



EU Human rights, democracy and rule of law: from concepts to practice

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Executive Summary

This report provides an analysis of the **EU's conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law**. It is the second Deliverable in Work Package 3 of the FRAME project.

The report understands the term 'concepts' to refer to the content of, or the ideas that underlie, the notions of human rights, democracy, and rule of law (Chapter I). Accordingly, the objective of this report is to analyse what content the EU assigns to human rights, democracy, and rule of law. As human constructs, concepts are dynamic and they have no clear boundaries. To complicate matters, the concepts of human rights, democracy and rule of law are famously elusive, which also certainly holds true for their application by the EU.

Chapter II describes one clearly discernible trend: the EU has increasingly moved away from 'thin'/formal to more 'thick'/substantive conceptions of human rights, the rule of law and democracy. Over the years, the EU has come to interpret these concepts in a fairly broad and holistic manner, which is conceptually underpinned by respect for human dignity. In external action, the EU's approach to these concepts is even broader. This report shows that the content of each concept consists of several components:

- Human rights are the rights humans universally enjoy, and that entail a universal legal obligation on the part of states to uphold them. Human rights are indivisible, in the sense that the EU recognises civil, political, social, economic and cultural rights. In the EU's conceptualisation, human rights are primarily individual but they can also have collective dimensions (e.g. when it comes to environmental protection).
- The rule of law is the proper method of governance, which includes both formal and substantive elements. Within the EU, the rule of law includes legality; legal certainty; prohibition of arbitrariness of the executive powers; independent judiciary; effective judicial review including respect for fundamental rights; and equality before the law.
- The concept of democracy determines who governs. There are several principles underlying the EU's vision of democracy: democratic equality; representative democracy; participatory democracy; transparency and deliberation.

There are several themes that cut across all three concepts. This report highlights two in particular: the interaction between universalism and cultural relativism, and the question of how to ensure that human rights, democracy and rule of law are conceptualised in inclusive ways.

Chapters III and IV turn to the question how the EU *operationalizes* these concepts. On the internal scene (Chapter III), the report provides a case study of Hungary. In spite of the fact that Hungary is an EU member state, it diverges from the values enshrined in Article 2 of TEU and the concept of democratic rule of law with human rights. Criticism by international and European organizations has not been followed by fundamental changes of the characteristics of the newly setup constitutional system. Chapter IV analyses the ways in which the EU operationalizes human rights, democracy and rule of law

in its external action through its human rights dialogues (HRDs), election observations missions (EOMs) and resolutions by the European Parliament (EP). It focused thereby on the case studies of Egypt and Pakistan. The key question of this analysis is whether the EU's external policy actors in practice follow the conceptual principles, which have been developed. The conclusion is that this is mixed. Especially as regards social and economic rights and the protection of 'vulnerable' groups, conceptualisation and operationalisation do not seem to correspond.

List of abbreviations

CJEU	Court of Justice of the European Union
COHOM	Council Working Group on Human Rights (in external relations)
CSO	Civil society organisation
DEG	Democracy Support and Election Coordination Group of the European Parliament
DG DEVCO	Directorate-General for Development and Cooperation, European Commission
DROI	Subcommittee on Human Rights (subcommittee of the Committee on Foreign Affairs of the European Parliament)
EC	European Commission
ECtHR	European Court of Human Rights
EEAS	European External Action Service
EIDHR	European Instrument for Democracy and Human Rights
ENPI	European Neighbourhood Policy Instrument
EP	European Parliament
EOM	Election Observation Mission (by the European Union)
HRD	Human Rights Dialogue
ICCPR	International Covenant on Civil and Political Rights
LGBTI	Lesbian, Gay, Bisexual, Transsexual and Intersex people
LTO	Long-term observer
MEP	Member of the European Parliament
NGO	Non-governmental organisation
PSC	Political and Security Committee (preparatory body for the Council of the EU)
STO	Short-term observer
TEU	Treaty on European Union
UN	United Nations

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I. Introduction

A. Introduction: aim and scope of this study

Human rights, democracy and rule of law are core values of the EU (Article 2 TEU¹). In its external action the EU is also guided by these values, which it moreover seeks to advance in the wider world (Article 21 TEU²). The EU views these three concepts as being in a harmonious relationship. This quote, from the Commission's 2014 Framework to strengthen the Rule of Law, is illustrative in this respect: 'respect for the rule of law is intrinsically linked to respect for democracy and for fundamental rights: there can be no democracy and respect for fundamental rights without respect for the rule of law and vice versa.'³ Contemporary scholars speak of the 'triangular relationship' between fundamental rights, democracy and rule of law in the EU,⁴ implying that the three notions function together like 'the three legs of a stool'⁵ ('democratic rule of law with fundamental rights').⁶

Although human rights, democracy and rule of law are prominently present in the EU treaties, this does not mean that it is clear how the EU conceptualises these values. No wonder: human rights, democracy and rule of law are famously contested, dynamic and elusive concepts. Cass Sunstein's notion of 'incompletely theorized agreements' is applicable here: the EU has agreed on these abstract values, without necessarily 'agreeing on the particular meaning of those abstractions'.⁷ Sunstein argues that incompletely theorized agreements are an important feature of successful constitutionalism, as these types of agreements allow for 'convergence despite disagreement, uncertainty, limits of time and

¹ Article 2 TEU proclaims that:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

² Article 21 TEU states that:

The 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.

³ Commission, 'Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final 5, 4.

⁴ Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU – Towards an EU Copenhagen Mechanism, Study for the European Parliament, PE 493.031 (2013) <[www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET\(2013\)493031_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2013/493031/IPOL-LIBE_ET(2013)493031_EN.pdf)> accessed 11 November 2014.

⁵ *ibid* 30.

⁶ *ibid* 30.

⁷ Cass R. Sunstein, 'Incompletely Theorized Agreements in Constitutional Law' (2007) Chicago Public Law and Legal Theory Working Paper No. 147, 2.

capacity, and heterogeneity.⁸ The same applies to the EU.⁹ The Union, meaning the 28 Member States and the EU institutions, has agreed on giving the EU a more 'normative'¹⁰ ethical direction by inserting human rights, democracy and rule of law prominently in the EU treaties, apparently without deeply theorizing these concepts. Also in carrying out its day-to-day human rights, democracy and rule of law policy work, the EU does not appear to pay much attention to questions of conceptualisation.

