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Promoting the Rule of Law in EU External Relations: A Conceptual Framework

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I. INTRODUCTION

Article 3(5) of the Treaty on the European Union (TEU) unequivocally states the firm objective for the Union 'to uphold and promote its values and interests' in its relations with the wider world.[1] Those values, which are common to the Member States and on which the Union is founded, are listed in Article 2 TEU and include respect for the rule of law but also human dignity, freedom, democracy, equality and human rights. The Treaty thus solidly underpins the global positioning of the EU as a soft power, which was on the whole rather successful until the large-scale Russian invasion of Ukraine in 2022 exposed its limits. Policy-wise, a corresponding ambition clearly transpires in the 2016 EU Global Strategy which asserts:

> [o]ur interests and values go hand in hand. We have an interest in promoting our values in the world. At the same time, our fundamental values are embedded in our interests. Peace and security, prosperity, democracy and a rules-based global order are the vital interests underpinning our external action.[2]

Proclaiming that the EU shall promote such a rules-based global order based on 'principled pragmatism',[3] however, sounds like an oxymoron. If the stated Treaty objective

[1] The use of the word 'shall' (meaning must) is telling in this respect: article 3(5) TEU reads: 'In its relations with the wider world, the Union *shall* uphold and promote its values and interests and contribute to the protection of its citizens. It *shall* contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter' (emphasis added). Similarly, the French version states unequivocally: 'Dans ses relations avec le reste du monde, l'Union *affirme et promeut* ses valeurs et ses intérêts' (emphasis added).

[2] HR F Mogherini, 'A Global Strategy for the European Union's Foreign And Security Policy', June 2016, 13–14, see www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf.

[3] See ibid, 8, 16.

and the corresponding EU Global Strategy ambition may be declared openly in this way, a major difficulty lies in their interpretation as well as their translation into a forceful, coherent and consistent practice in line with Articles 21(3) TEU and 7 of the Treaty on the Functioning of the European Union (TFEU).

The key question addressed in this chapter is whether promoting the rule of law whilst ensuring consistency of the EU's policies and activities necessarily implies a 'one-size-fits-all' approach or rather calls for differentiation between states based on objective criteria. Not only will the distinction between the EU and its Member States as compared to third states be scrutinised, but also, and especially, objective factors calling for a categorisation among third states. Correspondingly this chapter will consider whether the use of diversified instruments to promote the rule of law may be warranted to meet the single objective expressed in Article 3(5) TEU.

The proposed conceptual framework uses a five-sided prism to deconstruct the Article 3(5) TEU objective with a focus specifically on the rule of law. A first part builds on how both the 'EU rule-of-law' framework and concept translate in a broader and international setting, based on two questions. Why and to what extent is the internal EU rule-of-law framework at all relevant for EU external relations (section II)? Is the internal 'EU' rule-of-law concept sufficiently distinct to propel the EU as a normative actor and what is the possible external impact of flanking concepts underlying thick constitutional democracy (section III)? What emerges, secondly, is a three-pronged meaning of the rule of law according to the actors involved, which is then systematically dissected in the subsequent sections on the basis of, at first sight, simple questions. Should a distinction be drawn between third countries according to whether they qualify as functioning democracies or not? Superimposed on that issue is the question whether there is a need for further differentiation between those third countries that are candidates for EU accession and others, in particular when EU 'values' and EU 'interests' may not always and necessarily align (section IV)? And should a distinction be drawn in terms of the respect for the rule of law between the EU as an international actor, on the one hand, and third countries, on the other hand (section V)? The latter question reveals its full importance when one considers that, of all the international actors, only the EU and its Member States are bound to comply externally too with the rules of the 'Autonomous EU Legal Order', such as the primacy of EU law and the principle of mutual trust. Finally, the last part turns briefly to the often invoked quest for consistency and coherence in EU external relations and the avoidance of double standards, by examining possibly differentiated uses of the EU's soft power and hard law instruments in relation to differentiated rule of law concepts (section VI).

II. INTERNAL VERSUS EXTERNAL EU RULE OF LAW REFERENCE FRAMEWORK

Internally, the EU faces major difficulties in systematically upholding, let alone promoting its values in all of the Member States, in accordance with its stated ambition in Article 3(1) TEU. The long treasured presumption that all Member States automatically and fully endorse the EU's values was shattered over the past few years

by blatant rule-of-law backsliding, most notably in Hungary and Poland in relation to the independence of the judiciary.[4] In the rule-of-law financial conditionality judgments of 16 February 2022,[5] the European Court of Justice (ECJ) forcefully ruled that the common values expressed in Article 2 TEU, and in particular respect for the rule of law, were not only identified and shared by all the Member States but furthermore constitute the 'very identity of the European Union as a common legal order'.[6] As a logical consequence, it expressly held for the very first time that compliance with those values is not merely an accession requirement but instead stringently linked to continuing EU membership.[7] Respect for the rule of law can thus be labelled as an 'inherent constitutional condition' of EU membership, which triggers existential questions of political and legal rule-of-law enforcement within the EU in case of breach.[8]

Externally the setting is totally different. In relation to third countries there is no similar offhand presumption of commonly shared values or constitutional 'rule-of-law' conditionality, nor can there reasonably be one. The external dimension thus necessarily presents extra challenges compared to an already complex internal situation with which it cannot simply be assimilated. This is apparent also from Article 3(5) TEU which states that the EU should uphold and promote 'its' values and interests in its relations with the wider world, not the values and interests which the EU has in common with third states. The internal EU values expressed in Article 2 TEU are thus seemingly projected extraterritorially as the ultimate benchmark for all EU external action.

A complicating factor lies in the fact that, internally, discussion is still ongoing about what precisely the rule-of-law concept entails as a value 'common' to the Member States,[9] considering the scope of EU competence conferred by the Treaties.[10] For instance, in his contribution to this book, Leonard FM Besselink questions whether, constitutionally, there really exists such a unified concept of the rule of law, having regard not only to the constitutional homogeneity expressed in Article 2 TEU but also the underlying constitutional diversity expressed through the national identity clause in Article 4(2) TEU.[11] In the rule-of-law conditionality judgments, the ECJ for its part firmly underlines the existence of an obligation of

[4] See especially the chapters in Part I of this book dealing with the intra-EU dimension.

[5] For a discussion of the rule-of-law financial conditionality, including these judgments, see Chapter 11 by P Pohjankoski in this book.

[6] Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, para 145; Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 127.

