is only infrequently addressed in its own right, and that, even when it is, the analysis repeatedly touches upon issues of independence, rather than impartiality itself, of which a number of examples were provided in the relevant section.¹¹⁵

It is submitted here that part of the reason why the EU has failed to provide a clear articulation of the rule of law and some of its elements in the two case studies, lies in the fact that the EU relies on two separate assumptions. The first assumption relates to the rule of law's instrumental use-value: there is evidence in both policy areas that the EU has the assumption that the rule of law is a means to a variety of ends (security, economic growth, human right protection) rather than an end in itself (what the rule of law brings instead of what it is), which has led to a strong emphasis on the end itself and a lack of attention on precisely what elements of the rule of law are needed for achieving those ends. The second assumption relates

112 Programming Guide for Strategy Papers, Programming Fiche on Rule of Law - The judicial system within the broader justice sector context (2009), p. 1.

113 See the definition provided by the Commission on the requirements needed for a country to operate under the rule of law, Programming Guide for Strategy Papers, Programming Fiche on Rule of Law - The judicial system within the broader justice sector context (2009), p. 1.

114 2018 Albania Report, p. 18.

115 See chapter 4, section 3.2.1.

to the dominance of the idea of judicial reform: the assumption is that creating well-equipped judiciaries and training the staff within them will result in a general respect for the rule of law.

In relation to the first assumption, a great many examples can be found in the various documents related to development cooperation as well as enlargement in which the focus is not on the rule of law itself, but rather on its instrumental force, *i.e.* the rule of law is understood as a means to the realisation of other particular goals.¹¹⁶ To provide a few, in the Joint Communication on the renewed partnership with the ACP countries, it is stated that '[t]he partnership should focus on delivering the rule of law. This is a fundamental value, a necessary basis for sustainable development, a key component in preventing conflict, and a foundation for successful cooperation in other areas of interest for the EU.'¹¹⁷ In its 2015 Enlargement Strategy the Commission offered that '[s]trengthening the rule of law increases legal certainty, encourages and protects investments and contributes significantly to supporting economic development and competitiveness. Conversely, economic reforms and integration have the capacity to stabilise countries in the longer term. It is imperative that the enlargement process facilitates these synergies, to provide a stronger impetus to economic reforms so that the aspiring Member States enjoy the benefits of functioning market economies with a strong rule of law before they join.'¹¹⁸ Furthermore, the Multi-annual Indicative Programmes for the Kyrgyz Republic for the period 2014-2020 put forward that 'the enhancement of the rule of law greatly benefits the business climate and hence trade, investments and economic growth in the country. Continued support to rule of law and judicial reforms is therefore very much needed to strengthen democracy and protect individual rights, including human rights, as well as combating corruption.'¹¹⁹

While there are many more examples, the basic message to take away from the ones highlighted here is that they demonstrate that the Union perceives of the rule of law as a virtue that brings with it numerous positive other ends; the assumption is that by promoting the rule of law, economic development will follow, conflict will be prevented and security will be provided, and the protection of human rights will be strengthened. More spe-

116 See Neil Walker 'The Rule of Law and the EU: Necessity's Mixed Virtue' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 119-138 at 123; Brian Z. Tamanaha *Law as a Means to an End: Threat to the Rule of Law* Cambridge: Cambridge University Press (2006). Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad. In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 31-73.

117 Joint Communication of the Commission and the High Representative on A Renewed Partnership with the Countries of Africa, the Caribbean and the Pacific, JOIN(2016) 52 final, 22 November 2016, p. 8 [emphasis added].

118 Commission Communication on EU Enlargement Strategy, COM(2015) 611 final, 10 November 2015, p.5 [emphasis added].

119 Multi-annual Indicative Programme for the Kyrgyz Republic 2014-2020, p. 4 [emphasis added].

cifically, according to many strategic policy documents, the EU understands that there is a causal connection between rule of law reform and these other outcomes. This instrumental use-value of the notion was also highlighted in the introductory chapter of this thesis as the fourth function of the rule of law in relation to the EU's own security.¹²⁰ It was shown there that the Treaties have linked the EU's objective of safeguarding the rule of law to the protection of its own security. Moreover, it was pointed out that since the EU's internal and external security interests are highly intertwined, the more instrumental understanding of the rule of law has also made its way into the Union's perception of it in relation to its external security. Indeed, the EU sees the rule of law as a means to achieving economic prosperity, social order, and secure environments, which will, in turn, make people better able to withstand criminal activity and abuse of power.¹²¹ After all, the most advantages to the EU are stable states, with potential for trade, investment and economic growth. Clearly, both case studies demonstrate the Union's instrumental understanding of the rule of law. However, without entering in the discussion on the effectiveness of rule of law reform,¹²² it is fairly obvious that societies are complex and that the rule of law, while surely being a contributing factor, is not capable of achieving all these end goals on its own. The strength of the belief in the link between the rule of law on the hand and its assumed benefits on the other, however, is such, that none of the documents in either case study provide an insight into *how* specifically the rule of law contributes to the connection and *what* this means for the concept's definition. Thus, the strong causal assumptions underlying the rule of law's instrumental use-value, *i.e.* by strengthening the rule of law in a given country economic growth and stability will automatically follow, have led to a lack of attention to its precise components.

The second assumption relates to the EU's ubiquitous institutional understanding of the rule of law, namely, that by concentrating on judicial reform, the implicit belief is that the rule of law in its many assets will flourish, with effective judicial review, independent, efficient and qualitatively well-functioning judiciaries staffed with accountable and impartial judges.

120 See the Introduction to this thesis, section 3.1.4.

121 Compare with the general findings of the section on the lack of conceptual differentiation between the rule of law as a political criterion and as part of Chapter 23 of the *acquis* (chapter 4, section 4.3) in which it was argued that elements that threaten the rule of law such as corruption and organised crime, should not be considered as part of the rule of law.