Yet there is virtue in endeavouring to create more conceptual clarity. For one, clarity on underlying conceptual questions could help the EU to form more coherent policy instruments across the different institutes (the Directorates General of the Commission, the EEAS, the EP and the Council). Another reason is that, in its interaction with third-countries and other regional or international organisations, the EU often encounters contestation when it seeks to promote human rights, democracy and rule of law. These contestations often flow from conceptual disagreement. A keener understanding of both its own and others' conceptualisations of human rights, democracy and rule of law, could help the EU to be more effective in its external action.

These are precisely the goals of the FRAME project.¹¹ The present study is the second report in Work Package 3 of the FRAME project. FRAME is a large-scale, international, and multi-disciplinary research project that investigates EU internal and external human rights policies. Within FRAME, the focus of Work Package 3 is on conceptual questions. The first aim of this Work Package is to elucidate what concepts of human rights, democracy and rule of law underlie EU internal and external policies. That is also the aim of the present study. In a later stage of the FRAME project, this Work Package will investigate how the EU's conceptualisation of human rights, democracy and rule of law compares to that of international and regional organisations and third countries (Deliverables 3.3, 3.4 and 3.5).

Deliverable 3.1 laid the foundation for the present study and the reports that are yet to come, by summarizing the state-of-the-art as regards the conceptualization of human rights, democracy, and the rule of law in recent academic literature.¹² Deliverable 3.1 also outlined key challenges with regard to the implementation of these ideals; notably the tension between universalism and cultural relativism and the position of vulnerable groups (see further infra Part I.C). Thus, this report continues where Deliverable 3.1 left off by turning the enquiry to the EU.

⁸ *ibid.*

⁹ The Treaty of Lisbon can be viewed as the EU's constitutional document. Stefan Griller, 'Is this a Constitution? Remarks on a Contested Concept' in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer 2008) 32.

¹⁰ Ian Manners, 'The Normative Ethics of the European Union' (2008) 84 (1) *International Affairs* 45.

¹¹ More information regarding the FRAME project is available at: <www.fp7-frame.eu/> accessed 11 November 2014.

¹² FRAME Deliverable 3.1 is available at: <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 11 November 2014 .

B. Methodology

1. What are concepts and conceptions?

The topic of this Deliverable – ‘Critical analysis of the EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law’ – requires further reflection on the meaning of ‘concepts’. What are questions of conceptualisation? What is a conceptual analysis? At least since the seminal work of H.L.A. Hart, *The Concept of Law*,¹³ conceptual analysis is a key method of analysis for lawyers.¹⁴ Yet there is a lot of uncertainty surrounding this term. The authors of this report also noticed that when interviewing EU officials. Many interviewees were confused by the term, and would then solve the issue by giving examples of EU human rights promotion.

According to the ‘classical’ theory, which was dominant for a large part of the 20th century, concepts can be described in terms of definitions.¹⁵ On this reading, a concept is composed of several definable elements, which together form the necessary and sufficient conditions for the concept’s use. The standard example is the concept of ‘bachelor’; which can then be defined as ‘unmarried’ and ‘male’. This definitional approach to concepts implies, Aaron Rappoport remarks, that concepts have sharp edges: either something is part of the concept or it is not.¹⁶ There is no room for ambiguity.

This classical approach to concepts has now been largely discarded. Instead of viewing concepts as definitional structures, they are now mostly viewed as abstractions. Rappoport notes: ‘Concepts may apply to concrete objects like ‘table,’ or more ethereal ones, like ‘justice,’ but in either case the concept itself is an abstraction; it is not equivalent to any of its specific members.’¹⁷ They are categories used by people to group entities together.¹⁸ These categories result from human thought.¹⁹ This is the so-called relativist account of concepts:

The relativist approach acknowledges that concepts are human constructs, that concepts come in and out of existence as human practices change, and that the boundaries of these categories

¹³ H.L.A. Hart, *The Concept of Law* (3rd edn, Oxford University Press 2012).

¹⁴ Aaron Rappoport, ‘Conceptual Analysis in Science and Law’ (2010) University of California, Hastings College of Law, From the Selected Works of Aaron Rappoport, 3.

<http://works.bepress.com/cgi/viewcontent.cgi?article=1000&context=aaron_rappoport> accessed 11 November 2014.

¹⁵ *ibid* 21; see also Eric Margolis and Stephen Laurence, ‘Concepts’, *The Stanford Encyclopedia of Philosophy* (Spring edn, 2014) <<http://plato.stanford.edu/entries/concepts/>> accessed 11 November 2014.

¹⁶ Aaron Rappoport, ‘Conceptual Analysis in Science and Law’ (2010) University of California, Hastings College of Law, From the Selected Works of Aaron Rappoport, 22.

¹⁷ *ibid* 9.

¹⁸ *ibid* 14.

¹⁹ This is the relativist approach to concepts. A realist approach would claim that concepts exist independently of human thought. ‘Under this theory, concepts are universal and unchanging, concepts have features that are necessarily and always true’; *ibid* 10.

can change as well. Indeed, to the extent that human beings are confused and uncertain in their use or understanding of concepts, then the concept itself will be vague or ambiguous. Concepts, in short, are contingent phenomena, subject to change as people's beliefs change.²⁰

Concepts are without clear boundaries. This applies to even such seemingly clear concepts as 'bachelor': is a man who is in a long-term relationship with children a bachelor? Is the Pope a bachelor?²¹ A fortiori, complex concepts like human rights, democracy and rule of law have no clear boundaries. But that does not mean that they are entirely vague. Hart suggested that concepts have a solid core and that they have vagueness at their periphery:²²

As with every other empirical notion, we can hope only to find a core of relatively well-settled common usage amid much that is fluctuating, optional, idiosyncratic, and vague; but the study of this core, as in other cases, may be enough to shed light on at least the darkest corners. A conceptual investigation is served by the delineation of the main trends of usage, not by the compilation of a dictionary.²³

It goes beyond the scope of this report to give a full account of the philosophical debate on what concepts are. For the purposes of this report, concepts are abstracts. A conceptual analysis seeks to give an account of the *content* of an abstract. Accordingly, conceptual questions are usually descriptive rather than normative questions.

