

IANUS

Diritto e Finanza



UNIVERSITÀ
DI SIENA
1240

Rivista di studi giuridici

<https://www.rivistaianus.it>



ISSN: 1974-9805

n. 15-16 - giugno-dicembre 2017

«STRENGTHENING THE RULE OF LAW»:
SKETCHING A COMPARISON BETWEEN THE
“DOMESTIC” AND “EXTERNAL” CONSTRUCTIONS
OF AN EU FOUNDATIONAL PRINCIPLE

Sara Cocchi

«STRENGTHENING THE RULE OF LAW»: SKETCHING A COMPARISON BETWEEN THE “DOMESTIC” AND “EXTERNAL” CONSTRUCTIONS OF AN EU FOUNDATIONAL PRINCIPLE

Sara Cocchi

Dottore di ricerca in Diritto comparato presso l'Università degli Studi di Firenze

Pur senza definirne i caratteri, l'art. 2 TUE annovera la rule of law fra i principi fondanti l'UE, includendola altresì (art. 21 TUE) fra gli assi strategici fondamentali delle politiche e strategie messe a punto dalla Commissione (DG DEVCO e NEAR) e attuate in coordinamento con il Servizio di Azione Esterna della UE nei Paesi Candidati (attuali o potenziali) e negli altri Paesi partner. Questo scritto esplora la relazione fra le concezioni europee “interna” e “esterna” della rule of law. A seguito di una panoramica sulla rule of law come pilastro dell'ordinamento giuridico della UE e di quello degli Stati Membri, la prima parte analizzerà il rinnovato impegno delle istituzioni europee nella protezione della rule of law nell'Unione. La seconda parte si concentrerà sugli interventi esterni volti a promuovere e rafforzare la rule of law nei Paesi Candidati o del Vicinato, riservando particolare attenzione ai documenti strategici e ai rapporti-Paese annuali. La sezione conclusiva del paper offrirà alcuni spunti comparatistici con riferimento ai due profili sopra delineati, in cerca di sovrapposizioni e divergenze e ricordando le soluzioni proposte per interpretare e riconciliare le differenze, esistenti o potenziali.

Though not defined in its features, the rule of law is mentioned in art. 2 TEU as one of the key principles upon which the EU is founded. Additionally, it represents one of the backbones of the EU External Action deployed in current/potential EU Candidate Countries as well as in other partner Countries according to art. 21 TEU. This paper investigates the relationship between “domestic” and “external” EU concepts of the rule of law. Following an overview on the rule of law as a cornerstone of the EU legal system and a pillar in the legal order of the EU Member States, the first part of the paper will address the recently renewed commitment of EU institutions in protecting the rule of law within the Union. The second part will focus on EU external interventions aimed at promoting and strengthening the rule of law in Candidate or Neighbouring Countries, by paying special attention to strategic documents and yearly country reports issued by DGs DEVCO and NEAR. The final section of this paper will compare the two frameworks in search of overlappings and divergences and reviewing the solutions proposed to interpret and reconcile actual or potential discrepancies.

Table of contents:

1. More than one rule of law?
2. Two spare thoughts on the rule of law (with the EU context in mind)
3. Defining the rule of law within the EU: the Rule of Law and the Member States
4. Promoting the rule of law outside the EU: a different definition?
5. Comparing the rule(s?) of law. Concluding remarks

1. More than one rule of law?

Art. 2 TEU gives the rule of law a place of honour among the values upon which the EU is founded, alongside respect for human dignity, freedom, democracy, equality, respect for human rights and minorities. Coherently, art. 21 TEU features the rule of law, as one of the main principles by which the Union's External Action shall be inspired and to whose consolidation the Union shall cooperate with third countries and other international organisations. The rule of law being labelled as a «value common to the Member States», a *prima facie* reading of the above-mentioned articles would suggest a shared “domestic” understanding of it and conceptual consistency in its promotion by EU institutions outside its boundaries. As logical as it may seem, the congruence between “domestic” and “external” conceptions of the rule of law became the subject of a heated debate investigating whether the same standard is applied when it comes to guaranteeing or promoting the rule of law “at home” or “abroad”. In recent years, the debate has been reinvigorated by the entrenchment of respect for the rule of law as a precondition for EU membership application (art. 49.1 TEU), its relevance for the establishment of sound neighbouring partnerships (and the subsequent allocation of considerable resources for cooperation in the field) and the growing demand for the establishment of internal mechanisms aimed at protecting the rule of law in EU Member States.

Following an overview of traditional definitions of the rule of law and its features, the paper investigates the presence of and the relationship between two different concepts of the rule of law - “domestic” as opposed to “external” – relying on relevant EU sources as well as on EU external aid strategic planning documents. The final section will compare the findings and point out a few concluding remarks.