122 See, for example, Rachel Kleinfeld *Advancing the Rule of Law Abroad. Next Generation Reform* Washington: Carnegie Endowment for International Peace (2012); Amichai Magen 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' 45 *Stanford Journal of International Law* (2009), pp. 51-116; Thomas Carothers (ed.) *Promoting the Rule of Law Abroad. In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006); Eric G. Jensen & Thomas C. Heller *Beyond Common Knowledge – Empirical Approaches to the Rule of Law* Stanford: Stanford University Press (2003). Frank Upham 'Mythmaking in the Rule-of-Law Orthodoxy' in Carothers (2006), pp. 75-104; Wade Channell 'Lessons Not Learned About Legal Reform' Carothers (2006), pp. 137-160.

The case studies demonstrate that this reflects the EU's approach. They also show, that only selective elements have been articulated, some of them not fully, and the focus is on them in isolation, rather than on their performance in combination. However, while legal institutions supporting the rule of law are a *conditio sine qua non*, this does not mean that institutions are in themselves sufficient guarantees for the rule of law to operate in a satisfactory manner.¹²³ After all, the renewed emphasis on the rule of law in the EU's Enlargement Strategies of the past decade,¹²⁴ in combination with the lack of progress and even backsliding¹²⁵ in relation to the rule of law across the Western Balkan countries,¹²⁶ confirm that this is not the case. While the EU's rule of law approach has certainly led to judicial capacity-building, this, in itself, has not had more rule of law as a direct consequence. Thus, in a similar vein as the first assumption, the strong belief in the fact that judicial reform is equated with the rule of law, has led to the limited articulation of those rule of law elements, such as judicial review and the separation of power, that rely on more than the simple definition of component parts.

2.5 The EU's definition of the rule of law in development cooperation and enlargement in the light of the common elements identified in chapter one

The case studies demonstrate that the EU's definition of the rule of law found therein, departs from the rule of law as it is found to be 'common to the Member States'. Indeed, chapter 1 showed that formal legality is considered to be the common substance of the rule of law, setting requirements

123 Paul Blokker 'EU Democratic Oversight and Domestic Deviation from the Rule of Law' in Carlos Closa & Dmitry Kochenov (eds) *Reinforcing Rule of Law Oversight in the European Union* Cambridge: Cambridge University Press (2016), pp.249-269 at 255.

In its latest enlargement communications, the Commission seems to have understood this to some extent since it announced that '[s]trengthening the rule of law is not only an institutional issue. It requires societal transformation,' a statement it repeated a few months later in the 2018 Enlargement Strategy. Commission Communication on A Credible Enlargement Perspective for and Enhanced Engagement with the Western Balkans, COM(2018) 65 final, 6 February 2018, p. 4; Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 2.

124 In almost all Enlargement Strategies from 2011 onwards, the following sentiment, or a variation thereof, is repeated: 'Strengthening the rule of law has been identified as a continuing major challenge and a crucial condition for countries moving towards EU membership. This issue has been given greater attention in recent years at all stages of the accession process.' Commission Communication on Enlargement Strategy and Main Challenges 2011-2012' COM(2011) 666 final, 12 October 2011, p. 4.

125 Laurent Pech & Kim Lane Scheppele 'Illiberalism Within: Rule of Law Backsliding in the EU' 19 *Cambridge Yearbook of European Legal Studies* (2017), pp. 3-47.

126 According to the 2018 Enlargement Strategy: 'Structural shortcomings persist, notably in the key areas of the rule of law and the economy. Accession candidates must deliver on the rule of law.' Commission Communication on 2018 Communication on EU Enlargement Policy, COM(2018) 450 final, 17 April 2018, p. 1.

for governments in relation to their laws, while also setting criteria for the validity of laws themselves. In development cooperation and enlargement, however, formal legality is largely absent and even, in the case of the latter, undermined by the policy's methodology. Judicial review of legislation and executive acts, found to be the common mechanism to safeguard the rule of law in the *Rechtsstaat*, *état de droit*, and Anglo-Saxon rule of law,¹²⁷ is underarticulated and only minimally present in the EU's conceptualisation of the rule of law in the two external policy areas. The same finding applies to the separation of powers; the doctrine's inclusion as a rule of law element follows directly from the existence of legality in its power-constraining dimension and by virtue of the fact that its requirements are directed at the different branches of government.¹²⁸ However, the case studies show that while there is sensitivity about the necessity of the separation of powers, its articulation is restricted to a focus on judicial independence.¹²⁹

Furthermore, in contrast to the elements established in chapter 1, there is a particular emphasis on some procedural elements in either one of the external areas, the reasons for which were explained above (section 2.3). In the same vein, the case studies show that the EU concentrates much of its rule of law efforts on judicial reform, a finding that differs from the three national rule of law conceptualisations that were examined in the beginning of this thesis, in which the institutional angle is largely absent. Apart from the reasons explaining this emphasis provided above, the case studies also showed that there is an obvious difference between the rule of law as it has developed over time in Germany, France, and the United Kingdom, and the many different stages of development the developing countries and applicant states find themselves in, which often require state-building rather than the tweaking of existing rule of law structures. Compare, for example, the EU's rule of law efforts in the pre-accession process of the CEECs and the countries in the Western Balkans with the Commission's *avis* on Iceland's application for EU membership in which it was stated that '[t]he rule of law ... [is] guaranteed. The Icelandic authorities need to make further efforts to strengthen the independence of the judiciary, especially regarding the procedure for judicial appointment. Mechanisms to prevent conflicts of interest need to be strengthened.' Apart from these two adjustments, the Commission concluded that the country satisfied the political Copenhagen criteria.¹³⁰

127 See chapter 1, section 5.

128 See chapter 2, section 4.

129 Although, in the case of enlargement, some additional attention is paid to the fact that there should not be undue interference in the work of courts by the executive branch.

130 Commission Opinion on Iceland's Application for Membership of the European Union, COM(2010) 62 final, 24 February 2010, p. 7.