Prominent (legal) philosophers, notably Rawls and Dworkin, draw a distinction between concepts and conceptions.²⁴ Concepts are abstracts. When there are different ways of explicating or interpreting a concept, there are different *conceptions* of the concept. This is tied to the notion of contested concepts which was already mentioned in the introduction: contested concepts are those concepts of which competing conceptions exist.²⁵ Human rights, democracy, and rule of law are prime examples of such contested concepts. Take for example the literature on the rule of law. There the concept/conception distinction is frequently used.²⁶ There is broad agreement that there are two main conceptions of the concept of the rule of law: a formal/'thin' one and a substantive/'thick' one (see further infra Chapter II.D).

²⁰ *ibid* 13.

²¹ *ibid* 22.

²² *ibid* 33-34.

²³ H. L. A. Hart and Tony Honore, *Causation in the Law* (2nd edn, Oxford University Press 1985) 25; quoted in Aaron Rappaport, 'Conceptual Analysis in Science and Law' (2010) University of California, Hastings College of Law, From the Selected Works of Aaron Rappaport, 34.

²⁴ J. Rawls, *A Theory of Justice: Revised Edition* (Cambridge: The Belknap Press of Harvard University Press, 1999), 9; R. Dworkin, Ronald. 1977. *Taking rights seriously* (Cambridge, MA: Harvard University Press 1977) 103, 134–136, 226–227 and R. Dworkin, *Law's Empire* (Cambridge, Mass.: Belknap of Harvard University Press 1986) 70-71.

²⁵ Seminal is W.B. Gallie, 'Essentially Contested Concepts' (1955) 56 *Proceedings of the Aristotelian Society* 167.

²⁶ See e.g. P. Craig, 'Formal and substantive conceptions of the rule of law: an analytical framework' (1997) *Public Law* 447.

The present report presents an applied conceptual analysis, because it examines the content that the EU assigns to human rights, democracy, and rule of law. In other words, the authors investigate what conceptions of human rights, democracy and rule of law the EU supports. The way we discover this, is by examining how the EU refers to these terms in its materials (see the next section for an overview of the kinds of materials we examined). This, then, is what this report will do: while recognizing that the concepts of human rights, democracy and rule of law have no clear boundaries and that they are dynamic, it will delineate the main trends in the EU's usage of human rights, democracy, and rule of law.

2. Sources and structure of this report

The report consists of two main parts: first is the EU's *conceptualisation* of human rights, democracy and rule of law (Part III). Then we discuss the *operationalisation* of these concepts in both EU internal and external policies (Parts IV and V). By operationalisation, we mean that we will look at instances in which the concepts of human rights, democracy and rule of law are the object of policy. Operationalisation moves us from the abstract level to the empirical level.²⁷

By differentiating between conceptualisation and operationalisation, it is not the authors' intention to reinforce the difference between the two. The authors recognise that concepts emerge and are formed by practice, and that practice is formed by concepts. In other words, concepts and practice inform each other; there is interaction between them. Separating the two might thus seem artificial, especially in an applied conceptual analysis like the present one. However, the report is structured in this manner to allow room for two levels of inquiry: first is a more general analysis of EU law, and then follows an analysis of how these concepts are applied in concrete case studies. The authors hope that, in this way, the report successfully blends general conceptual analysis with more particular questions of implementation.

This study draws on both desk-research and qualitative empirical research. The report primarily consists of a critical analysis of several types of documents, namely:

- EU legislation and case law;
- EU policy documents;
- academic legal literature;
- reports of the Fundamental Rights Agency (FRA); and
- reports by NGO and think-tanks.

To supplement the desk research, the authors have conducted 15 semi-structured interviews with in total 20 officials from the Commission (DG Justice; DG Devco; and DG ECHO), the EEAS, the EU

²⁷ In the social sciences, operationalisation is usually understood as as the translation of concepts into measurable factors/variables/observations. See e.g. Charles W. Mueller 'Conceptualization, Operationalization, and Measurement' in Michael S. Lewis-Beck & Alan Bryman & Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (SAGE 2004).

Fundamental Rights Agency, and a representative from an NGO. During these interviews, the authors asked a series of broad and open-ended questions like ‘what do you consider to be the main challenges for EU human rights’, ‘how do you see the relationship between human rights, democracy and rule of law’, and ‘do you take vulnerable groups specifically into account in your work’. The authors also asked more specific questions. The purpose of these interviews was two-fold. In the first place, the objective was to gain insight into how officials address conceptual questions in their daily work: in other words, how officials view the content of human rights, democracy and rule of law. The second objective was to obtain concrete items of information that are not otherwise readily publicly available.

The parts of this report which focus on the operationalisation of the three central concepts (Parts IV and V) are based on case studies. In the EU’s internal sphere, this report presents a case study on Hungary. Regarding the EU’s external action, this report presents two brief case studies on Egypt and Pakistan. The reasons for selecting these countries for specific study are set out in the relevant parts (see *infra* Chapter IV.A).

C. Key issues and challenges that cut across all three concepts

1. Interaction between universalism and cultural relativism

There are several themes that cut across all three concepts of human rights, democracy and rule of law. Deliverable 3.1 identified the tension between universalism and particularism as ‘the most fundamental’ of these themes: ‘This tension is probably most clearly articulated in human rights scholarship, but all three concepts struggle between their claim to universal validity as ideals on the one hand, and the recognition of cultural, historical, social and developmental difference in their practice on the other hand.’²⁸ The academic literature distinguishes between several ways in which human rights can be said to be universal.²⁹ In the first place there is formal universality, meaning universality of the subjects of human rights: simply put, this is the idea that all people are human rights beneficiaries.³⁰ Then there is what Donnelly has called ‘international legal universality’, which means that nearly all states have endorsed the UDHR and the two Covenants.³¹

The EU has made it clear that it conceptualises human rights, rule of law and democracy as *universal* values. The EU Strategic Framework and Action Plan on Human Rights and Democracy declares that

²⁸ FRAME Deliverable 3.1, 36 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 11 November 2014.

²⁹ E.g. Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 (2) Human Rights Quarterly 281.