2. Two spare thoughts on the rule of law (with the EU context in mind)

A quick overview of different rule of law experiences across Europe clearly highlights that each of them unavoidably possesses its own legal tradition-specific connotations resulting from a unique combination of historical and institutional background, legal culture and landmark events. However, if we assume with Pietro Costa that the rule of law - in its most general terms - is a formula connecting “political power”, “law” and

“individuals” so that the position of the latter is reinforced against the first by means of law¹, a closer look at the three main Continental European patterns reveals prominent common trends. The answers they provide suggest strikingly different technical solutions aimed at preventing political power from “invading” the citizens’ private sphere composed of individual rights and freedoms. The German *Rechtstaat* points at the law (i.e., the procedure-compliant and formally consistent source expressed by the Parliament) as the sole instrument capable of restraining the State’s sovereign authority and therefore ensuring the protection of individual rights² against arbitrariness perpetrated by the executive and the judicial branches. The French *État de droit* “downgrades” the Parliament from a *primus inter pares* (formally) *pares* to one of the three branches in which political power is divided. Therefore, stressing the need to counterbalance its potentially unlimited power, it recalls the relevance of the Constitution as the source of the Parliament’s powers and the yardstick against which its acts must be checked both procedure- and content-wise. Continental approaches were subsequently enhanced by the introduction of judicial review as the key consequence of the hierarchical, compliance-based construction of the sources of law proposed by Hans Kelsen, locating a now truly rigid Constitution at its top³. On the other side of the Channel, the English tradition addresses the conundrum represented by the relationship between the principle of parliamentary supremacy and the potential arbitrariness into which it may develop by relying on the «lawmaking synergy⁴» between statutory law and common law, entrusting the latter with the task of supervising the (equal) implementation of the first and allowing solutions designed by the common law to be transposed into statutory law.

The presence of different European archetypes does not necessarily imply a still-frame landscape nor prevents cross-fertilisation between them. Prominent Italian scholar Danilo Zolo identifies two main common trends capable of reducing the differences sketched above and lays the foundations

¹ COSTA, *Lo Stato di diritto: un'introduzione storica*, in COSTA - ZOLO (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, 2002, p. 90.

² According to this construction, individual rights are the product of the State’s self-restraint, too; see BALDASSARRE, entry *Diritti pubblici soggettivi*, in *Enc. Giur. Treccani*, Vol. XII, Roma, 1989.

³ Kelsen’s intervention on the *Rechtstaat* pattern is discussed in details in COSTA, *Lo Stato di diritto: un'introduzione storica*, pp. 131-136.

⁴ ZOLO, *Teoria e critica dello Stato di diritto*, in COSTA - ZOLO (eds.), *Lo Stato di diritto. Storia, teoria, critica*, Milano, 2002, p. 24.

for a common European rule of law pattern⁵ revolving around the individual and his rights and attributing to the law the role of restraining political power's authoritarian tendencies⁶. Its features are: *a*) distribution of power among individuals entitled to fundamental rights and having the power of implementing legally relevant choices; *b*) differentiation of the legal and political system from other social organisational systems⁷ and as a progressively specialised system in itself. Further interconnected principles stem from these, namely: equality before the law, legal certainty (encompassing predictability, intelligible formulation, accessibility and non-retroactivity of legal precepts, respect for the natural judge principle), constitutional recognition of fundamental rights, on the one side; secularisation of the law, identification of a public sphere (as opposed to a private one), separation between legislative and executive/administrative functions, the principle of legality, respect for constitutional fundamental rights by the legislator, independence of the judiciary, on the other side⁸.

In time, different systematisations of these components have been variously combined into *formal* or "thin" and *substantive* or "thick" versions of the rule of law, according to a progressively cumulative criterion running from the focus on mere procedural legality to the inclusion of content requirements in the formulation of the law⁹. The current trend towards substantive versions is exemplified by the recent definition provided by the Council of Europe (CoE) in its 2011 report, which lists protection of human rights and compliance by the state with its obligations in both national and

⁵ Not surprisingly, the Venice Commission's 2011 report on the rule of law significantly aims «to reconcile [...] the notions of "Rule of Law", "Rechtsstaat" and "État de droit», all ultimately addressing «the exercise of power and the relationship between the individual and the state»; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Report on the Rule of Law*, 4 April 2011, CDL-AD(2011)003rev, p. 3 para. 5 and p. 5 para. 16, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2011\)003rev-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2011)003rev-e)

⁶ ZOLO, *Teoria e critica dello Stato di diritto*, pp. 33-34.

⁷ In proposing a new tripartite classification of legal systems, Ugo Mattei defines the Western legal tradition as the one based on the *rule of professional law*, whose distinguishing feature is the «separation between law and politics and the separation between law and religious and/or philosophical tradition», so that «the legitimacy of the law is [...] of a technical nature»; MATTEI, *Three patterns of Law: Taxonomy and Change in the World's Legal Systems*, in *The American Journal of Comparative Law*, Vol. 45, No. 1 (Winter, 1997), p. 23.