The question arises whether these discrepancies, although they can be explained, are problematic? In the light of the fact that the EU's external action shall be guided by the principles which have guided its own creation (Article 21(1) TEU), development and enlargement - those same principles that are common to the Member States (Article 2 TEU) - the findings are disconcerting. In development cooperation and enlargement, the EU is clearly expounding a rule of law concept that is at variance with what the EU Treaty expects and even prescribes that it should be. While there are some extenuating circumstances related to the nature of the rule of law concept itself that allow for a more flexible approach towards the concept, these discrepancies are cause for concern. The clearest reason for more precision regarding the rule of law's definition lies in the EU's policy financing instruments and conditionality, as will be shown below.

Regarding the nature of the rule of law, it is repeated several times throughout this thesis, that the notion does not prescribe institutional design, rather, it informs states about the balance and effects of its choices; it sets a framework in order to better understand the inherent trade-offs.¹³¹ For example, strict adherence to the doctrine of the separation of powers would preclude judicial review. However, since the rule of law requires the review of actions of governmental bodies at least in a marginal sense in order to prevent abuse of power,¹³² checks and balances become a matter of degree.¹³³ Similar trade-offs exist in relation to the rule of law elements of judicial independence, impartiality, and judicial accountability.¹³⁴

131 Rodriguez *et al.* formulate trade-offs in terms of conflicts among institutions aiming to promote the rule of law, *i.e.* the choices that have to be made in order to accommodate the various aims of the rule of law. Daniel B. Rodriguez, Mathew D. McCubbins & Barry R. Weingast 'The Rule of Law Unplugged' 50 *Emory Law Journal* (2010), pp. 1455-1494 at 1459.

132 Tom Bingham *The Rule of Law* London: Penguin Books (2010), p. 61; Geranne Lautenbach *The Concept of the Rule of Law and the European Court of Human Rights* Oxford: Oxford University Press (2013), p. 42; Jeremy Waldron 'The Core of the Case Against Judicial Review' 115 *The Yale Law Journal* (2006), pp. 1346-1406 at 1354; Trevor R.S. Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' 44 *Cambridge Law Journal* (1985), pp. 111-143 at 114.

133 Allen (1985), p. 113.

134 Further, see Martin Mendelski 'Europeanization and the Rule of Law: Towards a Pathological Turn' 40 *Southeastern Europe* (2016), pp. 346-384; Michal Bobak & David Kosar 'Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe' 15 *German Law Journal* (2014), pp. 1257-1292; Ramona Coman 'Quo Vadis Judicial Reforms? The Quest for Judicial Independence in Central and Eastern Europe' 66 *Europe-Asia Studies* (2014), pp. 892-924; Rodriguez *et al.* (2010), pp. 1492; Erik S. Heron & Kirk A. Randazzo 'The Relationship between Independence and Judicial Review in Post-Communist Courts' 65 *The Journal of Politics* (2003), pp. 422-438; Open Society Institute (2001) *Monitoring the EU Accession Process: Judicial Independence*, p. 18, available at: https://www.opensocietyfoundations.org/sites/default/files/judicialind_20011010.pdf.

Consequently, from the perspective of the rule of law, it is clear that the EU can give states some leeway in how to strengthen and consolidate it in a manner that reflects this.¹³⁵ This flexibility might even be preferable from the perspective of country specificity in relation to the rule of law,¹³⁶ but does rely on the assumption that there is an actual will to strengthen the rule of law on the side of the third state with the appropriate allocation of funds provided by the EU.¹³⁷ Nonetheless, while the flexibility applies in relation to *how* elements can be implemented, it does not allow the rule of law to stretch so far as to *exclude* elements altogether; a definition of the rule of law without legality is patently missing one of its core components.

According to the Preamble of the EU's financing instruments for development cooperation and enlargement, they take as their point of departure the direct correlation between the rule of law as it is found in all the Member States and the same value as it is tasked with promoting in its external action.¹³⁸ The DCI, EIDHR and IPAI Regulations all call for progress towards achievement of the specific objectives set out in them to be monitored and assessed on the basis of 'pre-defined, clear, transparent and, where appropriate, country specific and measurable' indicators.¹³⁹ In the light of the fact that conditionality requires at the very minimum that concrete and clear minimum standards are formulated, the EU's limited rule

135 Several findings in the cases studies showed that the EU's limited articulation has had as its outcome that it has allowed states, at least to some extent, to grapple with rule of law issues in a manner that they see fit. See, for instance the section on the procedural element of judicial quality and efficiency in the enlargement chapter, where it was shown that the Commission acknowledged the existing problems, such as the effective enforcement of court decisions and backlogs, but did/does not provide a detailed outline of what the applicants need(ed) to achieve. See chapter 4, section 3.2.2.

In the case of development cooperation, an example can be found in the section on judicial independence where, instead of offering a comprehensive definition, a handful of sub-elements are offered from which developing countries are seemingly allowed to pick the ones that fit them best. See chapter 3, section 3.3.3.

136 EuropeAid's document on Sector Indicator Guidance for Programming even states that 'it should be noted that due to the inherently different operating contexts across countries, it is not possible to provide an exhaustive list of sector indicators which cover every possible situation in a meaningful way.' Sector Indicator Guidance for Programming - Sector Indicator Guidance Note - Rule of Law & Justice, EuropeAid (2013), p. 1.

137 See the European Court of Auditors' Report on Pre-accession assistance to Turkey, in which this exact point is made in terms of the sustainability of reform efforts being at risk due to lack of political will. See European Court of Auditors 'EU Pre-Accession Assistance to Turkey: Only Limited Results So Far' Special Report No 7 (2018), pnt. 35.