³⁰ Yvonne Donders and Vincent Vleugel, ‘The Receptor Approach: A New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart’s Article in HRQ’ (2014) 36 Human Rights Quarterly, 655.

³¹ Jack Donnelly, ‘The Relative Universality of Human Rights’ (2007) 29 (2) Human Rights Quarterly 281, 288-289; FRAME Deliverable 3.1, 7 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 11 November 2014.

'human rights are universally applicable legal norms. Democracy is a universal aspiration.'³² As Deliverable 3.1 set out, critical human rights scholars and non-Western voices have castigated human rights as a Western invention, which the West uses to further its own interests.³³ Interviews with officials from the Commission and the EEAS confirmed that the EU is keenly aware of this image-problem. Indeed, the EU Special Representative for Human Rights, Mr Lambrinidis, has consistently addressed this issue as one of the most important challenges confronting the EU. He warns against 'dangerous attacks on Human Rights universality in the name of cultural relativism', and emphasises that 'human rights are the universal language of the powerless against the cultural relativism of the powerful'.³⁴ His point is that we will not hear victims of human rights abuses reason away what happened to them by an appeal to relativism: usually the ones who appeal to relativism are the perpetrators. Lambrinidis focuses attention on the people, the rights-holders of human rights.

At the risk of sounding trite, it should at the same time be pointed out that people (meaning rights-holders, not just the regimes in power) value their cultures. Like human rights, democracy and rule of law, however, culture is a highly contested concept. One influential definition of culture is the one used by UNESCO:³⁵ 'the set of distinctive spiritual, material, intellectual and emotional features of society or a social group,(...) [which] encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.'³⁶

The authors of the present report are therefore of the opinion that the debate should not be framed as an either/or: it is highly unhelpful to create a deadlock in the debate by positing a dichotomy between universalism and cultural relativism.³⁷ Such a dichotomy presents commentators, legislators and policy-makers with a forced choice between black and white: it does not present tools to deal with various

³² Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12) 1
<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf> accessed 11 November 2014.

³³ FRAME Deliverable 3.1, 7-8 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 11 November 2014; see e.g. Costas Douzinas, *The End of Human Rights* (Hart Publishing 2000); Ratna Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side', (2006) 28 *Sydney Law Review* 665; and Makau Mutua, 'Savages, Victims and Saviors: The Metaphor of Human Rights' (2001) 42 (1) *Harvard International Law Journal* 201.

³⁴ 'Human Rights is the universal language of the powerless – EU Special Rep. for Human Rights Lambrinidis' (*World Youth Alliance Blog*, 16 October 2014) <<http://worldyouthalliance.wordpress.com/2014/10/16/human-rights-is-the-universal-language-of-the-powerless-eu-special-rep-for-human-rights-lambrinidis/>> accessed 11 November 2014 .

³⁵ Yvonne Donders, 'Human Rights: Eye for Cultural Diversity' (2012) Inaugural Lecture at University of Amsterdam, 6 <http://www.oratiereeks.nl/upload/pdf/PDF-6449weboratie_Donders.pdf>, accessed 11 November 2014 .

³⁶ *Universal Declaration on Cultural Diversity*, proclaimed by the General Conference of UNESCO, Paris, 2 November 2001, preamble.

³⁷ See e.g. Yvonne Donders and Vincent Vleugel, 'The Receptor Approach: A New Human Rights Kid on the Block or Old Wine in New Bags? A Commentary on Professor Zwart's Article in HRQ' (2014) 36 *Human Rights Quarterly*, 655.

facets of grey. Such deadlock can be avoided if universalism is not equated with sameness or uniformity: there is room for diversity within universality.

Nowadays, most authors emphasise that universal human rights leave room for particular interpretations (dependent on culture and history).³⁸ The same applies to rule of law and democracy. An interviewee from the EEAS put this succinctly when he suggested that the proper place for cultural relativism is on the level of implementation, rather than on the level of conceptualisation.³⁹ Cultural and historical factors affect the way human rights are implemented. The questions are how much room there is for diversity in interpretation, which factors influence that room, and where the limits are to diversity. The case law of the European Court of Human Rights (ECtHR) provides a rich source of information on how to answer these questions. The ECtHR has developed the doctrine of the ‘margin of appreciation’, which is the space to manoeuvre that national authorities have in securing people their rights under the European Convention on Human Rights.⁴⁰

In the sphere of EU internal action, the interrelatedness of human rights, democracy and the rule of law becomes most obvious when there is a tension between European law protecting them and the national identity of member states. There are no international or European standards directly applicable to questions concerning the identity of states like, for example, the concept of the nation or ideological references used in a constitution. According to Article 4 paragraph 2 of the TEU, the EU shall respect the identity of member states: ‘The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.’ But the constitutional identity of member states might cause legitimate concerns for domestic human rights protection, the rule of law and democracy which are protected by the Article 2 of the TEU.⁴¹ This dilemma is further illustrated and explored in this report in the case study on Hungary (see infra Chapter III).

2. Positioning vulnerable groups

Another pressing concern that the EU faces in relation to all three concepts is how to ensure that they are conceptualised in such a manner as to include perspectives of ‘vulnerable groups’.⁴² Deliverable 3.1 summarized this issue as follows:

³⁸ FRAME Deliverable 3.1, 8 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 12 November 2014; see e.g., Eva Brems, *Human Rights: Universality and Diversity* (Kluwer Law International 2001), coining the term ‘inclusive universality’.

³⁹ Interview with EEAS official (Brussels, September 2014).

⁴⁰ See FRAME Deliverable 3.1 at 9 (which includes further references to literature on the margin of appreciation).

⁴¹ See e.g. François-Xavier Millet, *L’Union européenne et l’identité constitutionnelle des États membres* (L.G.D.J. 2013).