[7] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 126.

[8] See Helsinki Rule of Law Forum, 'A Declaration on the Rule of Law in the European Union' (2022) 27 *ELJ* 306.

[9] Art 2 TEU stipulates that '[t]hese 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'.

[10] The principle of conferral is laid down in art 5(2) TEU. It was argued elsewhere that the principle of conferral is the very first structural principle of EU law, see I Govaere, 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford, Hart Publishing, 2018) 71. On this principle, see also S Garben and I Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Oxford, Hart Publishing, 2017; paperback 2020).

[11] See Chapter 6 by LFM Besselink in this book.

result, but not necessarily one of means, for the Member States to respect the rule of law. It held that

> [e]ven though, as is apparent from Article 4(2) TEU, the European Union respects the national identities of the Member States, inherent in their fundamental structures, political and constitutional, such that those States enjoy a certain degree of discretion in implementing the principles of the rule of law, it in no way follows that that obligation as to the result to be achieved may vary from one Member State to another.[12]

Such internal discussions do not facilitate the framing of the rule-of-law concept to be upheld and promoted by the EU in its relations with the wider world pursuant to Article 3(5) TEU.

Expressly and stringently linking the internal and external objectives to uphold and promote EU values can thus easily backfire. The current actions undertaken by the EU (institutions) against backsliding Member States can be said (and demonstrated) to be fully in compliance with precisely those founding EU principles. The EU's international position is nonetheless undermined by being exposed to an easy 'get your own house in order before you start telling us what to do' response. The apparent paradox of holding third countries to standards and values that are openly challenged and breached by EU Member States may perhaps be accommodated by highlighting the somewhat 'softer' wording of the first subparagraph of Article 21(1) TEU. Here it is more realistically stated that

> [t]he Union's action on the international scene *shall be guided by* the principles which have inspired its own creation, development and enlargement, and which *it seeks to advance* in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law (emphasis added).[13]

Whereas the internal EU values are also here put forward as the reference frame for EU external action, the crucial differentiating factor lies in an (external) obligation as to means as opposed to the (internal) obligation as to result. This distinction is of fundamental significance in assessing the consistency of EU external action.

III. THE 'RULE-OF-LAW' CONCEPT REVISITED FOR EXTERNAL USE

Related to but also distinct from the above issue of the rule-of-law reference frame is the question of the formulation or definition of the very EU rule-of-law concept in its interaction with international law. At least three fundamental questions emerge which will be addressed in turn. Firstly, how does the EU internal definition of 'rule of law' relate to the international understanding thereof and how does this reflect on

[12] Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97, para 233.

[13] On the use of the word 'principles' instead of 'values' in this context, see Chapter 8 by W Schroeder in this book, as well as W Schroeder, 'The Rule of Law as a Value in the Sense of Article 2 TEU: What Does It Mean and Imply?' in von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer, 2021) 105.

the EU as a global normative actor (A)? Secondly, what can it possibly mean for the EU to promote and thus to 'export' the EU rule-of-law concept in terms of principled pragmatism (B)? And lastly, is there consensus and consistency in the formulation of the rule-of-law concept? A related question is whether the rule of law is a stand-alone concept or whether it should rather be linked to the flanking and interrelated trinity concepts of respect for democracy and fundamental rights (C).

A. Scope for the EU as a Global Normative Actor?

It would be not only shortsighted but also counterproductive to present the necessity to uphold respect for the rule of law as a matter of concern only for the EU and its Member States. Other contributions in this book have already pointed to the crucial importance of the broader international context to (help) uphold the rule of law in the EU Member States, most notably in the framework of the Council of Europe.[14] Not surprisingly, therefore, EU legislation as well as the ECJ openly refer to such external benchmarks, and in particular the Venice Commission Rule of Law Checklist,[15] inter alia in order to reject attempts by Poland and Hungary to limit the concept of the rule of law adopted by the EU in relation to its Member States in terms of references to the protection of fundamental rights and non-discrimination.[16]

The elaboration of an active internal rule-of-law approach[17] is thus systematically and necessarily accompanied by integrating international law elements, including, where relevant, reference to the European Convention on Human Rights (ECHR),[18] within the EU's autonomous legal order balloon.[19] This is consonant not only with the EU Treaty requirement to contribute to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter',[20] but also with the international commitments undertaken by the EU.

[14] See in particular the chapters in this book by P Craig (Chapter 3), A Rosas (Chapter 2), and S Bogojević and X Groussot (Chapter 4). See also J Polakiewicz and JK Kirchmayr, 'Sounding the Alarm: The Council of Europe As the Guardian of the Rule of Law in Contemporary Europe' in von Bogdandy et al (eds), *Defending Checks and Balances in EU Member States: Taking Stock of Europe's Actions* (Springer, 2021) 361.

[15] Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), endorsed by the Ministers' Deputies at the 1263rd Meeting (6–7 September 2016), Council of Europe, Study No 711/2013, CDL-AD(2016)007rev.

[16] Reference to the Venice Commission Rule of Law Checklist is made both in recital 16 of the Rule-of-Law 'Conditionality Regulation', Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget [2020] OJ L433I/1, and in the Court's related judgment (Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97 paras 229–30, where the ECJ links the protection of fundamental rights and non-discrimination to the principle of effective judicial protection, 'which is also guaranteed in Article 19 TEU', which refers to the EU rule of law.

[17] See the Chapter 8 by W Schroeder in this book.

[18] Art 6(3) TEU and art 53 of the Charter of Fundamental Rights of the European Union (the Charter).

[19] On the reasons why (and how) interaction between EU and international law is indispensable for the survival of the EU autonomous legal order, see I Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: a Balloon Dynamic' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Oxford, Hart Publishing, 2019) 19–43.

[20] See arts 3(5) and 21(1) TEU, as well as Declaration no 13 concerning the common foreign and security policy [2016] OJ C 202/343.