138 See, for example, the Preamble of Regulation (EU) No 235/2014, paras. 2-5.

139 Article 2(2) Regulation (EU) No 231/2014; Article 11(5) Regulation (EU) No 233/2014; Article 5 Regulation (EU) No 235/2014.

of law articulation is, while at the very least unhelpful for third states,¹⁴⁰ also legally problematic.¹⁴¹ How is the Union to follow its own instructions that progress measurement of and allocation of funds for rule of law reform be performed in a transparent way,¹⁴² if there is no clear articulation of the concepts it applies?

It seems that, to some extent, the EU is aware of outside expectations regarding definitional clarity. In 2011, in their Joint Communication on Human Rights and Democracy at the Heart of EU External Action, the Commission and the High Representative remarked on the fact that the EU has not always been as successful as it might have been and that to improve the situation, the task at hand was 'to ensure the *clarity*, coherence and effectiveness of policy'.¹⁴³ Moreover, according to the same Communication, since the Lisbon Treaty put the rule of law at the centre of all external action, the efficacious implementation of this principle is made 'even more

140 At the Balkan summit on May 17, the Albanian prime minister again expressed the oft-heard sentiment that the accession process has become much more difficult and much less predictable, see Eric Maurice 'Connectivity Trumps Enlargement at Balkan Summit' 17 May 2018, available at; <https://euobserver.com/enlargement/141854>. On the problem of 'moving targets' in the pre-accession process of the CEECs, see Heather Grabbe 'A Partnership for Accession? The Implications of EU Conditionality for the Central and East European Applicants' *RSC Working Paper* (1999) No. 12; Andrew Williams 'Enlargement of the Union and Human Rights Conditionality: A Policy of Distinction' 25 *European Law Review* (2000), pp. 601-617; Marise Cremona 'Accession to the European Union: Membership Conditionality and Accession Criteria' 25 *Polish Yearbook of International Law* (2002), pp. 219-240; Christophe Hillion 'Enlargement of the European Union: A Legal Analysis' in Anthony Arnall & Daniel Wincott (eds) *Accountability and Legitimacy in the European Union* Oxford: Oxford University Press (2002), pp. 401-418; Karen E. Smith 'The Evolution and Application of EU Membership Conditionality' in Marise Cremona (ed) *The Enlargement of the European Union* Oxford: Oxford University Press (2003), pp. 105-140.

141 In at least two of its reports on the topic of rule of law reform in enlargement, the Court of Auditors pointed out that there has been a lack of clear benchmarks and objectively verifiable indicators to assess progress in meeting the EU's rule of law related objectives. See European Court of Auditors 'European Union Assistance to Kosovo Related to the Rule of Law' Special Report No 18 (2012), pnt. 68; European Court of Auditors 'EU Pre-Accession Assistance to Turkey: Only Limited Results So Far' Special Report No 7 (2018), pnt. 24.

142 Next to the financial instruments that have already been mentioned, the Regulation applicable to the financial regulation of the 11th European Development Fund mentions under its principle of sound financial management that '[s]pecific, measurable, achievable, relevant and timed objectives shall be set. The achievement of those objectives shall be monitored by performance indicators.' Moreover, 'the operation shall be subject to an ex post evaluation with a view to ensuring that the intended results justified the means deployed.' Article 11(2) and 11(3)(b) Council Regulation (EU) 2015/323 of 2 March 2015 on the financial regulation applicable to the 11th European Development Fund. Also see Article 2(2) Regulation (EU) No 231/2014; Article 11(5) Regulation (EU) No 233/2014; Article 5 Regulation (EU) No 235/2014.

143 Joint Communication of the Commission and the High Representative for Foreign Affairs and Security Policy on Human Rights and Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011) 886 final, 12 December 2011, p. 6 [emphasis added].

pressing'.¹⁴⁴ Specifically when it comes to the distribution of EU funds, the Union has shown that it is cognizant of the fact that there is an element of legal certainty in relation to the EU and Member States on the one hand, and beneficiaries on the other.¹⁴⁵ However, at the very minimum for reasons of legal certainty, the EU should put forward a more concrete definition of the rule of law.

3. THE WAY FORWARD?

This chapter discussed the EU's conceptualisation of the rule of law in development cooperation and enlargement and provided reasons in order to explain the outcomes of the case studies in relation to the rule of law elements identified therein. In this final section, the focus turns to the question of the way forward; what are the lessons learned from the research undertaken in this thesis? Three interrelated insights will be presented here, along with suggestions for improvement. The first insight relates to perspective, the second to policy influence, and the third insight to the need to distinguish between the rule of law's definition and its projected benefits.

3.1 In order to see the bigger picture, start with the component parts

Throughout the strategic documents underlying the case studies, the call for a 'comprehensive' approach towards rule of law reform is stressed. For example, in the guidance document for future EU development cooperation programmes of 2012 it is stated that there is a need for a more comprehensive perspective toward technical assistance for capacity development in the justice area,¹⁴⁶ a sentiment already expressed in the 2004 Handbook on promoting Good Governance in EC Development and Co-Operation.¹⁴⁷ Similarly, the Programming Fiche on the Rule of Law put forward that the EU's response strategy 'should approach the reforms in the judicial system in a holistic way.'¹⁴⁸ Moreover, taking stock of developments in the pre-

¹⁴⁴ *Ibid.*

¹⁴⁵ Paragraph 7 of the Preamble of the Regulation 1303/2013 of 17 December 2013 laying down common provision on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006, OJ[2013] L347/320.

¹⁴⁶ Tools and Methods Series Reference Document No. 15 on 'Support to Justice and the Rule of Law' EuropeAid (2012), p. 53.

¹⁴⁷ 'Handbook on Promoting Good Governance in EC Development and Cooperation' EuropeAid (2004), p. 33.