⁴² The term ‘vulnerable groups’ is itself problematic, as ‘vulnerability’ often carries a stigma with it. Vulnerability would suggest weakness, dependence or a lack of autonomy. This topic is further explored in FRAME Deliverable 12.1 <<http://www.eframeproject.eu/fileadmin/Deliverables/Deliverable12.1.pdf>> accessed 12 November 2014;

[W]ithin human rights scholarship a persistent question is how to construct human rights law in such a manner that it affords effective recognition and protection of the human rights of vulnerable groups of people. Indeed, human rights are often used as tools to challenge the power of dominant norms (as for example when gender-based norms are challenged) and dominant groups. In democracy theory a similar issue is at stake: how to ensure that vulnerable people, including people from minority groups, are heard in the democratic process? How to make sure that the democratic system does not succumb to powerful special interests? In regard to debates on the rule of law, the issue of vulnerable groups refers to several aspects; mainly in relation to the aims of the concept such as the provision of social order (how to ensure that members of vulnerable groups enjoy the same security of person as members of dominant groups) and equality before the law.⁴³

The position of vulnerable groups actually relates to the first concern of how to navigate the demands of both universality and particularity. Some might be tempted to perceive a focus on vulnerable groups to be antithetical to the idea of the universalism of human rights. Special attention for vulnerable groups, so runs the argument, would negate the idea of universalism: human rights are for everybody and not just for the disadvantaged. True, the UDHR and the International Covenants 'do not contain provisions that favour a particular group' (although they prohibit discrimination on certain grounds and protect motherhood and children).⁴⁴ But after this trio of founding documents was created, most within the human rights movement have come to realize that the inclusion of marginalized groups within the human rights universal does not occur automatically. Marginalized groups require particular protection. This is why specific treaties have subsequently proliferated, such as the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); the Convention on the Rights of Persons with Disabilities (CRPD); the Convention on the Elimination of all Forms of Racial Discrimination (CERD); and the Convention on the Rights of the Child (CRC).⁴⁵

This report is based on the premise that focusing on the inclusion of vulnerable groups does not affect the primacy of universality of human rights. On the contrary: a central tenet of this report is that it is in relation to particularly vulnerable groups – such as women, LGBTI's, or ethnic and religious minorities – that both States' and the EU's commitment to universalism becomes clear.⁴⁶ *Vulnerable groups are the litmus test for human rights, democracy and rule of law*: focusing on vulnerable groups uncovers

see also Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 (4) International Journal of Constitutional Law 1056.

⁴³ FRAME Deliverable 3.1, 36 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 12 November 2014.

⁴⁴ Elisabeth Reichert, *Understanding Human Rights: An Exercise Book* (SAGE 2006), 77.

⁴⁵ Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 (4) International Journal of Constitutional Law 1056, 1062.

⁴⁶ The same applies to regional and international human rights organizations. These will not, however, be discussed further in the present report. FRAME Deliverable 3.4 will examine the conception of human rights, rule of law and democracy in other regional organizations.

whether the commitment to these ideals only extends to the people in power, or whether they truly include everyone.

Achieving inclusive conceptualisation of human rights, democracy and rule of law, requires specific efforts. The construction of human rights, democracy and rule of law standards need to be investigated: 'neutral' human rights standards tend to reflect the experiences of dominant groups. For example, feminist scholars and activists have campaigned to include rape in the legal definition of 'torture'; disability rights scholars and activists have challenged the definition of disability, so that nowadays disability is not purely understood as a 'personal impairment' but as resulting from an interaction between persons with impairments and barriers in their surroundings; and LGBTI advocates recast the legal conception of 'marriage' to include same-sex marriage.

In fact, the issue of how to conceptualise human rights standards starts with the term 'vulnerable groups' itself. The terms 'vulnerable groups' or 'vulnerable persons' are used to denote groups that require special attention to ensure that they enjoy their human rights, because their perspectives are not automatically included in the actions and thoughts of dominant groups. They are the people whose rights are most at risk of being violated. The EU uses this term regularly both in internal and external action, as is evidenced by the Stockholm Programme and the Strategic Framework on Human Rights and Democracy,⁴⁷ as well as numerous more specific policy documents. FRAME Deliverable 12.1 contains an extensive discussion of EU human rights policies directed at vulnerable groups.⁴⁸ The European Court of Human Rights (ECtHR) also uses this term,⁴⁹ as do UN treaty bodies.⁵⁰ But while the term is widely used, it is highly problematical.⁵¹ Briefly put, 'vulnerability' often carries a stigma with it. Vulnerability evokes

⁴⁷ European Council, 'The Stockholm Programme— An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1, para 2.3.3.; Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12), 2-3.

⁴⁸ See also Edouard Dubout, 'La vulnérabilité saisie par la Cour de justice de l'Union européenne', in Laurence Burgorgue-Larsen (ed), *La vulnérabilité saisie par les juges en Europe* (Pedone 2014), 31-57.

⁴⁹ Samantha Besson, 'La vulnérabilité et la structure des droits de l'homme – L'exemple de la jurisprudence de la Cour européenne des droits de l'homme', in Laurence Burgorgue-Larsen (ed), *La Vulnérabilité saisie par les juges en Europe* (Pedone 2014), 59-85; Lourdes Peroni and Alexandra Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law' (2013) 11 (4) *International Journal of Constitutional Law* 1056; Alexandra Timmer, 'A Quiet Revolution: Vulnerability in the European Court of Human Rights', in Martha Fineman and Anna Grear (eds), *Vulnerability – Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013).

⁵⁰ Audrey R. Chapman & Benjamin Carbonetti, 'Human Rights Protections for Vulnerable and Disadvantaged Groups: The Contributions of the UN Committee on Economic, Social and Cultural Rights' (2011) 33 (3) *Human Rights Quarterly* 682.

⁵¹ There is a rich literature theorizing vulnerability in law. See e.g. Maksymilian Del Mar, 'Relational Jurisprudence: Vulnerability between Fact and Value' (2012) Queen Mary School of Law Legal Studies Research Paper 120/2012, 2 *Law and Method* 2012; Martha Fineman and Anna Grear (eds), *Vulnerability – Reflections on a New Ethical Foundation for Law and Politics* (Ashgate 2013); Anna Grear, 'Challenging Corporate 'Humanity': Legal Disembodiment, Embodiment and Human Rights' (2007) 7 (3) *Human Rights Law Review* 511; Anna Grear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave Macmillan 2010); Ann V. Murphy, 'Reality Check': Rethinking the Ethics of Vulnerability, in Renée J. Heberle and Victoria Grace (eds),

associations of weakness, dependence or a lack of autonomy. The language of vulnerable group easily suggests that it is abnormal to be 'vulnerable'; 'vulnerable groups' deviate from the norm. This topic is further explored in FRAME Deliverable 12.1. To counteract the risks of stigmatization and perceived deviance, Deliverable 12.1 therefore concluded that 'EU policy should focus less on individual characteristics, and more on the societal arrangements that construct these vulnerabilities.'⁵²

Officials from the EEAS indicated in interviews that they have debated the term 'vulnerable groups' in the context of EU external action.⁵³ Some officials strongly hold the view that the term should not be used at all, because it undermines the agency of people. Vulnerability rings of powerlessness, passivity, victimhood and hopelessness. But EEAS officials also indicated that they have a hard time finding an alternative. The alternative would be to simply list certain groups (like women, children and LGBTI people), but such a list can grow endless and is not very helpful in daily practice of EU officials (in Brussels or around the world). These officials from the EEAS indicated that there might be a need for an alternative overarching term, but that this has not been found yet.