For instance, the 2007 Memorandum of Understanding with the Council of Europe expressly states that '[t]he Council of Europe will remain the benchmark for human rights, the rule of law and democracy in Europe'.[21] On a larger and global scale, the United Nations (UN) has framed the rule of law as

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires measures to ensure adherence to the principles of supremacy of the law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.[22]

In recent years various international initiatives have, furthermore, been deployed inter alia by the UN to enhance respect for the rule of law worldwide, such as the creation of the Global Focal Point for the Rule of Law (GFP)[23] and the Rule of Law Coordination and Resource Group (RoLCRG).[24]

Considering the international attention already given to respect for the rule of law, it was pointedly argued by Laurent Pech that in this field 'there has always been … extremely limited room for normative leadership by the EU'.[25] Added to this the dual backdrop of lack of internal consensus on the rule-of-law concept among the EU Member States and reliance on already existing international rule-of-law benchmarks to settle EU internal disputes, it seems rather illusory and futile to try to discern a sufficiently precise, distinct, and forceful 'EU-specific' rule-of-law concept that could serve the ambitions of a global normative actor.[26] It may thus legitimately be questioned what margin as well as what role is left for the EU to effectively uphold and promote the rule of law in its relations with the wider world as prescribed by Article 3(5) TEU.

B. Scope for Principled Pragmatism in 'Exporting' the EU Rule of Law?

Reverting back to the wording of Article 3(5) TEU, it is noteworthy that the EU should not simply 'export' its values but rather it should uphold and promote both its values and interests in its relations with the wider world. Considering the complexity underlying EU external relations it is illusory to hold that EU values and interests will always and necessarily fully coincide. Furthermore, as mentioned above,[27] the 'softer'

[21] MoU EU-Council of Europe (2007), at para 10, available at: rm.coe.int/16804e437b.

[22] See 'What is the Rule of Law', www.un.org/ruleoflaw/what-is-the-rule-of-law/.

[23] Created in 2012, see www.un.org/ruleoflaw/globalfocalpoint/.

[24] 'Strengthening and Coordinating Rule of Law Activities', www.un.org/ruleoflaw/blog/2019/10/strengthening-and-coordinating-rule-of-law-activities/.

[25] L Pech, 'Rule of Law as a guiding principle of the EU's external action', *CLEER Working Papers 2021/3*, 28.

[26] This is in strong contrast to the worldwide normative role played by the EU in other fields such as data and environmental protection: see inter alia, A Bradford, *The Brussels Effect: How the European Union Rules the World* (Oxford, Oxford University Press, 2020).

[27] See above n 13.

wording of Article 21(1) TEU suggests an obligation as to means, not one of result, in upholding and promoting its values abroad.

It could thus be argued that the Treaties do leave a certain margin of flexibility for the EU as an international actor to adopt or negotiate a rule-of-law approach targeted to a specific international context. Instead of a rigid parallelism between internal and external rule-of-law approaches, there thus seems to be scope for principled pragmatism in practice. As the wording suggests, principled pragmatism does not, however, imply complete and total political expediency in any given case but rather points to the systematic pursuit of coherent principles underlying policy decisions.

The important question addressed here is whether, from a conceptual point of view, flexibility can or should relate to the concept of the rule of law as such, or rather to the *approach* to the rule of law to be adopted (or not) towards a specific country, or to a combination of both. In search of coherent principles to underpin such pragmatism, it is necessary to first turn to the possible different readings of the rule-of-law concept before pinpointing essential third-country specificities that may warrant conceptual differentiation on the basis of superimposed criteria, such as whether or not third states purport to be functioning democracies and/or seek to closely align themselves with the EU.

C. Conceptual Ambiguity and Flanking Concepts

Although it is commonly understood what the rule-of-law concept stands for in a general manner – for instance equality before the law and independence of the judiciary – when pressed for more precision, it reveals highly chameleonic features which may cause conceptual ambiguity.[28] The rule-of-law concept can be understood in a thin (minimalist, largely procedural), or in a thick (maximalist, more substantive) sense,[29] and can either be expressly linked to important flanking concepts such as democracy and fundamental rights or be considered in isolation. There are thus numerous possible variations which allow for underlying differentiation in the use of one and the same concept on the surface.

Even in the intra-EU context, where the rule of law is a common value, what precisely constitutes this concept is increasingly the topic of discussion and fundamental disagreement. In the financial rule-of-law conditionality judgments of 2022, a thin concept of the rule-of-law argument was openly deployed by Poland and Hungary but expressly and firmly rejected by the ECJ.[30] Instead the ECJ embraced

[28] Robert Stein has pointedly remarked: 'Everyone, it seems, is in favor of the rule of law. The phrase has become chameleon-like, taking on whatever shade of meaning best fits the author's purpose': see R Stein, 'Rule of Law: What Does It Mean' (2009) 18 *Minnesota Journal of International Law* 250, 296. Brian Tamanaha also observed that 'the rule of law … stands in the peculiar state of being the pre-eminent legitimating political ideal in the world today, without agreement upon precisely what it means': B Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004) 4.

[29] J Møller and SE Skaaning, *The Rule of Law: Definitions, Measures, Patterns and Cause* (London, Palgrave Macmillan, 2014) 13–27 (chapter on 'Systematizing Thin and Thick Rule of Law Definitions'). See also P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

[30] Case C-157/21 *Poland v Parliament and Council* ECLI:EU:C:2022:98, at para 145; Case C-156/21 *Hungary v Parliament and Council* ECLI:EU:C:2022:97.

a thick concept of the rule of law, expressly including fundamental rights and non-discrimination, by reference in particular to the Venice Commission Rule of Law Checklist as the (supporting) external benchmark.[31]

It is apparent from both Articles 2 and 49 TEU, as well as the Copenhagen Accession criteria,[32] that the rule of law as an EU value common to the Member States is, furthermore, stringently linked to respect for democratic values and protection of fundamental rights. Also this is consonant with the Council of Europe approach which equally presents the rule of law, democracy and fundamental rights as a trinity.[33]

It has already been argued elsewhere[34] that within the EU and its Member States this trinity or triptych is to be upheld without compromise as they form indissociable concepts crucial to upholding liberal democracy. Safeguarding the rule of law essentially implies that disputes will be settled on the basis of a predetermined set of rules and by independent judges who have, as a primary task, to balance both individual and societal interests. As such it stands in sharp contrast to enforcing the will of the majority or to settling disputes by leveraging financial, economic or political power, or by plain force. Constitutional democracy, which is not to be equated simply with democratic elections, guards against backsliding on the rule of law. It provides procedural constitutional safeguards to ensure that envisaged changes in rule-setting which entail a fundamental or lasting societal impact may not be subject to an 'accidental' majority at a given point in time, for instance a one-off referendum, but, to the contrary, raise a sufficiently large and lasting public debate and support. As such, constitutional democracy also guards against the occurrence of a democratic paradox, whereby democracy is undermined from within by democratically elected leaders systematically undermining democratic checks and balances such as judicial and parliamentary control. Constitutional democracies lay down not only important procedural safeguards but also key constitutional principles such as the protection of rights of minorities and individuals in society. This triggers the last element of the triptych, respect for fundamental rights, which embraces the protection of human rights and minority rights ensured by independent judges, furthermore based on the premises that all are equal before the law[35] and that all benefit from equal protection of the law. The 'given' that under the rule *of* law no one is above the law, including the

[31] See above n 15, at point 3 (a).