¹⁴⁸ Programming Guide for Strategy Papers, Programming Fiche on Rule of Law - The judicial system within the broader justice sector context (2009), p. 1.

accession process in the Western Balkan, the 2012 Enlargement Strategy affirmed that since limited progress had been achieved in the area of judicial system reform, a constructive attitude towards the need for a comprehensive reform strategy needed to emerge.¹⁴⁹

These calls for a more all-encompassing approach towards rule of law reform are echoed in the literature. Since the notion is regarded as a variegated,¹⁵⁰ complex¹⁵¹ and cross-cutting¹⁵² one, it is oft repeated that the EU should pay greater attention to 'the whole forest and not just the trees'¹⁵³ when it comes to rule of law reform. In other words, the rule of law needs to be defined and assessed from a comprehensive perspective that considers all its parts together, as well as its interplay with a host of other ideals, such as democracy, human rights, and security. The idea is that merely establishing a definition consisting of 'laundry lists'¹⁵⁴ of institutional attributes, with a selective focus on the performance of atomised rule of law elements is not a sufficient condition for the rule of law to be truly embedded at the domestic level of states.¹⁵⁵ The point here is not to deny this approach; rather, the insight gained from the present research is that a comprehensive perspective should necessarily be preceded by an understanding of the component parts and their interrelationships, in order to understand the elements that make up the rule of law. If there is no clarity at the level of elements, not only will there be the possibility that the applied definition will, unknowingly (or not), put more emphasis of certain elements over others (see section 2.1), there is also the chance that elements are left out (see section 2.2), or that stressing a particular element will negatively impact another¹⁵⁶ (see section 2.4).

Section 2.5 showed that the EU's understanding of the rule of law in development cooperation and in enlargement is unbalanced and incomplete. Out of the three categories, the institutional one receives the most attention, with the procedural category a close second, and the first category

149 Commission Communication on Enlargement Strategy and Main Challenges 2012-2013, COM(2012) 600 final, 10 October 2012, p. 59.

150 Walker (2009), p. 119.

151 Martin Mendelski 'Europeanization and the Rule of Law: Towards a Pathological Turn' 40 *Southeastern Europe* (2016), pp. 346-384 at 378.

152 Olga Burluk 'An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine)' 6 *Hague Journal on the Rule of Law* (2014), pp. 26-46 at 43.

153 Marko Kmezić *EU Rule of Law Promotion. Judiciary Reform in the Western Balkans* London: Routledge (2017), p. 164.

154 Jeremy Waldron 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed) *Getting to the Rule of Law* New York: New York University Press (2011), pp. 3-31 at 5-7.

155 See, for example, Martin Mendelski 'The Rule of Law' in Adam Fagan & Petr Kopecky *The Routledge Handbook of East European Politics* London: Routledge (2018), pp. 113-125 at 122.

156 See Martin Mendelski 'The EU's Rule of Law Promotion in Post-Soviet Europe: What Explains the Divergence Between Baltic States and EaP Countries?' 7 *Eastern Journal of European Studies* (2016), pp. 111-144.

of formal elements having been left out all-together. This chapter furthermore showed that within each of these two categories the emphasis is on a few particular elements, with others, while part of the Union's definition, not nearly receiving the same level of attention. Moreover, the analysis has made it clear that a number of the identified rule of law elements are left underdefined. Thus, before discussing a 'comprehensive' approach towards the rule of law, the insight is proposed here that the EU's institutions would do well to understand the rule of law's different elements, their interaction and complementary combination in order to come to a more balanced and complete conceptualisation.

3.2 Acknowledge policy influence and the emphasis it brings with it on the rule of law definition

The case studies unveiled two things. First, the findings in relation to the existence of certain elements (judicial review, separation of powers, judicial independence) and the EU's understanding of these (limited articulation, focus on judicial reform), are similar. Secondly, there is a different emphasis on certain other elements (access to justice in development cooperation, and impartiality, judicial effectiveness, judicial accountability in enlargement). From this, the conclusion can be drawn that the EU's definition of the rule of law in the examined policy areas is largely overlapping, however, it is apparent that the policy area itself also impacts the various rule of law elements either in relation to why they are there or how they are interpreted.

The insight here is not to propose that the rule of law is purely contextual. As shown above, the concept itself allows for some measure of flexibility, and as long as the interplay between the various elements is recognised, a different balance can be found in a different country. After all, the rule of law is applied at the domestic level of states and many variations exist. This insight is about the fact that the case studies show that the definition of the rule of law *per se* is impacted by the policy area; the policy areas are such that they influence, at least to a certain degree, the prioritisation of certain rule of law elements over others. To give an example, the EU understands the rule of law in enlargement in terms of judicial reform, *inter alia* because of the centrality of well-functioning courts in the applicant states as future Member States. In development cooperation, the EU's focus on court reform is reinforced by the fact that adjacent policy areas such as security and good governance, emphasise the reform of the same sector (see section 2.1). In a similar vein, reasons were found to underpin the emphasis of the rule of law elements in the procedural and institutional categories, stemming from the particular nature of the two external areas, (section 2.3). Consequently, by understanding these influences on its rule of law definition, the EU can make more conscious choices about its rule of law reform and the elements it wishes to emphasise therein instead of being pushed into a particular direction on grounds of policy considerations.

3.3 Distinguish between the definition of the rule of law, its threats, and its instrumental use-value

In order to have a clearer definition of the rule of law, the EU should more carefully distinguish between the definition of the rule of law on the one hand, and its perceived benefits as well as threats on the other. Section 2.4 showed that the rule of law's instrumental use-value, and the EU's assumptions that come with it, have, at least to some extent, impeded a more precise articulation. The rule of law has a reputation as a 'panacea'¹⁵⁷ and as a bringer of many societal benefits. The section argued that because the notions positive reputation is so strong, seeing the rule of law as a means to an end (economic growth, a rise in foreign investment, and increasing stability and security), has led to a strong emphasis on the ends themselves and a lack of attention to defining the rule of law needed for achieving those ends. More particularly, it was shown that the rule of law's instrumental use-value subsumes the need for a precise definition; the assumption that more rule of law is better (without a clear idea of what the rule of law precisely is), is entirely based on the positive connotations the notion carries with it. Next to this, the case studies revealed that the rule of law is often conflated with the issues that threaten it, such as urban crime and violence, corruption, and organised transnational crime related to arms, drugs, and human trafficking.¹⁵⁸ This is exemplified by the treatment of enlargement Chapters 23 and 24 as 'rule of law-chapters' (see chapter 4, section 4.3.1), which the case study showed to be a misnomer, *inter alia*, for exactly this reason.