⁸ ZOLO, *Teoria e critica dello Stato di diritto*, pp. 37-44.

⁹ For an extensive account of "thin" and "thick" theories on the rule of law, see TAMANAHA, *On the Rule of Law. History, Politics, Theory*, Cambridge, 2004, pp. 91-113.

international law among the «8 ingredients» composing the rule of law¹⁰. Additionally, in its 2016 *Rule of Law Checklist*, the CoE highlights the close ties between the rule of law, respect for human rights and democracy, and further “thickens” the meaning of the rule of law by adding on another layer (i.e., «the involvement of the people in the decision-making process in a society¹¹»). However, as the CoE itself warns, the implementation of the rule of law is a process which must take into account *legal* as well as *non-legal* factors, thus showing relevant points in common with the “teleological” (as opposed to an “anatomical”, checklist-structured one) construction of the rule of law developed by Martin Krygier¹². While laying theoretical frameworks and systematisations is certainly useful for a proper understanding of the rule of law, its protection and promotion (both “at home” and “abroad”) should not overlook those social, political and cultural factors which can facilitate or hamper its reinforcement and ownership.

3. Defining the rule of law within the EU: the rule of law and the Member States

Against this backdrop, it is now possible to explore the “domestic” understanding of the rule of law within the European Union, bearing in mind at least one preliminary observation and an important linguistic clarification. As far as the first one is concerned, it must be highlighted that the rule of law as one of the values upon which the EU is founded may be analysed at least from three different – though closely intertwined and mutually reinforcing – viewpoints, as it may be regarded as:

i) a principle governing the functioning of the EU itself as a supranational legal order;

ii) a principle which EU Member States are built upon and which they must comply with; in this second meaning, one further subdivision applies, being Member States compliance with (specific aspects of) the rule of law (take the principle of legality as one outstanding example) “bi-directional”, i.e.:

¹⁰ VENICE COMMISSION, *Report on the Rule of Law*, p. 9 para. 37.

¹¹ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Rule of Law Checklist*, 18 March 2016, CDL-AD(2016)007, p. 9 para. 33, available at [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)007-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)007-e)

¹² KRYGIER, *The Rule of Law: Legality, Teleology, Sociology*, University of New South Wales Faculty of Law Legal Studies Research Paper No. 2007-65, available at <https://ssrn.com/abstract=1218982>

- a) internal to their own legal system, and
- b) external to it but internal to the EU legal system;
- iii) a policy objective and a guiding principle of the EU's foreign policy.

While an account of no. *iii* will be attempted at in para. 4, this paragraph will focus on no. *ii.a*, and more specifically on the definition provided by the EU Commission (EC) in its 2014 Communication, establishing *A new EU framework to strengthen the Rule of Law*¹³.

Significantly, almost thirty years after its mention in the European Court of Justice judgement *Les Verts*¹⁴ as a foundational principle of the then-European Community, the EC offers the first EU definition of the rule of law in the very document setting a new procedural framework for protecting it from the threats which may occur *within* the legal systems of EU Member States. Without eschewing its intrinsic multifaceted nature and its Country-specific nuances and building on the work already done by other EU institutions and the CoE, the EC provides a list of features pertaining to the rule of law as the «backbone of any modern constitutional democracy¹⁵». These include: a) *legality* (implying a transparent, accountable, democratic and pluralistic process for enacting laws); b) *legal certainty* (requiring inter alia that all the rules are clear and predictable and cannot be retrospectively changes); c) *prohibition of arbitrariness of the executive powers* (in the words of the CJEU, meaning that «any intervention by public authorities in the sphere of private activities must have a legal basis and be justified on the grounds laid down by law»); d) *independent and impartial courts plus effective judicial review including respect for fundamental rights*; e) *equality before the law*¹⁶. In proposing a substantive understanding of its components, the EC affirms the inextricable link between the rule of law, respect for democracy and respect for fundamental rights, thus rejecting “thin” conceptions and making a decided move towards a «mixed [but non-cumulative] model» of rule of law, in which all three principles are interdependent¹⁷. Although criticised for leaving out some (assumedly

¹³ Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, 13 March 2014, COM(2014) 15 final/2.

¹⁴ *Les Verts v. European Parliament* (1986), C-294/83.

¹⁵ *A new EU Framework to strengthen the Rule of Law*, p. 1.

¹⁶ *A new EU Framework to strengthen the Rule of Law*, Annex 1, pp. 1-2.

¹⁷ PECH, ‘*A Union Founded on the Rule of Law*’: *Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law*, in *European Constitutional Law Review*, no. 6, 2010, p. 368, grounded his definition on a pre-2014, CJEU case law-based analysis. On a different post-2014 basis, other scholars criticised this lack of clear distinction between the rule of law, democracy and fundamental/human rights as the foundational values enshrined in

fundamental) elements¹⁸, this self-declaredly non-exhaustive list marks an extremely significant advancement for the construction of an EU understanding of the rule of law.

