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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 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-

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 Copsy & 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 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 Burluyk (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-end-justifly-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>; Michal 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 tribunal, '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 States 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 Arnull (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 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 on 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

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.