The problems of the above in relation to the definition of the rule of law can be illustrated on the basis of the New European Consensus on Development, which provides, *inter alia*, that:¹⁵⁹

Poverty, conflict, fragility and forced displacement are deeply interlinked and must be addressed in a coherent and comprehensive way also as part of the humanitarian-development-nexus. The EU and its Member States will address their root causes at all levels, ranging from exclusion, inequality, food insecurity, human rights violations and abuses, impunity and the absence of the rule of law to environmental degradation and climate change.

According to this statement, absence of the rule of law is one of the root causes of conflict, fragility, and poverty. This displays the notion's use-value, as, clearly, its existence is a means of preventing these matters from occurring. The Consensus, in a further paragraph, also provides more positively

157 Thomas Carothers 'The Rule-of-Law Revival' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad – In Search of the Question of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 3-13 at 3.

158 New European Consensus on Development (2017), pnt. 63.

159 *Ibid.*, pnt. 64.

that the rule of law will 'proactively contribute to stability and security as well as resilience' and a host of other benefits.¹⁶⁰ It would be expected that the EU would provide a comprehensive definition for a concept able to attain such complex goals. Moreover, each of these goals requires a focus on a different type of rule of law reform, with measures ranging, *inter alia*, from more and better equipped police forces and prisons to an understanding of, and enforcement and protection of property rights. However, as far as the rule of law is concerned, the Consensus simply advances the following: the EU 'will promote independent and impartial courts, and support the provision of fair justice, including access to legal assistance.'¹⁶¹ If the EU is more aware of its oft unstated and under-explicated assumptions, it will be able to acknowledge these and subsequently make a conscious choice whether or not to take these into account in relation to its rule of law definition.

4. CONCLUSION

This final chapter showed that the findings resulting from the examination of the rule of law in development 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 argued 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 was shown 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 provided three insights for improvement regarding the EU's conceptualisation of the rule of law. First, it was argued 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 was 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

160 *Ibid.*, pnt. 68.

161 *Ibid.*, pnt. 61.

to keep a clear focus on the rule of law despite the fluctuating developments in different policy areas. Thirdly, it was asserted 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.

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.

Samenvatting (Dutch summary)

The EU's Conceptualisering van de 'Rule of Law' in haar Externe Betrekkingen

Casestudy's in het ontwikkelingssamenwerkings- en uitbreidingsbeleid

Dit proefschrift onderzoekt de vraag wat de EU's conceptualisering van de 'rule of law' is in haar externe betrekkingen. Het concentreert zich op de wisselwerking tussen theorie en praktijk in relatie tot het rechtsstaatconcept in de externe betrekkingen van de Unie, meer specifiek binnen het ontwikkelingssamenwerkingsbeleid en het uitbreidingsbeleid. Hoewel er steeds meer onderzoek wordt gedaan met betrekking tot het EU-rechtsstaatconcept, ontbreekt in de literatuur een vergelijkende analyse hiervan. De toenevende aandacht voor de externe aspecten van de rechtsstaat in het externe optreden van de Unie in combinatie met de EU's post-Lissabon ambities als een internationale speler, onderstrepen de noodzaak voor meer duidelijkheid met betrekking tot de EU-benadering van het rechtsstaatconcept.

De onderzoeksvraag is onderverdeeld in twee deelvragen: a. Zijn er waarneembare verschillen tussen het rechtsstaatconcept zoals dat wordt gedefinieerd in de rechtstheorie en zoals het wordt toegepast door de EU in haar beleid? b. Wordt vervolgens dezelfde of een verschillende definitie van het rechtsstaatconcept gehanteerd in het ontwikkelingssamenwerkingsbeleid en in het uitbreidingsbeleid? Om deze vragen te kunnen beantwoorden is het proefschrift in twee delen onderverdeeld.

Deel I biedt het analytische kader voor de latere toetsing van het rechtsstaatconcept in de EU-praktijk. Daar een definitie van rechtsstaat als zodanig ontbreekt in de EU Verdragen, is het uitgangspunt de verwijzing naar dit concept in het EU Verdrag als een waarde die de lidstaten gemeen hebben (artikel 2 VEU). Op basis hiervan vormen de tradities van de lidstaten het vertrekpunt voor het verkennen van de theoretische definitie van het rechtsstaat begrip. Hiertoe worden in hoofdstuk 1 de drie voornaamste lidstaat-tradities onderzocht: de Duitse *Rechtsstaat*, de Franse *état de droit* en de Angelsaksische *rule of law*. De analyse toont aan dat hoewel er geen gemeenschappelijke definitie van het concept bestaat, er wel degelijk een aantal gemeenschappelijke elementen kunnen worden geïdentificeerd. Ten eerste laat het zien dat de drie rechtsstelsels de rechtsstaat beschouwen als een oplossing voor de noodzaak om de regeringsmacht te beperken met het oog op de bescherming van het individu. Ten tweede stelt het proefschrift dat, om de macht te kunnen controleren en om ervoor te zorgen dat de overheid ook zelf gebonden is aan de eigen wet- en regelgeving, alle drie de rechtsstelsels een vorm van functionele scheiding der machten vereisen. Hierbij krijgt de rechtelijke macht een grote mate van onafhankelijkheid toegewezen in relatie tot de wetgevende en uitvoerende macht. Ten derde vormt zowel in Duitsland en Frankrijk alsook in het Verenigd Koninkrijk

legaliteit (*legality*) de gemeenschappelijke inhoud van het begrip. Meer in het bijzonder toont het proefschrift aan dat legaliteit niet alleen eisen stelt aan de wetgever in relatie tot de kwaliteit van wet- en regelgeving, maar ook aan de geldigheid van het recht zelf. Ten vierde vereist de rechtsstaat bepaalde beschermingsmechanismen in de vorm van rechterlijke toetsing.