Theorizing Sexual Violence (Routledge, 2009); Brian S. Turner, *Vulnerability and Human Rights* (The Pennsylvania State University Press 2006).

⁵² FRAME Deliverable 12.1, 172 <<http://www.eframeproject.eu/fileadmin/Deliverables/Deliverable12.1.pdf>> accessed 12 November 2014.

⁵³ Information provided by EEAS during interviews held in Brussels in September 2014.

II. EU Conceptualisation of human rights, rule of law and democracy

A. Introduction: a brief history

The history of EU fundamental rights protection reaches back to the beginning of the integration. Certain elements of rights protection could be found in the first treaties. The Treaty Establishing the European Economic Community (1957) contained for instance the prohibition of discrimination on the basis of sex in the field of employment (equal remuneration for equal work between men and women workers, Article 119), and the abolition of any discrimination based on nationality between workers (Article 48 (2)). To enhance the economic integration of democratic member states and create a competitive market it was necessary to guarantee the prohibition of discrimination between the workers to a certain extent. Increasing economic integration necessitated increasing political integration. However, the Treaty of Rome did not generally address human rights issues. De Búrca called this first period the ‘period of silence’ which lasted until 1969.⁵⁴

The foundation of a general fundamental rights protection first appeared in the jurisprudence of the Court of Justice (ECJ). The ECJ proclaimed as early as 1969 that fundamental rights form an integral part of the general principles of European community law and are protected by the Court. It also declared that Community institutions shall be committed to the respect of human rights, see cases *Stauder* (1969),⁵⁵ *Internationale Handelsgesellschaft* (1970)⁵⁶ and *Nold* (1973)⁵⁷. Due to increasing EC legislation the ECJ had to be increasingly active in the field of human rights to protect the primacy (as laid down in the 1964 decision *Costa v ENEL*)⁵⁸ of the community law.

The Treaty of Maastricht (TEU) in 1992 acknowledged that human rights are part of EU law. Article 6 of the TEU stipulated the need of the recognition of human rights in accordance with the European Convention of Human Rights and the common constitutional heritage of member states. Common constitutional traditions were most probably evoked in respect of civil and political rights, since common traditions are difficult to find in respect of social rights; in this field rather the political aspirations are common.⁵⁹

⁵⁴ Gráinne de Búrca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’ (2011) 4 American Journal of International Law 105, 649.

⁵⁵ Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

⁵⁶ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4.

⁵⁷ Case 44/79 *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission* [1974] ECR 491, para 13.

⁵⁸ Case 6/64, *Flaminio Costa v ENEL* [1964] ECR 585, CMLR 425, 593.

⁵⁹ Gábor Kardos, ‘Universal Justification for Social Rights’ (2009) 6 (1) Miskolc Journal of International Law, 18.

A significant step was taken in the TEU by creating European citizenship, since rights related to citizenship had an important effect on the independent human rights system of the EU and promoted the development of the imagined European polity.⁶⁰ The Treaty established the European Ombudsman Institution to investigate complaints of maladministration of EU institutions.

The Copenhagen European Council in 1993 defined the political criteria of membership: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.⁶¹

As a following step the Treaty of Amsterdam (1997) declared that ‘the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.’⁶² The Amsterdam treaty introduced the so called ‘nuclear option’: it became possible to suspend the rights of a member state if it violated human rights (Article 7 TEU-L). It stated that EU member states are responsible for ‘serious’ and ‘persistent’ violation of human rights. The Treaty of Amsterdam included the respect for human rights among accession criteria. Important steps were taken also concerning the expansion of antidiscrimination law.⁶³ The Amsterdam Treaty also prescribed the respect for social rights as they appear in the Social Charter of the Council of Europe and the Community Charter of Fundamental Social Rights of Workers – the latter was adopted in 1989 as a document without binding force, formulating principles and social policy objectives. The Treaty of Amsterdam declares as one of the objectives of the Common Foreign and Security Policy (CFSP)⁶⁴ ‘to develop and consolidate democracy and the rule of law, and respect for human rights’ (Article J.1. 1.)

After the Haider affair, the Treaty of Nice (2000) expanded the suspension of rights of the member states also to the situation of a serious risk of violation of human rights. The Charter of Fundamental Rights was solemnly proclaimed by the three organs of the EU (the European Parliament, the Council of Ministers and the European Commission) in Nice on 7 December 2000. It shows the direction of the development of the EU’s human rights system in that the Charter does not make a split between the generations of human rights (see *infra* Chapter II.B.2).

⁶⁰ An important antecedent of European citizenship as an institution was the direct election of the European Parliament since 1979.

⁶¹ ‘Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.’ European Council, ‘Conclusions of the Presidency’ [1993], para 7.A.iii, available at <http://europa.eu/rapid/press-release_DOC-93-3_en.htm>.

⁶² Treaty of Amsterdam amending the Treaty on European Union [1997] OJ C340/1.

⁶³ Due to the legislative delegation of Article 13 of the Amsterdam Treaty, two directives were adopted in 2000: the Employment Equality (2000/78) and the Racial Equality Directive (2000/43).

⁶⁴ Barbara Brandtner and Allan Rosas, ‘Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice’ (1998) 9 *European Journal of International Law* 468, 470-471.