Firstly, it must be noted that the attempt at defining a cluster of soundly accepted principles stemming from the constitutional traditions of the Member States implies endorsing conceptual coherence beyond the linguistic discrepancies underlining different national and historical constitutional identities¹⁹ (see art. 4.2 TEU) and construing an originally State-related principle (*Rechtsstaat/État de droit/Stato di diritto...*) in the context of a non-State supranational legal order²⁰. Moreover, it represents an unprecedented effort to systematise what had been so far defined mainly – if not exclusively - through the CJEU case law²¹.

Secondly, but not less remarkably, it comes along with the formal rejection of the “presumption of compliance” with the rule of law applied so far with reference to Member States²². When their authorities are either perpetrating or tolerating «systemic threats» to the rule of law within their own national legal systems (i.e, when the «political, institutional and/or legal order of a Member State as such, its constitutional structure, separation of powers, the independence or impartiality of the judiciary, or its system of judicial review including constitutional justice where it exists» are

art. 2 TEU, which may cause interpretive troubles *vis à vis* the procedure under art. 7 TEU; see MAGEN, *Cracks in the foundations: understanding the great rule of law debate in the EU*, in *Journal of Common Market Studies*, Vol. 54, no. 5, p. 1055.

¹⁸ Even though the Communication specifies that the principles listed define the «core meaning» of the rule of law according to art. 2 TEU (*A new EU Framework to strengthen the Rule of Law*, p.4), some scholars regretted that the EC did not include elements such as access to the law (intelligibility, clarity, predictability and publicity of law; however, these are partially mentioned under the label of “legality”), “conscience légitime” and proportionality (KOCHENOV – PECH - PLATON, *Ni panacée, ni gadget: le nouveau cadre de l’Union européenne pour renforcer l’État de droit*, in *Revue trimestrielle de droit européenne*, no. 4, octobre-décembre 2015, p. 705), absence of corruption, access to justice and civilian control of security forces (MAGEN, *Cracks in the foundations*, p. 1054).

¹⁹ COSTA, *Lo Stato di diritto: un’introduzione storica*, p. 121.

²⁰ PECH, *‘A Union Founded on the Rule of Law’*, pp. 364.

²¹ An extensive account of the ECJ-CJEU case law on the rule of law (in its multiple dimensions described in this paragraph) is provided by VON DANWITZ, *The rule of law in the recent jurisprudence of the ECJ*, in *Fordham International Law Journal*, Vol. 37, 2013-2014, pp. 1311-1347.

²² «However, recent events in some Member States have demonstrated that a lack of respect for the rule of law and, as a consequence, also for the fundamental values which the rule of law aims to protect, can become a matter of serious concern»; *A new EU Framework to strengthen the Rule of Law*, p. 1.

endangered²³), they may be subject to the three-stage procedure envisaged by the new Framework.

Thirdly, in setting up a framework as imperfect and incomplete as it may be, but nonetheless aimed at tackling rule of law-related violations perpetrated at the national level²⁴, the EC makes clear that violations of this founding principle *by* and *within* Member States do matter for the functioning of an EU based on mutual trust among Member States and confidence in the further development of the Union into an area of freedom, security and justice²⁵. Therefore, the “domestic” construction of the rule of law is a necessarily multi-tiered one: though perfect congruence is not possible because of unavoidable national specificities, the “national-domestic” and “EU-domestic” levels of implementation and protection of the rule of law – as sketched under *i*) and *ii*) above - appear to be inextricably intertwined and working as the «normative glue that holds the entire political and legal edifice together²⁶».

A further step towards the formal definition of the rule of law has been taken by a recent EU Parliament Resolution (25 October 2016) recommending to the EC the creation of a comprehensive «EU mechanism on democracy, the rule of law and fundamental rights»²⁷ under art. 295 TFEU. In proposing a dedicated Union Pact outlining a yearly policy cycle to be jointly conducted by the EU institutions, the Parliament explicitly qualifies the rule of law as a principle pertaining to the EU «constitutional core²⁸», whose erosion poses a serious threat to the stability of the Union²⁹,

²³ *A new EU Framework to strengthen the Rule of Law*, p. 7. KOCHENOV – PECH - PLATON, *Ni panacée, ni gadget*, pp. 705-708, offer critical review of this definition. It must be noted that an assumedly loose or unclear definition of «systemic threat» could be functional to leaving the EC – a highly technical but ultimately, political body of the EU - enough margin of appreciation in applying the mechanism to those breaches of the rule of law when soft power or “moral suasion” instruments do not suffice and other procedures (the so-called “nuclear option” envisaged by art. 7 TEU or the infringement procedure based on art. 258 TFEU) do not apply.