In het tweede hoofdstuk van Deel I gaat het proefschrift na of, en zo ja, in welke mate de doctrine dezelfde kenmerken van cruciaal belang acht voor het rechtsstaat concept. Het onderzoek laat zien dat dezelfde elementen, zoals deze voorkomen in de nationale tradities van de drie lidstaten, ook een belangrijke rol spelen in de rechtstheorie, alhoewel sommige elementen meer de nadruk krijgen dan andere. Deel I eindigt vervolgens met de introductie van het analytische kader. Het stelt dat de gevonden elementen als volgt kunnen worden gecategoriseerd: *formeel*, *procedureel* en *institutioneel*. Formele elementen hebben betrekking op de voorzienbaarheid en de vorm van regels, procedurele elementen hebben betrekking op de onpartijdige rechtspraak en institutionele elementen zien op de institutionele vereisten die ten grondslag liggen aan de handhaving van de rechtsstaat.

Tegen deze achtergrond wordt in Deel II van het proefschrift onderzocht of, en in welke mate de elementen die zijn geïdentificeerd in het analytische kader voorkomen in de twee externe EU-beleidsterreinen, ontwikkelings-samenwerking (hoofdstuk 3) en het uitbreidingsbeleid (hoofdstuk 4). In relatie tot ontwikkelingssamenwerking toont de eerste casestudy in hoofdstuk 3 aan dat het formele element van legaliteit – het element dat centraal staat binnen de rechtstheorie – en het procedurele element van rechterlijke toetsing – het kernelement voor de waarborging van de rechtsstaat in de lidstaten – onderontwikkeld zijn gebleven. Daarentegen laat het proefschrift zien dat de EU de nadruk legt op het formele element van toegang tot de rechter en het institutionele element van rechterlijke onafhankelijkheid. De analyse toont echter ook aan dat de EU een duidelijke definitie van beide elementen achterwege laat.

Hieropvolgend brengt het hoofdstuk twee algemene bevindingen naar voren. Ten eerste, tegen het licht van de welhaast volledige afwezigheid van formele elementen, berust het EU-rechtsstaatconcept in ontwikkelings-samenwerking grotendeels op het institutionele element van justitiële hervorming. Onderzoek naar de redenen die aan deze eenzijdige definitie ten grondslag kunnen liggen laat zien dat het internationale kader waarbinnen de EU haar ontwikkelingssamenwerking uitvoert, sterk van invloed is en het beleid met name richt op institutionele capaciteitsopbouw in ontwikkelingslanden. Meer in het bijzonder kan de institutionele conceptualisering worden verklaard door de impact van het '*good governance*' begrip alsook het belang dat door de EU wordt gehecht aan de hervorming van de veiligheidssector binnen het beleidsterrein. Beide hebben een focus op het effectief functioneren van instellingen wat in relatie tot de rechtsstaat heeft geresulteerd in een formulering van dit begrip in termen van de hervorming en versterking van de justitiële sector. Ten tweede, de casestudy toont aan dat de door de EU gehanteerde methodologie in relatie tot het

ontwikkelingssamenwerkingsbeleid heeft geleid tot conceptuele verwarring met betrekking tot een aantal van de geïdentificeerde elementen. Alhoewel het gangbare praktijk is om te werken met indicator-lijsten om resultaatsgebieden vast te kunnen stellen heeft de willekeurige toepassing hiervan door de EU, zonder onderliggende definitie van de rechtsstaat, geleid tot vaagheid en onduidelijkheid.

In hoofdstuk 4 richt de tweede casestudy zich op het rechtsstaat begrip in het EU-uitbreidingsbeleid. Het onderzoek toont aan dat, net als in de vorige casestudy, ook binnen dit beleidsterrein de Unie weinig tot geen aandacht besteedt aan het formele legaliteitselement. Meer in het bijzonder laat de analyse zien dat de methodologie onderliggend aan het uitbreidingsbeleid met betrekking tot de harmonisatie van wet- en regelgeving gebaseerd is op een kwantitatieve evaluatie van gemaakte vorderingen. Als gevolg hiervan worden kwalitatieve criteria van legaliteit (zoals stabiliteit en coherentie van wet- en regelgeving) feitelijk ondermijnd. Met betrekking tot de procedurele elementen blijkt uit het onderzoek dat onpartijdigheid en efficiëntie van het juridisch proces de twee kernelementen in deze categorie vormen. Uit nauwkeurige bestudering van de relevante documenten blijkt echter dat een duidelijk verband met EU-standaarden ontbreekt. Met betrekking tot de institutionele rechtsstaat-elementen betoogt de casestudy dat de formulering van de criteria van Kopenhagen en het relevante juridische kader van invloed zijn op de overwegend institutionele focus van de EU bij de activiteiten met betrekking tot de versterking van de rechtsstaat in de kandidaat-lidstaten. Het laat zien dat de rechtsstaat geconceptualiseerd is in termen van justitiële hervorming met een nadruk op de opbouw en het functioneren van rechtbanken. Wat vervolgens weer resulteert in specifieke aandacht voor het institutionele element van de onafhankelijkheid van de rechterlijke macht.