[32] The Copenhagen accession criteria were first established by the Copenhagen European Council in 1993 and later on strengthened by the Madrid European Council in 1995. The first criterion expressly mentions 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'. The other two criteria relate to 'a functioning market economy and the ability to cope with competitive pressure and market forces within the EU' and 'the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the "*acquis*"), and adherence to the aims of political, economic and monetary union'. For an assessment, see C Hillion, 'The Copenhagen Criteria and their Progeny' in C Hillion (ed), *EU Enlargement: A Legal Approach* (London, Hart Publishing, 2004) 1.

[33] See also Chapters 2 and 3 by A Rosas and P Craig respectively, in this book.

[34] S Garben, I Govaere and P Nemitz, 'Critical Reflections on Constitutional Democracy in the European Union and its Member States' in S Garben, I Govaere and P Nemitz (eds), *Critical Reflections on Constitutional Democracy in the European Union* (Oxford, Hart Publishing, 2019) 1, esp at 2–3.

[35] Art 20 of the Charter.

state (authorities), is an important factor distinguishing it from a system based on the rule *by* law,[36] whereby the law is instrumentalised by power.

The concept of the rule of law, in particular such a thick understanding of the rule of law, intertwined with fundamental rights and democracy, is not universally shared. Not all states profess to be democratic in nature. Even among democratic states there is not necessarily agreement about what precisely is covered by fundamental rights protection (suffice it to think of abortion or capital punishment), or to what extent such rights are enforceable before the courts.[37] This raises questions as to the extent to which the EU can realistically aspire to export liberal democracy beyond its borders in a rigid manner. Against this backdrop the following sections will consider what differentiating factors among third countries may call for a differentiated rule-of-law concept, in search of consistency underlying principled pragmatism.

IV. CONCEPTUAL DIFFERENTIATION BETWEEN THIRD COUNTRIES

Whilst proclaiming that the EU strategy to promote a rules-based global order should be based on 'principled pragmatism', little guidance was offered in the 2016 EU Global Strategy as to how to understand and apply this new guiding principle of EU foreign policy in practice in a consistent manner.[38] Interestingly, in the 2019 follow-up assessment, 'Principled Pragmatism' was first labelled as the 'philosophy',[39] later as 'the leitmotif'[40] of the EU Global Strategy. The question as to whether in particular the EU values expressed in Articles 2 and 3(5) TEU would benefit from a more 'principled' or more 'pragmatic' approach was rather enigmatically addressed as follows: 'The EU can act pragmatically on the grounds of a lucid assessment of reality, while being unwavering in its commitment to the principles, values and rules enshrined in our Treaties'.[41] In spite of this assertion, the EU strategy based on principled pragmatism has already been strongly criticised for its inconsistencies in relation to a given country, such as Russia after the invasion of Crimea,[42] which can only be aggravated when comparing the EU's response to different countries.

Given the great variety in political, economic and legal models applicable in the various countries across continents, but also within regions, it appears futile to try to

[36] See B Tamanaha, *On The Rule of Law: History, Politics, Theory* (Cambridge, Cambridge University Press, 2004) 91.

[37] Australia, for instance, does not have a Bill of Rights: see M Groves, J Boughey, D Meagher (eds), *The Legal Protection of Rights in Australia* (London, Hart Publishing, 2019).

[38] See HR F Mogherini, 'A Global Strategy for the European Union's Foreign And Security Policy', June 2016, 13–14, see www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf., 16: 'We will be guided by clear principles. These stem as much from a realistic assessment of the strategic environment as from an idealistic aspiration to advance a better world. In charting the way between the Scylla of isolationism and the Charybdis of rash interventionism, the EU will engage the world manifesting responsibility towards others and sensitivity to contingency. Principled pragmatism will guide our external action in the years ahead.'

[39] F Mogherini (High Representative), 'The European Union's Global Strategy Three Years On, Looking Forward', 2019, 22, www.eeas.europa.eu/sites/default/files/eu_global_strategy_2019.pdf.

[40] ibid 31.

[41] ibid.

[42] F Bossuyt and P van Elsuwege (eds), *Principled Pragmatism in Practice The EU's Policy towards Russia after Crimea*, vol 19 *Studies in EU External Relations* (Leiden, Brill, 2021).

measure the consistency and coherence of the EU approach against a single yardstick of the internal EU rule-of-law concept.[43] Instead the best course of action would seem to be to conceptually differentiate the concept of rule of law between third countries on the basis of two distinctive yet superimposed criteria, namely whether or not they are functioning democracies (A) and whether or not they are seeking accession to the EU (B). How this impacts on the rule-of-law concept to be flexibly understood externally will be considered in turn.

A. Functioning Democracy as a Conceptual Differentiation Criterion

Within the EU the concept of the rule of law is stringently linked to that of a functioning democracy and respect for human rights. Democracies are, however, fragile and not to be taken for granted, whether in the EU or globally. According to the latest figures of the Economist Intelligence Unit's 2021 Democracy Index, which measures democracy in a thick sense on the basis of five measures (electoral process and pluralism, the functioning of government, political participation, democratic political culture, and civil liberties),[44] only 21 out of 167 countries worldwide currently qualify as 'full' democracies.[45] Of those, 12 are countries in Western Europe albeit not all of them EU Member States.[46] The report points out that 'full democracy' currently benefits only 6.4 per cent of the world population, whilst 'less than half (45.7%) of the world's population now live in a democracy of some sort'.[47] This includes the other EU Member States (as well as, for instance, the USA) which are currently

[43] The combination of those contextual elements has led to the identification of four 'ideal types' of relationship between the EU and its counterpart in trade negotiations by Maryna Rabinovych: Type 1: undemocratic state (or group of states), yet economically oriented on trade with the EU and dependent on the EU aid (eg MENA region); Type 2: economically powerful yet undemocratic countries that hold a prominent role in regional economic integration projects other than the EU (eg Russia, China, the Gulf Cooperation Countries); Type 3: high-income democracies marked by convergence of regulatory rules (eg Canada, Japan, South Korea); Type 4: 'combination of a counterpart's democratic aspirations and its ambitions pertaining to the EU membership or close association relations, coupled with its dependence on the exports/imports to the EU and development aid' (eg Albania, Montenegro, Macedonia, Serbia, Turkey, the 'associated' Eastern Neighbourhood (Ukraine, Moldova and Georgia) and the Organisation of African, Caribbean and Pacific States (ACP) group of countries); M Rabinovych, *EU Regional Trade Agreements: An Instrument of Promoting the Rule of Law to Third States* (London and New York, Routledge, 2021) 55.