²⁴ On the different proposals concerning possible gap-filling mechanisms for addressing and sanctioning rule of law violations by Member States, see CLOSA – KOCHENOV - WEILER, *Reinforcing Rule of Law Oversight in the European Union*, RSCAS Paper no. 2014/25, EUI Working Papers, available at <https://ssrn.com/abstract=2404260>.

²⁵ *A new EU Framework to strengthen the Rule of Law*, p. 1.

²⁶ This powerful metaphor is borrowed from MAGEN, *Cracks in the foundations*, p. 1055.

²⁷ EU Parliament Resolution P8_TA(2016)0409 (25 October 2016) *with recommendations to the Commission on the establishment of an EU mechanism on democracy, the rule of law and fundamental rights* (2015/2254(INL)).

²⁸ EU Parliament Resolution *EU mechanism on democracy, the rule of law and fundamental rights*, Preamble sub D.

as well as to the protection of fundamental rights and the proper implementation of EU economic *and* social policies. While analysing the policy cycle proposed by the Parliament is outside the scope of this paper, it is worth mentioning a couple of interesting points in the perspective of a “multi-directional” approach to the rule of law. By stressing the «duty» of the EU and its Member States to intervene in «situations where a Member State no longer guarantees respect for democracy, the rule of law and fundamental rights, or in cases of a breach of the rule of law» in order to «protect the integrity and application of the Treaties and to protect the rights of everyone within its jurisdiction³⁰», the Parliament recognises the intersections between the two domestic dimensions of the rule of law just like the EC did in its 2014 Communication. Moreover, the Parliament goes beyond the importance of a consistent domestic understanding of the rule of law and advocates for the same coherent approach between «internal and external democracy, rule of law and fundamental rights policy» as the «key to the credibility of the Union³¹». Recognising the need to assess on a regular basis whether Member States laws and practices continue to comply with the common values upon which the Union is founded, the Parliament seems to admit that a double standard of compliance with the Copenhagen criteria is applied to Member States *vis à vis* candidate Countries³².

If a double standard really applies, does it mean that a different “external” definition of the rule of law applies, too?

4. Promoting the rule of law outside the EU: a different definition?

Before venturing out in search of an EU “external” definition of the rule of law as a *guiding principle* of the Union’s external action (art. 21 TEU), it may be worth recalling that – just as it happens with reference to its “domestic” understanding – no “official” description of its features is offered in the Treaties. Though not surprising, given its nature of “foreign policy objective” from which no particular enforceable obligation arises for either

²⁹ EU Parliament Resolution *EU mechanism on democracy, the rule of law and fundamental rights*, Preamble sub H.

³⁰ EU Parliament Resolution *EU mechanism on democracy, the rule of law and fundamental rights*, Preamble sub AE.

³¹ EU Parliament Resolution *EU mechanism on democracy, the rule of law and fundamental rights*, Preamble sub U.

³² EU Parliament Resolution *EU mechanism on democracy, the rule of law and fundamental rights*, Preamble sub R, S.

EU institutions or Member States³³, it may become at least questionable when the rule of law itself becomes a benchmark to be attained by those countries wishing to join the EU (art. 49 TEU). Additionally, no document so far has tried to establish a set of shared criteria according to which the rule of law “external” concept can be defined (and against which compliance with it can be tested). However, an attempt can be done at extracting the main “rule of law ingredients” from the core legal and policy documents relating to the EU external action, focusing on two of its main “geographical” directions, i.e., EU enlargement and neighbourhood partnership, given their paramount importance in terms of assistance programmes implemented and financial resources allocated.

Even a quick look at the dedicated webpages on the Commission’s website shows that the main policies and strategies designed by the Commission’s DG NEAR and implemented in coordination with the EEAS through the EU’s external aid instruments place significant relevance on strengthening the rule of law in current/potential EU Candidate Countries as well as in Eastern and Southern neighbouring Countries. However, the relevant regulatory framework for cooperation and assistance provides no details as far as rule of law-related interventions are concerned.

In establishing the Instrument of Pre-Accession (2007-2013), through which assistance is provided to Candidate Countries in their «progressive alignment with the standards and policies of the European Union [...] with a view to membership³⁴», Reg. EC 1085/2006 only *mentions* the rule of law alongside a list of target fields of interventions such as (among others) the strengthening of democratic institutions, public administration and economic reform, promotion of human rights, minority rights and gender equality and support to civil society³⁵. Along the same line is Reg. EC 1638/2006, instituting the European Neighbourhood and Partnership Instrument to provide assistance to neighbouring Countries «for the development of an area of prosperity and good neighbourliness³⁶» (ENPI, 2007-2013)³⁷, which

³³ PECH, *Rule of law as a guiding principle of the European Union’s external action*, CLEER Working Papers 2012/3, available at <http://www.asser.nl/media/1632/cleer2012-3web.pdf>, p. 12.