Op basis van het onderzoek in deze casestudy zijn drie algemene conclusies getrokken. Ten eerste is de conceptualisering van het rechtsstaat-begrip in het EU-uitbreidingsbeleid sterk gericht op bepaalde procedurele en institutionele elementen en is het formele legaliteitselement bijna volledige afwezig. Daarnaast blijkt dat uitgebreide institutionele focus van het onderliggende beleid heeft geleid tot een specifieke nadruk op justitiële hervormingen en op een institutionele aanpak van een aantal procedurele elementen, zoals rechterlijke toetsing. Ten tweede, hoewel de EU aangeeft zich in te zetten voor de versterking van de rechtsstaat op nationaal niveau, toont de analyse aan dat de EU rechtsstaat-conceptualisering sterk wordt beïnvloed door het feit dat de kandidaat-lidstaten toekomstige lidstaten zijn; voor het garanderen van de doorwerking en toepassing van het Europese recht in de lidstaten is immers een goed functionerende rechterlijke macht onontbeerlijk. De analyse laat verder zien dat dit heeft geleid tot het negeren van bepaalde rechtsstaat-elementen (legaliteit) en het onevenredig benadrukken van andere (onafhankelijkheid van de rechterlijke macht). Ten derde heeft de Europese Commissie afgezien van het aanbrengen van een duidelijk onderscheid tussen de rechtsstaat elementen zoals die zijn

geformuleerd onder de zogeheten 'politieke' criteria van Kopenhagen en als onderdeel van het *acquis*. Bovendien toont de casestudy aan dat de Commissies analyse van het functioneren van de rechterlijke macht als onderdeel van het monitoren van de vorderingen die gemaakt zijn op het gebied van het versterken van de rechtsstaat in de kandidaat-lidstaten hetzelfde is, wat gezien kan worden als de codificatie van de rechtsstaat onder de politieke Kopenhagen criteria.

Tenslotte geeft het laatste concluderende hoofdstuk een overzicht van de kernbevindingen van het proefschrift en biedt het een vergelijkende analyse van de casestudy's. Het laat zien dat de bevindingen die voortvloeien uit de analyse van het rechtsstaatconcept in het ontwikkelingssamenwerkingsbeleid en uitbreidingsbeleid grotendeels kunnen worden verklaard aan de hand van de specifieke kenmerken van beide beleidsterreinen. Zo benadrukt dit hoofdstuk onder meer dat de nadruk op justitiële hervormingen, het ontbreken van het formele legaliteitslement, de nadruk op bepaalde institutionele en procedurele kenmerken ten koste van andere, als ook de beperkte uitwerking van een aantal deelelementen van het concept, gezien moeten worden in het licht van specifieke beleidsaccenten en ontwikkelingen binnen deze terreinen. Het hoofdstuk stelt vervolgens ook dat de discrepantie tussen de rechtsstaatelementen zoals die zijn aangetroffen in de lidstaten (hoofdstuk 1) en die zijn geïdentificeerd in de casestudies, problematisch is. Hoewel het rechtsstaatconcept een inherente flexibiliteit in zich draagt in de manier waarop verschillende elementen met elkaar in verband staan en in de manier waarop ze worden geïmplementeerd, strekt deze flexibiliteit zich niet uit tot het uitsluiten van kerncomponenten; een definitie van de rechtsstaat zonder legaliteit en duidelijk omtrent rechterlijke toetsing mist deze kerncomponenten. Voorts toont de analyse ook aan dat de financiële instrumenten die de hervormingsmaatregelen van de EU met betrekking tot de versterking van de rechtsstaat ondersteunen een zeker niveau van duidelijkheid vereisen, welke de EU in het kader van rechtszekerheid ook dient te bieden. Tenslotte biedt het laatste deel van hoofdstuk 5 drie inzichten ter verbetering van de EU's conceptualisering van de rechtsstaat. Ten eerste betoogt het dat de Unie een concrete inspanning moet leveren om eerst de elementen van de rechtsstaat en hun onderlinge samenhang te definiëren, alvorens over te gaan tot een 'allesomvattende' aanpak. Ten tweede stelt het dat de EU er goed aan zou doen te erkennen dat de ontwikkelingen binnen de verschillende beleidsterreinen van invloed zijn op de invulling van het rechtsstaatconcept en de nadruk die wel of niet op bepaalde subelementen wordt gelegd. Alleen zo kan het rechtsstaatconcept zelf worden ontdaan van fluctuerende beleidsinvloeden. Ten derde geeft het hoofdstuk aan dat de EU zich meer bewust moet zijn van de eigen voorkeur om zich op rechtsstaathervormingen te beroepen terwijl het in feite andere doelen voor ogen heeft. Dit heeft er immers toe geleid dat er te veel aandacht is voor deze doelen, zonder dat er expliciet bij wordt stilgestaan of en zo ja welke rechtsstaat elementen er precies benodigd zijn om die doelen te bereiken.

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Curriculum Vitae

Lisa Louwerse was born in 1978 in De Bilt, the Netherlands. After studying for four years at the Christelijk Gymnasium in Utrecht, she was awarded a place at the United World College of the Adriatic in Duino, Italy in 1994. Obtaining the International Baccalaureate in 1996 she studied law at Utrecht University and Japanese language and culture at Leiden University. She graduated in three separate degrees of law: International law, European law, and criminal law. During her studies she spent a year in Japan and worked as a research assistant to Dr H. van der Veere on the topic of Japanese pilgrimage culture of the Shikoku pilgrimage. She joined the Europa Institute as a researcher and lecturer in 2005. Between 2008-2013 she was a guest lecturer on EU external relations at the Europa Institute of Basel University, Switzerland. In 2012 she became the EU law line coordinator at the Hague University of Applied Sciences, after which she has also been the programme manager of the Dutch law programme. She currently holds the position of senior lecturer/researcher as well as that of research coordinator and coordinator internationalisation of the same programme.

Lisa's primary research interests concern EU external relations law, with a particular focus on enlargement and the European Neighbourhood Policy, the promotion of EU values, as well as EU citizenship and free movement of persons. She is also interested in the interplay between international law and the EU legal order and the internal dimension of the EU's rule of law.

In de boekenreeks van het E.M. Meijers Instituut van de Faculteit der Rechtsgeleerdheid, Universiteit Leiden, zijn in 2018 en 2019 verschenen:

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