Subsequently the Treaty of Lisbon was adopted in 2007 and entered into force in 2009. Article 6 (1) of TEU gives binding legal status to the Charter of Fundamental Rights – with this paragraph the Charter reached the legal status of the treaties. The Charter is a guarantee of human rights, meaning that the EU cannot violate the rights protected at the European level and the situation is the same with Member States when they implement community law. The TEU in Article 6 (2) expresses commitment to accede to the European Convention on Human Rights. The accession to the Convention derives from the common constitutional traditions and from the jurisprudence of ECtHR, and can ensure a communicative relationship between the two courts.

As De Búrca states, the Lisbon Treaty ‘marks the EU’s coming of age as a human rights actor’.⁶⁵ The internal human rights system of the EU serves as a bulwark against a populist backlash in the member states and helps to preserve the EU as a community of liberal democracies. Theoretically, the fact that the EU is founded on values such as human rights, democracy and the rule of law should oblige all public authorities in the EU, including authorities of member states.⁶⁶ Respect for the identity of member states, however, limits the effectiveness of the EU’s internal human rights system as the case study on Hungary will show (see *infra* Chapter III).

⁶⁵ Gráinne de Búrca, ‘The Road Not Taken: The EU as a Global Human Rights Actor’ (2011) 4 *American Journal of International Law* 105, 649 at 649.

⁶⁶ Armin von Bogdandy and others, ‘Ein Rettungsschirm für europäische Grundrechte – Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten’ (2012) 72 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 45, 67.

B. Human dignity underpins all three concepts

The moral basis for human rights is often sought in the concept of human dignity. Authors addressing human dignity regularly refer to Kant, whose concept of human dignity is based on the autonomy of the morally acting person. 'Humanity itself is a dignity; for a human being cannot be used merely as a means by any other human being (either by others or even by himself) but must always be used at the same time as an end.'⁶⁷ In Dworkin's view all human life is equally valuable and every person has an inalienable responsibility for identifying value in his or her life, thus the role of fundamental rights is to protect human dignity and to ensure equal treatment.⁶⁸ As pointed out in Deliverable 3.1, however, this is a complex concept that raises both philosophical and practical questions.⁶⁹

The 1948 Universal Declaration of Human Rights (UDHR) mentions in its preamble 'the inherent dignity and the equal and inalienable rights of all members of the human family.' It directly links the concept of dignity to the concept of equality. Both UN Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights) recognise 'the inherent dignity and the equal and inalienable rights' mentioned by the UDHR and state in their preamble that 'rights derive from the inherent dignity of the human person.' The ECHR of the Council of Europe does not mention human dignity explicitly but by referring in its preamble to the UDHR it invokes the concept. And, as McCrudden points out, it is included prominently in several later Council of Europe conventions, e.g. the Revised European Social Charter and the Convention on Human Rights and Biomedicine.⁷⁰

Furthermore, dignity is a central concept of several democratic constitutions which were adopted after 1945 and which turned against the dictatorial past. When the German Basic Law was adopted in 1949, the formulation of dignity implied a commitment never again to make it possible to breach dignity as the Nazi regime had done.⁷¹ Article 1 (1) of the German Basic Law states that: 'human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.' Dignity often had a similar role in post-communist constitutions. For instance, after the change of the regime the Hungarian Constitution of 1989 and the interpretation of the Constitutional Court put the right to human dignity at the top of the hierarchy of human rights and connected it to equality.⁷² Some constitutions make an

⁶⁷ Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor, ed, tr, Cambridge University Press 1996), 209.

⁶⁸ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press 1996).

⁶⁹ FRAME Deliverable 3.1, 10 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 12 November 2014

⁷⁰ Christopher Mc Crudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 (4) European Journal of International Law 655, 672.

⁷¹ Catherine Dupré, 'Dignity, Democracy, Civilisation' (2012) 33 (3) Liverpool Law Review 263, 275.

⁷² László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy – With Special Reference to Hungary' (2003) 18 (1) International Sociology 133.

explicit link between equality and dignity, e.g. the Italian,⁷³ or the Slovakian⁷⁴ constitutions. According to the common European understanding (presented by European and domestic documents) human dignity is primarily an individual human quality, 'equal concern and respect'⁷⁵ applies to everyone, independently from his or her idea about a good life. The implication of human dignity is that all human beings are equal. At present the concept of human dignity appears in the constitutions of more than twenty member states.⁷⁶

Drawing on the philosophical background, the international documents and the constitutional heritage of member states, fundamental rights appear in European law as abstract moral principles that protect individuals against the institutions of the EU and the member states applying EU law. In 1999 former German President Herzog linked the necessity of the recognition of human dignity in the EU to the need of the EU to bring itself closer to people and become a human-centred community.⁷⁷ The constitutional documents of the EU show that the 'rights as trumps'⁷⁸ against the institutions in defence of the individual can be best drawn by reference to human dignity protected by human rights, as discussed next.

Nowadays, the notion of human dignity is crucial both in the Treaties of the EU (e.g. Article 2 TEU) and in the Charter of Fundamental Rights, which is built on the common constitutional heritage of member states. Even before the Charter became binding, the Court of Justice confirmed that the right to human dignity is part of EU law.⁷⁹ According to the official explanation of the Charter: 'It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter.'⁸⁰ And: '(T)he dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights.'⁸¹ The explanation of the Charter also refers back to the 1948 UDHR. Subsequently, Title I of the Charter is entitled 'Dignity'. Under this title, the Charter deals with the following values and rights: human dignity (Article 1), right to life (Article 2), right to the integrity of the person (Article 3), prohibition of torture and inhuman or degrading treatment or punishment (Article 4), and prohibition of slavery and forced labour (Article 5).

EU policy documents also regularly refer to the importance of human dignity. For instance, the key instruments that set out the EU's priorities in the field of human rights – the 'Stockholm Programme'

⁷³ 'All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.' Article 3 of the Constitution of the Italian Republic.

⁷⁴ 'People are free and equal in dignity and their rights.' Article 12 (1) of the Constitution of the Slovak Republic.

⁷⁵ Ronald Dworkin, 'Justice and Rights' in Dworkin, R, *Taking Rights Seriously* (Harvard Univ. Press, 1977), 180.

⁷⁶ Jackie Jones, 'Human Dignity in the EU Charter of Fundamental Rights and its Interpretation Before the European Court of Justice' (2012) 33 (3) *Liverpool Law Review* 281, 298.