[44] Economist Intelligence Unit, 'Democracy Index 2021' (the report may be requested via *The Economist*, 'A new low for global democracy: More pandemic restrictions damaged democratic freedoms in 2021', 9 February 2022, www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy). Except for political participation which shows an upward trend, the other four indicators show worrying signs of decline over the period 2008–2021, see ibid, the figure at 25. On the choice for a 'thick' concept of democracy, including protection of basic human rights and the methodology used, see the Appendix to the report, at 66.

[45] ibid, Table 1 at 4. The concept of 'Full democracies' refers to '[c]ountries in which not only basic political freedoms and civil liberties are respected, but which also tend to be underpinned by a political culture conducive to the flourishing of democracy. The functioning of government is satisfactory. Media are independent and diverse. There is an effective system of checks and balances. The judiciary is independent and judicial decisions are enforced. There are only limited problems in the functioning of democracies.' See ibid at 68.

[46] For instance, the Scandinavian countries, in particular Norway (best country) and Iceland, together with Finland, Sweden and Denmark, rank highly as full democracies.

[47] Economist Intelligence Unit, 'Democracy Index 2021', above n 44, at 4.

labelled as 'flawed' democracies, although they may still qualify as 'functioning' democracies.[48] Importantly, 59 countries, or more than one-third of the world population, live under authoritarian rule,[49] with the remaining 34 countries (amounting to a further 17 per cent of the world population) having some but not all of the required democratic elements and therefore being labelled as 'hybrid' regimes.[50] Quite worryingly, over the past years democracy seems to be in decline in all parts of the world, with the number of democratic states going down, not up.

The World Justice Project, for its part, annually measures respect for the rule of law in a thick sense worldwide.[51] It does so in 139 countries, based on the following eight factors: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice, and criminal justice.[52] When comparing the above '2021 Global Democracy Index' map[53] with the World Justice Project (WJP) 'Rule of Law Index 2021' global map,[54] the resemblances in outcome are striking. Full democracies consistently have a high rule-of-law ranking whereas declining democratic features correspond to a decrease in rule-of-law score. If this finding may not be surprising as such, it does raise questions about the proper interpretation to be given to the EU objective to promote and

[48] See Table 7 for the qualification of Eastern European countries and Table 12 for the Western European countries, above n 44, at 44 and 62 respectively. The concept of 'Flawed democracies' refers to '[t]hese countries also have free and fair elections and, even if there are problems (such as infringements on media freedom), basic civil liberties are respected. However, there are significant weaknesses in other aspects of democracy, including problems in governance, an underdeveloped political culture and low levels of political participation' (ibid at 68).

[49] The report (above n 44, at 68) states that 'Authoritarian regimes' refers to the following: 'In these states, state political pluralism is absent or heavily circumscribed. Many countries in this category are outright dictatorships. Some formal institutions of democracy may exist, but these have little substance. Elections, if they do occur, are not free and fair. There is disregard for abuses and infringements of civil liberties. Media are typically state-owned or controlled by groups connected to the ruling regime. There is repression of criticism of the government and pervasive censorship. There is no independent judiciary'.

[50] See the report (above n 44 at 68) which describes them thus: 'Hybrid regimes: Elections have substantial irregularities that often prevent them from being both free and fair. Government pressure on opposition parties and candidates may be common. Serious weaknesses are more prevalent than in flawed democracies – in political culture, functioning of government and political participation. Corruption tends to be widespread and the rule of law is weak. Civil society is weak. Typically, there is harassment of and pressure on journalists, and the judiciary is not independent.'

[51] See The World Justice Project (WJP) Rule of Law Index 2021, 14 (accessed via worldjusticeproject.org/our-work/research-and-data/wjp-rule-law-index-2021), where it is explained that the WJP definition of the rule of law is based on four Universal Principles. 'The rule of law is a durable system of laws, institutions, norms, and community commitment that delivers:

- Accountability: The government as well as private actors are accountable under the law.
- Just Law: The law is clear, publicized, and stable and is applied evenly. It ensures human rights as well as contract and property rights.
- Open Government: The processes by which the law is adopted, administered, adjudicated, and enforced are accessible, fair, and efficient.
- Accessible and Impartial Justice: Justice is delivered timely by competent, ethical, and independent representatives and neutrals who are accessible, have adequate resources, and reflect the makeup of the communities they serve'.

[52] The World Justice Project (WJP) Rule of Law Index 2021, 9. It is stated (at 12) that 'The World Justice Project (WJP) developed the WJP Rule of Law Index to serve as a quantitative tool for measuring the rule of law in practice'. For the methodology used, see 180 ff.

[53] To be consulted at: www.economist.com/graphic-detail/2022/02/09/a-new-low-for-global-democracy.

[54] For the interactive (WJP) Rule of Law Index 2021 map, see worldjusticeproject.org/rule-of-law-index/.

uphold its values in its relations with the wider world, in particular the rule of law, according to whether it is faced with functioning democracies or not.

The challenges to externally uphold and promote the rule of law in functioning (and to a large extent like-minded Western) democracies are more aligned with the internal situation in the EU Member States and the EU should thus aim at upholding the rule of law in a thick sense. If anything, the internal EU rule-of-law issues (as well as the USA surge on the capitol on 6 January 2021) show that due attention should be paid to established liberal democracies quasi imperceptibly sliding into illiberal democracy.[55] Also in its relations with functioning democracies the EU should therefore be wary against complacency, which dangerously facilitates rule-of-law backsliding. A better option would seem to be to (pro)actively formulate common answers to the potential impact of digitalisation on the democratic processes and, importantly, to maintain in force democratic checks and balances not just in theory but also in practice.[56] This may necessitate revisiting and strengthening the role and function of institutions to ensure effective judicial control by independent courts and democratic control by parliaments, but also the role and functions of media and social media.