³⁴ Reg. EC 1085/2006, art. 1 para. 1.

³⁵ See Reg. EC 1085/2006, Preamble, para. 13, art. 2 para. 1 (a).

³⁶ Reg. EC 1638/2006, art. 1 para. 1. The partner Countries listed in Annex 1 are: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Moldova, Morocco, Palestinian Authority of the West Bank and Gaza Strip, Russian Federation, Syria, Tunisia, Ukraine.

³⁷ See Reg. EC 1638/2006, Preamble para. 4, art. 1 para. 3, art. 2 para. 2 (d).

also features “good governance” beside the rule of law, as part of an oft-repeated doublet whose fortune will increase in the years to come³⁸.

A notable change in attitude is detectable in Reg. EU 232/2014, establishing the European Neighbourhood Instrument (ENI), under whose scope ENP interventions are funded. Art. 2 para. 1 clarifies that Union’s support shall target in particular «[the promotion of] human rights and fundamental freedoms, the rule of law, principles of equality and the fight against discrimination in all its forms, establishing deep and sustainable democracy, promoting good governance, fighting corruption, strengthening institutional capacity at all levels and developing a thriving civil society including social partners». An even more noteworthy advancement can be seen in Reg. EU 231/2014, whose Annex II lists thematic priorities to be funded under IPA II and features «[e]stablishing and promoting from an early stage the proper functioning of the institutions necessary in order to secure the rule of law». Interventions in this area will be directed at establishing «independent, accountable and efficient judicial systems [...], ensuring the establishment of robust systems to protect the borders, manage migration flows and provide asylum to those in need; developing effective tools to prevent and fight organised crime and corruption; promoting and protecting human rights, rights of persons belonging to minorities [...] and fundamental freedoms, including freedom of the media³⁹».

Quite differently from the *ENI Strategic Priorities 2014-2020*, where democracy and respect for human rights are mentioned instead of the rule of law⁴⁰, the programming documents adopted under IPA II reveal a strong

³⁸ Both sources contain a *caveat* concerning respect for (among others) the rule of law as a condition for the continuation of sound partnerships. Under IPA, non-compliance may result in the Member States taking «appropriate steps with regard to any assistance granted under this regulation» (art. 21 para. 2), while under ENPI (art. 7 para. 6) a crisis or a threat to democracy, the rule of law, human rights and fundamental freedoms may entail an *ad hoc* review of the programming documents featuring financial allocations (i.e., Country/Multi-Country Strategy Papers).

³⁹ Reg. EU 231/2014, Annex II, para. (b). The establishment of an independent judiciary includes «transparent and merit-based recruitment, evaluation and promotion systems and effective disciplinary procedures in cases of wrongdoing», while the fundamental rights of minorities include those of «Roma as well as lesbian, gay, bisexual, transgender and intersex persons».

⁴⁰ EEAS - EUROPEAN COMMISSION DG DEVCO, *Programming of the European Neighbourhood Instrument (ENI) 2014-2020. Strategic Priorities 2014-2020 and Multi-annual Indicative Programme 2014-2017. European Neighbourhood-wide measures*. Of course, this does not mean that interventions aimed at supporting justice reform (including reform of penitentiary systems), the fight against corruption and organised crime have not

focus on the rule of law as one of the crucial pre-accession challenges. This is especially true following the adoption of a new rule of law approach by the Enlargement Strategy 2012-2013, which lists strengthening the judiciary (in terms of independence, accountability, efficiency and effective enforcement of judicial decisions), the fight against corruption and organised crime, broad public administration reform, protection and promotion of fundamental rights (including the rights of vulnerable groups and minorities) and freedom of the media as the key areas of rule of law-related interventions⁴¹. Along with economic governance and public administration reform, since 2014 the rule of law (including the strengthening of democratic institutions) has become one of the three pillars upon which the enlargement process is based. Components of the rule of law set in 2012-2013 are confirmed by the 2014⁴² and 2015⁴³ Enlargement Strategies, while in 2016 «terrorism and radicalisation» can be found under the rule of law-related paragraph as a new priority to be addressed through criminal and anti-terrorism legislation reform⁴⁴.

taken place under ENPI-ENI, as it can be seen from the allocation of resources summarised in the DG DEVCO document *European Neighbourhood Partnership Instrument 2007-2013. Overview of Activities and Results*, available at

https://ec.europa.eu/europeaid/sites/devco/files/overview_of_enpi_results_2007-2013_en_0.pdf

However, «[e]nsuring the rule of law and independent and effective justice systems» capable of protecting human rights and featuring transparent, impartial and depoliticised judiciary and accountable central and local public administration remains a priority in the *Review of the European Neighbourhood Policy* jointly conducted by the Commission and the High Representative for Foreign Affairs and Security Policy in 2015; see EC-HRFASP Joint Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, *Review of the European Neighbourhood Policy*, COM(2015) 50 final, pp. 5-6.