A more difficult exercise, conceptually, is to pinpoint what it can possibly mean to uphold and promote the rule of law in EU relations with the majority of countries worldwide, which openly or in practice clearly do not share democratic aspirations. Other chapters in this book have pointed to the close link between the concepts of 'rule of law' and 'democracy' and have reflected on the existence of a sequential interaction between the two.[57] It is hardly an option, realistically, for the EU to refuse to interact economically and politically with more than half the countries of the globe solely because they do not share liberal democracy as a preferred or sustained model. Policywise, the emphasis is instead put on the strategic interest for the EU to advance its 'global leadership' with respect to human rights and democracy.[58] A crucial policy feature for the EU to emphasise is that it remains 'steadfast as a strong defender of human rights and democracy', which translates into 'maximising the EU's role on the global stage by expanding the human rights toolbox, its key instruments and policies'.[59] The very notion of a toolbox[60] indicates that a differentiated approach may need to be taken, and different instruments employed, depending on the assessment

[55] See F Zakaria, 'The Rise of Illiberal Democracy' (1997) 76(6) *Foreign Affairs* 22.

[56] On the importance of the practical impact, see Chapter 12 by K Miklóssy in this book.

[57] See in particular Chapter 2 by A Rosas in this book.

[58] Joint Communication to the European Parliament and the Council, 'EU Action Plan on Human Rights and Democracy 2020–2024', JOIN(2020) 5 final of 25 March 2020, 1. This builds on the 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Council of the European Union, 25 June 2012: see www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

[59] As indicated (ibid, at 4) the Action Plan 'will set out EU ambitions and identify priorities for action around five interlinked and mutually reinforcing lines of action:

- I Protecting and empowering individuals
- II Building resilient, inclusive and democratic societies
- III Promoting a global system for human rights and democracy
- IV New technologies: Harnessing opportunities and addressing challenges
- V Delivering by working together'.

[60] On the expanding Human Rights toolbox, see also Chapter 14 by S Blockmans in this book.

of the actual situation in the third country concerned.[61] Seen from this perspective, it would be counterproductive for the EU then to steadfastly not engage in relations with third countries which do not share the last part of the triptych, namely a (thick) rule-of-law concept. The main challenge for the EU as a global leader in this respect does not lie in preaching to the choir. For the sake of consistently pursuing the EU Treaty objective of promoting and upholding the rule of law in relations with the wider world, a gradual step-by-step approach may instead be called for, targeted to the specific external context and interlocutor. Such a finding is also in line with the external reference frame discussed above.[62]

B. Pre-accession Conditionality (Or Not) as a Conceptual Differentiation Criterion

Superimposed onto the above distinction between third countries based on their democratic status, a further conceptual differentiation is called for according to whether or not the third country concerned aspires to EU membership. It is only with respect to the latter that the 'values' and 'interests' of the EU, as referred to in Article 3(5) TEU, always and necessarily coincide. It is clearly in the interest of the EU to ascertain that candidate countries fully share all the EU values expressed in Article 2 TEU, at least by the time of their accession. The pre-accession conditionality requires full compliance with the 'thick' rule-of-law concept and triggers the full intra-EU reference frame as applies to the EU Member States.[63] Candidate countries are thus under a firm obligation as to result to duly respect the rule of law, democracy and human rights, subject to control by the European Commission. The fact that the leverage exerted by the prospect of EU membership status is lost immediately upon EU accession, qualifies the pre-accession conditionality truly as the most powerful rule-of-law enforcement instrument at the disposal of the EU, all internal and external situations taken together.

A similar presumption that promoting and upholding the EU's 'values' and its 'interests' always and necessarily coincides, appears more problematic with respect to all other third countries, regardless of whether they are functioning democracies. It would also simply be wrong to assume that the closer the geographical proximity of a third country to the EU the more likely that, for the EU, promoting its values will ultimately prevail over its interest. It has been suggested that instead of geographical proximity, it is rather the third country's ambition of integration with the EU that is the crucial factor, pointing out that the EU leverage to export the rule of law would then logically be more important in respect of associated countries.[64] Some level of policy coherence may thus be explained depending on the differentiated nature of the bilateral relations with those countries.

[61] See also section VI below.
[62] See section III above.
[63] See section II above.
[64] P Van Elsuwege and O Burlyuk, 'Exporting the Rule of Law to the EU's Eastern Neighbourhood: Reconciling Coherence and Differentiation' in S Poli, (ed), *The European Neighbourhood Policy – Values and Principles* (London and New York, Routledge, 2018) 176.

In theory the EU's leverage to promote the rule of law may indeed be stronger the more closely a country wishes to integrate with the EU, so that the EU instruments to enforce the rule of law thus become more effective. Yet other studies have shown that in practice there are important inconsistencies in the EU's approach to promoting its values under its neighbourhood policy, in spite of the express mention of the Union's 'values' in Article 8 TEU,[65] which can mostly be explained by reference to more immediate and narrow interests that the EU has sought to protect.[66]

It thus appears that whereas pursuant to Article 3(5) TEU the EU should consistently endeavour to promote its values and its interests, in practice it systematically pursues its interests whereas it promotes its values to the extent possible. Except for countries under pre-accession conditionality, where the EU has an existential interest in fully upholding its rule-of-law concept in a thick sense, the third country concerned may simply not at all share a similar concept or concern for the rule of law, thereby inducing a pragmatic compartmentalisation approach by the EU. Yet all too often it is simply the pursuit of more immediate EU interests, whether economic, or geopolitical, but also for instance related to migration or the fight against terrorism, that take the upper hand.

V. CONCEPTUAL DIFFERENTIATION BETWEEN THE EU AND THIRD COUNTRIES

A last important differentiation relates to the rule-of-law concept as applicable to the EU itself, in its external action, compared to the third countries with which it interacts. Whereas the rule of law may be understood and enforced differently externally depending on the above-mentioned specificities of the third country concerned,[67] it is undisputed that the EU and its institutions of course always and systematically need to respect the EU values expressed in Article 2 TEU, including the rule of law, pursuant to Article 13(1) TEU[68] both in the EU's internal and external action.[69]

[65] Art 8(1) TEU stipulates: '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.'

[66] See also the conclusion by Nathalie Tocci that 'in practice, the pursuit of narrow interests has often hindered the EU's potential to advance those long-term goals that reflect the values on which the Union is founded': N Tocci, 'Comparing the EU's role in neighbourhood conflicts' in M Cremona (ed), *Developments in EU external relations law* (Oxford, Oxford University Press, 2008) 216, 243.

[67] See section IV above.

[68] Art 13(1) TEU: 'The Union shall have an institutional framework which shall aim to promote its values, advance its objectives, serve its interests, those of its citizens and those of the Member States, and ensure the consistency, effectiveness and continuity of its policies and actions.'

[69] Ilaria Vianello makes the following distinction: 'The rule of law as a structural principle in EU external relations law requires the Union to abide by certain principles in its relations with those countries outside the Union's legal structure. This obligation has nothing to do with the actual content of the Union policies, it is rather concerned with the action targeted at their development and implementation': see I Vianello, 'The rule of law as relational principle structuring the Union's action towards its external partners' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford, Hart Publishing, 2018) 225, 239–40.

When looking at the external action of the EU there is, however, an extra layer to the rule of law concept to consider – here called the rule of 'EU' law – which may not immediately be apparent in relations with third countries. It has been argued elsewhere that EU external action and instruments, too, come squarely within the autonomous EU legal order and thus unequivocally need to comply specifically with the rule of 'EU' law in the sense of Article 19 TEU.[70] The rule of 'EU' law thus comprises the EU values as expressed in Article 2 TEU as well as all other 'intra-balloon' characteristics, not least primacy, direct effect and uniform interpretation by the ECJ. Cases such as the *Mauritius Agreement*[71] and *Rosneft*[72] illustrate how the horizontal scope of Article 19 TEU has also been instrumental to reduce the practical impact of the express carve-out for the Common Foreign and Security Policy (CFSP) in Articles 24(1) TEU and 275(1) TFEU. At the same time, this case law triggered a shift from CFSP measures needing to respect solely a domestic or internationally formulated and enforced rule-of-law concept towards safeguarding respect for specifically the 'EU' rule of law under the control of the ECJ.[73]

Going a step further by externalising the effects of the EU autonomous legal order in terms of requiring respect for the rule of 'EU' law by international bodies or under dispute settlement in international agreements to which the EU is a party is, however, highly unlikely. On the one hand it could theoretically be argued that since such international agreements 'form an integral part of EU law from their coming into force',[74] full respect for Article 19 TEU, or at least the EU values as expressed in Article 2 TEU, is warranted by all international bodies set up (or acceded to) by the EU. On the other hand, and more importantly, the ECJ has clarified that the international legal personality of the EU necessarily implies that the EU institutions, including the ECJ itself, are bound by decisions of such bodies,[75] adopted in compliance with international, not EU, law. Apart from the fact that third countries would of course hardly accept being (in)directly bound by EU law in such a construction, also some crucial elements seem to be lacking from the side of the EU itself.

[70] See I Govaere, 'Interconnecting Legal Systems and the Autonomous EU Legal Order: a Balloon Dynamic' in I Govaere and S Garben (eds), *The Interface Between EU and International Law: Contemporary Reflections* (Oxford, Hart Publishing, 2019) 19.

[71] Case C-658/11 *Parliament v Council* (*Mauritius Agreement*) ECLI:EU:C:2014:2025. For a comment, see P Van Elsuwege, 'Securing the Institutional Balance in the Procedure for Concluding International Agreements: European Parliament v. Council (Pirate Transfer Agreement with Mauritius)' (2015) 52 *CML Rev* 1379.

[72] Case C-72/15 *PJSC Rosneft Oil Company v HM Treasury and Others* ECLI:EU:C:2017:236. See inter alia S Poli, 'The Common Foreign and Security Policy after Rosneft: Still Imperfect but Gradually Subject to the Rule of Law' (2017) 54(6) *CML Rev* 1799.

[73] For a discussion of this development, see also G Butler, 'The Coming to Age of the Court's Jurisdiction in the Common Foreign and Security Policy' (2017) 13(4) *EuConst* 673; I Govaere, 'To Give or to Grab: The Principle of Full, Crippled and Split Conferral of Powers Post-Lisbon' in M Cremona (ed), *Structural Principles in EU External Relations Law* (Oxford, Hart Publishing, 2018) 71, esp at 83–84; C Hillion and R Wessel, '"The Good, the Bad and the Ugly": three levels of judicial control over the CFSP' in S Blockmans and P Koutrakos (eds), *Research Handbook on the EU's Common Foreign and Security Policy* (Cheltenham, Edward Elgar, 2018) 65; P Van Elsuwege and F Gremmelprez, 'Protecting the rule of law in the EU legal order: a constitutional role for the Court of Justice' (2020) 16(1) *EuConst* 8.

[74] Case 181/73 *Haegeman v Belgian State* ECLI:EU:C:1974:41, para 5.

[75] *Opinion 1/76* (*Draft Agreement establishing a European laying-up fund for inland waterway vessels*) ECLI:EU:C:1977:63 and *Opinion 1/91* (*Draft EEA Agreement*) ECLI:EU:C:1991:490, paras 39–40.

The strongest arguments in favour of EU competence to enforce the rule of 'EU' law internally, instead of international or domestic law, are stringently linked to the necessity to maintain mutual trust between the national courts of the Member States as EU courts under Article 267 TFEU.[76] To the contrary, in *Opinion 1/17* the CJEU has forcefully underlined that in relation to third countries no such presumption of mutual trust in an independent and functioning judiciary may be taken to exist,[77] not even in relation to a functioning democracy such as Canada. If from an EU law perspective internally so much emphasis is placed on the link between mutual trust and respect for the rule of 'EU' law, then it would appear to be difficult, if not impossible, to externalise the rule of 'EU' law without the anchorage of mutual trust.