⁴¹ Communication from the Commission to the European Parliament and the Council, *Enlargement Strategy and Main Challenges 2012-2013*, COM(2012) 600 final, pp. 4-6. The relevant chapter is significantly titled *Putting the rule of law at the centre of enlargement policy*.

⁴² Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, *Enlargement Strategy and Main Challenges 2014-15*, pp. 10-16

⁴³ Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, *EU Enlargement Strategy*, COM(2015) 611 final, pp. 5-6.

⁴⁴ Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, *2016 Communication on EU Enlargement Policy*, p. 3.

More recently, the *DG NEAR Strategic Plan 2016-2020*⁴⁵ set a new comprehensive framework for its activity, through the identification of three general objectives applying to both Neighbourhood and Enlargement policies and a number of specific objectives for each of them. Support to the rule of law⁴⁶ acquires significant importance under *General Objective 1* («Making the EU a stronger global actor»). Specific objectives are nonetheless different for ENP and Enlargement: while the first is generally formulated as an increase in stability in political, economic and security terms, the latter is more specifically focused on the «readiness» of Candidate Countries to join the Union. In this respect, coherently with the above-mentioned planning documents, tailored «readiness indicators» will aim at assessing the progress of EU candidates in key areas such as the functioning of the judiciary, fight against corruption and organised crime, freedom of expression and public administration reform. Notably, in 2018 DG NEAR will launch two interim thematic evaluations in the fields of rule of law and public administration reform.

Bearing in mind that the strategic documents analysed here only limitedly take into account Country-specific issue and priorities⁴⁷, the picture described above suggests some provisional conclusions. The first one relates to the different attitudes towards the rule of law in the Neighbourhood and the Enlargement dimensions of the EU external action. Though founded on the same premises, rule of law priorities are more specifically defined with respect to the latter rather than the first, where the focus is more on broader – though intertwined – values and principles such as political stability, democracy, good governance or human rights. This can be explained by the higher level of commitment that Candidate Countries have towards EU accession and the consequently stricter compliance requirements they have

⁴⁵ DG NEAR, *Strategic Plan 2016-2020*, 12.04.2016, available at https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-near_april2016_en.pdf, p. 37.

⁴⁶ Under objectives such as poverty reduction, human development, inclusive and sustainable growth and human rights, but via financing instruments other than IPA II and ENI, DG DEVCO Strategic Plan 2016-2020 will promote «democracy, human rights, rule of law, gender equality and empowerment of women, the economic and social inclusion of vulnerable groups» and «support the civil society and local authorities». DG DEVCO, *Strategic Plan 2016-2020*, 10.05.2016, available at https://ec.europa.eu/info/sites/info/files/strategic-plan-2016-2020-dg-devco_may2016_en.pdf, p. 41.

⁴⁷ Detailed programmes for each Country can be found in Indicative Strategy Papers (for EU Candidates) and Annual Action Programmes (for ENP Countries) available at https://ec.europa.eu/neighbourhood-enlargement/news_corner/key-documents_en

to meet in the process. However, it is also necessary to remember that – as different as their “starting points” might have been – Candidate Countries already passed a preliminary screening when their candidacy for EU membership was accepted. Because of that, and irrespective of the differences in progressing towards EU accession, Candidate Countries appear a more homogeneous group than ENP Countries, and therefore a more homogeneous characterisation of interventions aimed at strengthening the rule of law applies to them.

In this respect, documents and sources in this section clearly show that the external Enlargement-related EU support to the rule of law is essentially based on four pillars. These are: *a)* independence, accountability, efficiency of the judiciary and effectiveness in the implementation of judicial decisions; *b)* fight against corruption; *c)* fight against organised crime; *d)* protection and promotion of fundamental (and minorities) rights and freedom of the media in particular. Public administration reform – as another key area of the EU enlargement strategy – complements the picture. At first glance, it may be argued that the above-listed entries only partially coincide with the Commission’s 2014 rule of law framework definition. Does it mean that “external” and “internal” understanding differ?

5. Comparing the rule(s?) of law. Concluding remarks

The answer can be affirmative only if based on the assumption that “priorities” and “ingredients” of the rule of law are interchangeable terms, which, of course, are not. Leaving aside ENP Countries for the moment and focusing on the Enlargement policy, a closer look at the *priorities* expressed by the IPA II regulation reveals that they are all connected with one or more *ingredients* listed in the 2014 EU framework definition. The focus on the justice system at large and the promotion of fundamental rights are perfectly in line with points *d)* and *e)* of Annex I of the EU Framework, while it would be difficult to argue that a State where organised crime and corruption hamper the proper functioning of public institutions, civil society and economy does not need to reinforce the rule of law, especially when accepting a “thick” conception of it as the EU Framework clearly does. The identification of a set of policy *priorities* in line with the commitments undertaken by Candidate Countries clearly does not exclude the existence of

other possible fields of intervention falling under the scope of the great «umbrella principle⁴⁸» represented by the rule of law.

Following the introduction of the 2014 EU Framework, the oft-criticised lack of a once-and-for-all description of the “external” understanding of the rule of law may be scaled down by the very presence of the definition therein offered: in bridging the “domestic and the “external” dimensions of EU policies aimed at strengthening the rule of law, it can be considered the meta-benchmark against which consistency of rule of law-related external action should be ensured⁴⁹, without attaching excessive importance to necessary Country-specific variations. This is even more true with reference to ENP Countries⁵⁰, as bilateral cooperation and rule of law interventions needs to adapt to far more different political and institutional contexts, as shaped by variously combining «drivers of diversity⁵¹» and resulting in a wide and ever-evolving spectrum of regimes and legal systems that requires flexibility more than a one-size-fits-all type of policy.

If context-sensitiveness in policy design is highly desirable according to prominent law and development scholars⁵² and political advantages of maintaining flexibility in external relations are self-evident⁵³, different conclusions apply when coming to *measuring* a Country’s compliance with rule of law-related benchmarks. As far as EU Candidates are concerned, the provision of detailed *opening*, *interim* and *closing* benchmarks under Chapters 23 (judiciary and fundamental rights) and 24 (justice, freedom and security), and the possibility of stopping negotiations on other chapters if progress on Chapters 23 and 24 lags behind⁵⁴, demonstrates the will to

⁴⁸ PECH, *Rule of law as a guiding principle of the European Union’s external action*, p. 26.

⁴⁹ See BURLUYUK, *Variation in EU external policies as a virtue: EU rule of law promotion in the Neighbourhood*, in *Journal of Common Market Studies*, Vol. 53, no. 3, 2015, p. 513.

⁵⁰ *Id.*, *infra*.

⁵¹ MAGEN, *Overcoming the diversity-consistency dilemmas in EU Rule of Law external action*, in *Asia Europe Journal*, Vol. 14, No. 1, 2016, pp. 31-35.

⁵² See, among others, CAROTHERS, *Promoting the rule of law abroad. The problem of knowledge*, Carnegie Endowment Rule of Law Series Working Papers, No. 34, 2003, available at <http://carnegieendowment.org/files/wp34.pdf>. The

⁵³ PECH, *Rule of law as a guiding principle of the European Union’s external action*, pp. 25-26.

⁵⁴ Communication from the Commission to the European Parliament and the Council, the European Economic and Social Committee and the Committee of the Regions, *Enlargement Strategy and Main Challenges 2014-15*, COM(2014) 700 final, pp. 1, 12-13.

closely monitor progresses in the field throughout all stages of the EU accession process.

Broad and coherent monitoring mechanisms should be applied to EU Member States with the same rigour. The comprehensive monitoring cycle proposed by the EU Parliament in its 2016 Resolution suggests relevant steps in that direction. Building a set of rule of law benchmarks for EU Member States would clearly be the challenging task of striking a balance between general, non-negotiable thresholds of compliance and tailor-made indicators based on national specificities, legal traditions and baselines. Nonetheless, interesting examples of Country-specific (transitory) monitoring mechanisms are already in place: the Cooperation and Verification Mechanism established in 2006 aims at assessing progresses made by Romania and Bulgaria with reference to specific rule of law-related areas, namely the effectiveness, transparency and professionalism of the judicial system, fight against corruption and – for Bulgaria only – fight against organised crime. For each Country, a detailed set of benchmarks has been established, against which progresses are monitored on a yearly basis⁵⁵. The Commission Recommendation regarding the rule of law in Poland, adopted in 2016 under the new EU framework to strengthen the rule of law, provides something vaguely similar in its final paragraph, though with a far more punctual and case-specific perspective relating to the criticalities reported in the previous Commission Opinion⁵⁶. In a long-term perspective, it would be interesting to explore possibilities for the incorporation of Country-specific benchmarks in the rule of law policy cycle proposed by the EU Parliament for monitoring Member States compliance. In this respect, the Venice Commission *Rule of Law Checklist*⁵⁷ could definitely offer sound bases for further elaboration.

⁵⁵ See Commission Decisions 2006/928/EC and 2006/929/EC of 13 December 2006. Progress reports are available at https://ec.europa.eu/info/effective-justice/rule-law/assistance-bulgaria-and-romania-under-cvm/reports-progress-bulgaria-and-romania_en

⁵⁶ See Commission Recommendation *regarding the rule of law in Poland*, C(2016) 5703 final, para. 6, available at http://ec.europa.eu/justice/effective-justice/files/recommendation-rule-of-law-poland-20160727_en.pdf

⁵⁷ EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION), *Rule of Law Checklist*, pp. 11 ff.