VI. CONSISTENCY AND INSTRUMENTS TO PROMOTE THE RULE OF LAW

The one consistent factor in the external action of the EU is that it openly seeks to 'leverage the broad range of policies and tools at its disposal to promote and defend human rights, democracy and the rule of law'.[78] This does not mean that the EU will always use the same instruments for all countries, or that it will always adopt a similar and standardised response, but rather that the various EU instruments may be put into effect depending on the specific circumstances and context. The question is whether the instruments are currently used consistently and systematically with regard to the above-mentioned factors which call for a conceptual differentiation between third countries in terms of functioning democracy and membership aspirations. A complicating factor is that the degree of leverage to be expected from EU trade policy, in particular, and the prospect of market access may play out very

[76] In an external relations setting, see in particular Case C-284/16 *Slowakische Republik v Achmea BV* ECLI:EU:C:2018:158, paras 34: 'EU law is thus based on the fundamental premiss that each Member State shares with all the other Member States, and recognises that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premiss implies and justifies the existence of mutual trust between the Member States that those values will be recognised, and therefore that the law of the EU that implements them will be respected. It is precisely in that context that the Member States are obliged, by reason inter alia of the principle of sincere cooperation set out in the first subparagraph of Article 4(3) TEU, to ensure in their respective territories the application of and respect for EU law, and to take for those purposes any appropriate measure, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the EU (Opinion 2/13 (Accession of the EU to the ECHR) of 18 December 2014, EU:C:2014:2454, paragraphs 168 and 173 and the case-law cited)'. In an internal setting, see in particular the so-called 'Independence of judges cases', see eg C-64/16, *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117, para 30: 'According to Article 2 TEU, the European Union is founded on values, such as the rule of law, which are common to the Member States in a society in which, inter alia, justice prevails. In that regard, it should be noted that mutual trust between the Member States and, in particular, their courts and tribunals is based on the fundamental premiss that Member States share a set of common values on which the European Union is founded, as stated in Article 2 TEU (see, to that effect, Opinion 2/13 (Accession of the European Union to the ECHR), of 18 December 2014, EU:C:2014:2454, paragraph 168)'.

[77] *Opinion 1/17* (*CETA*) ECLI:EU:C:2019:341, para 129: 'However, that principle of mutual trust, with respect to, inter alia, compliance with the right to an effective remedy before an independent tribunal, is not applicable in relations between the Union and a non-Member State'.

[78] EU Action Plan on Human Rights and Democracy 2020–2024, JOIN(2020) 5 final, 4, www.eeas.europa.eu/sites/default/files/eu_action_plan_on_human_rights_and_democracy_2020-2024.pdf.

differently depending on the counterpart and the counter leverage the latter can exert in terms of economic or geopolitical weight.

The EU toolbox to promote the rule of law consists of both legally binding instruments and soft power tools, possibly used in combination to increase the effectiveness in any given case. What is most crucial, however, is for the EU to lead by example, so as not to undermine the external credibility of the EU and to spark the criticism of double standards.

The legally binding instruments at the disposal of the EU to promote the rule of law in its relations with the wider world are manifold. The EU may leverage and apply longstanding unilateral measures such as the Generalised Scheme of Preferences Plus (GSP+)[79] but also the recently elaborated EU Global Human Rights Sanctions Regime 2020.[80] Since the mid-nineties, at the instigation of the European Parliament, most bilateral agreements concluded by the EU contain a human rights or conditionality clause,[81] which allows for a carrot-and-stick approach and should, if need be, also facilitate the adoption of sanctions and suspension of the agreement. But also content-wise the agreements can aim to promote EU values and in particular human rights and the rule of law. There may be provisions calling for either compliance with, or accession to, international agreements (external benchmarking) or approximation and direct alignment to EU values so as to secure market access (trade leveraging). Rule-of-law issues may also be addressed in Political Dialogue Chapters of agreements.[82]

Among the soft power instruments it is noteworthy to mention state-to-state initiatives such as not only classical diplomacy, dialogues with indication of priority areas (HR dialogue;[83] Policy dialogue) and Financial and Technical Financial Assistance, but also for instance engagement with civil society and people-to-people contacts.[84] Although in practice such soft instruments may help to overcome the deadlock otherwise posed by the reluctance or plain refusal of third countries to undertake obligations in relation to rule of law and human rights, it should be used with caution. The efficiency of those soft instruments in also overcoming sometimes difficult internal discussions on issues of competence cannot hide the fact that in so doing EU external action may be withdrawn from direct judicial and democratic control by the ECJ and European Parliament. It would be paradoxical to weaken the respect for the thick intra-EU rule-of-law concept by the EU institutions by sidestepping democratic checks and balances at EU level, in order to promote an often only 'thin' rule-of-law concept, if any, in those third countries concerned by such measures.

[79] Regulation (EU) No 978/2012 of the European Parliament and of the Council of 25 October 2012 applying a scheme of generalised tariff preferences [2012] OJ L303/1.

[80] Council Regulation (EU) 2020/1998 of 7 December 2020 concerning restrictive measures against serious human rights violations and abuses [2020] OJ L410/1. See also Chapter 14 by S Blockmans in this book.

[81] See eg the study made by Dr Lorand Bartels for the EP, 'The European Parliament's Role in Relation to Human Rights in Trade and Investment Agreements', February 2014, www.europarl.europa.eu/cmsdata/86031/Study.pdf.

[82] On the discussion on whether this necessarily implies CFSP is a legal basis and mixity, see Case C-180/20 *Commission v Council* (*Accord avec l'Arménie*) ECLI:EU:C:2021:658.

[83] See Council of the EU, 'EU guidelines on human rights dialogues with third countries_update', PESC 1591, 22 December 2008, data.consilium.europa.eu/doc/document/ST-16526-2008-INIT/en/pdf.

[84] See eg Commission and High Representative, 'EU-Russia relations: Push back, constrain and engage', JOIN(2021) 20 final of 16 June 2021.

VII. CONCLUSION

It is of paramount importance for the credibility of the EU worldwide to be seen to be consistent, for it to lead by example, and in particular not to be accused of double standards when it comes to the rule of law. Nonetheless, to a large extent abstraction was made in this chapter of the highly unwarranted effects of the currently defaulting intra-EU rule-of-law implementation and enforcement. Instead the focus was to elaborate a conceptual framework for the external promotion of the rule of law by the EU, specifically tailored to meet identified external challenges and stakes. Consistency in promoting the rule of law should not be measured against one single yardstick in terms of outcome or instrument. Instead, upholding and promoting the rule of law in relations with the wider world implies a deliberate and flexible process with policy choices based on conceptually distinctive factors. It was argued that even the very concept of the rule of law as used by the EU in different settings cannot be steadfast. Both the meaning and the reference frame of the rule of law are distinct when dealing with the EU and its Member States or with third countries. It was argued that the rule of law should be further conceptually differentiated between third countries, based on objective criteria in terms of functioning democracy and membership aspirations. All too often the external practice of the EU, based on 'principled pragmatism', is perceived as favouring narrow and pointed EU interest over the systematic promotion of EU values. The adoption of an underlying conceptual framework, allowing for objective grounds for differentiation and sufficient flexibility, could only enhance the coherence and credibility of the EU and strengthen its position as a global soft power.