⁷⁷ Jürgen Schwarze, *EU-Kommentar* (3rd edn, Nomos 2012), 2616.

⁷⁸ Ronald Dworkin, 'Rights as Trumps' in Waldron Jeremy (ed), *Theories of Rights* (Oxford University Press 1977).

⁷⁹ Case C-377/98 *Netherlands v European Parliament and Council* [2001] ECR I-7079, paras. 70 – 77.

⁸⁰ *Explanations relating to the Charter of Fundamental Rights* [2007] OJ C 303/17.

⁸¹ *ibid.*

regarding internal action and the 'Strategic Framework on Human Rights and Democracy' in the external action sphere – both explicitly refer to the concept⁸²

Furthermore, the notion of human dignity also underpins the EU's conceptualisation of democracy and rule of law. As Dupré mentions: '(T)he legal concept of dignity connects human beings and democracy: by placing human beings at the centre, used as a judicial argument, it rebalances the power relationship between (state) power and people, including all those who are left at the fringes of legal and constitutional rules drafted with a 'normal' person in view and allows the reformulation of answers to new and difficult problems.'⁸³ EU documents reflect an interpretation of democracy that foregrounds persons of equal dignity in a manner described by Dupré. Consequently, the Charter defines European democracy as a regime where 'the individual is at the heart of its activities' (preamble). Dignity, equality and liberty are the values that inform European constitutionalism. The citizens of the EU are persons of equal dignity – in the conceptualisation of dignity an interpretation of liberal democracy is delineated.⁸⁴

The liberal model of constitutional democracy is based on human rights, legal procedures based on the rule of law and the equality of citizens before the law. The EU defines itself as a community of liberal democracies and simultaneously emphasises the protection of human rights. European integration is founded on 'the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights' (Article 2 TEU). From the diversity of constitutional traditions and the need of respect for this diversity no model other than a liberal model of European polity with respect for the equal dignity of individuals follows.

The EU, by focusing on human dignity, commits itself to a moral interpretation of European constitutional documents.⁸⁵ Such moral reading is in accordance with both international and European law. It is in the spirit of this moral interpretation that the EU in the framework of a 'thick' understanding links the concepts of democracy, the rule of law and human rights. According to these concepts free and equal citizens establish democracy with respect for equal dignity. This vision is very similar to Dworkin's concept about partnership democracy: 'democracy is government by the people as a whole acting as partner in a joint venture of self-government.'⁸⁶ Shared values can make substantial political argument

⁸² European Council, 'The Stockholm Programme— An Open and Secure Europe Serving and Protecting Citizens' [2010] OJ C115/1; Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12).

⁸³ Catherine Dupré, 'Dignity, Democracy, Civilisation' (2012) 33 (3) *Liverpool Law Review* 263, 278.

⁸⁴ *ibid.*

⁸⁵ 'Most contemporary constitutions declare individual rights against the government in very broad and abstract language ... The moral reading proposes that we all — judges, lawyers, citizens — interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.' Ronald Dworkin, 'The Moral Reading of the Constitution' (*The New York Review of Books* 21 March 1996) <www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/> accessed 12 November 2014.

⁸⁶ Ronald Dworkin, 'What Democracy Is?' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation – On Hungary's 2011 Fundamental Law* (Central European University Press 2012), 26.

possible and help create mutual respect between the members of the political community, and can strengthen trust in democracy⁸⁷

To sum up: in this study the three concepts are interpreted with regard to the common values enshrined in EU documents, such as equality and human dignity. Starting from the triangular relationship between the concepts, the study analyses a substantive concept of democracy and rule of law. Human rights protection centres around equal dignity, which, however, because of the triangular relationship also influences the notions of democracy and the rule of law: dignity placing the individuals in the centre of the democratic political system. The rule of law also implies compatibility with human rights e.g. equal treatment before the courts.

⁸⁷ Ronald Dworkin, *Is Democracy Possible Here? – Principles for a New Political Debate* (Princeton University Press 2006).

C. Conceptualisation of human rights

1. Introduction

This part examines how the EU legally conceptualises human rights. EU law and case law are the primary sources of information on this topic. The Charter, in particular, is key to understanding how the EU conceives of human rights, as it is the Union's primary legal instrument in this field. Thus, the Charter will be discussed further below.

The publications of the FRA provide additional insight in the EU's conception of human rights. As the name of this agency refers to 'fundamental rights', it needs to be clarified how, in FRA's practice, fundamental rights relate to human rights. The name was intended by the Commission to signify that the (then non-binding) Charter of Fundamental Rights (CFR) 'should be a point of reference for the mandate' of the Agency.⁸⁸ In spite of this, in the founding regulation of the FRA, the Charter was only mentioned in the non-operational part, and the operational part referred to (ex-)Art. 6 (2) TEU, which in turn mentioned ECHR and general principles of EU law as values to be observed. Reform suggestions were voiced in the literature to the effect that the FRA ought to be better/more clearly authorized to function as a 'full Charter body', meaning an institution which first of all monitors EU law with regard to its compliance with the CFR.⁸⁹

In any case, the name does not mean that the FRA ought not or does not conceptualise rights as human rights. In fact, the Agency positions Charter-rights within the context of European and international human rights law, and regularly cites both Charter and Convention articles in its opinions.⁹⁰ The FRA relies also on international and European human rights jurisprudence,⁹¹ and, to the extent there is, the jurisprudence of the CJEU.⁹² In accordance with its generally wide understanding of rights (including

⁸⁸ European Commission's proposal for Council regulation establishing a European Union Agency for Fundamental Rights, COM(2005) 280 final, 4 as cited by Toggenburg (2013) 6.

⁸⁹ Gabriel N. Toggenburg, *Fundamental Rights and the European Union: how does and how should the EU Agency for Fundamental Rights relate to the EU Charter of Fundamental Rights?* EUI Working Papers, 2013/3.

<http://cadmus.eui.eu/bitstream/handle/1814/28658/LAW_2013_13_Toggenburg.pdf?sequence=1>; Markus Thiel, 'European Civil Society and the EU Fundamental Rights Agency: Creating Legitimacy through Civil Society Inclusion?', (2014) *Journal of European Integration*, 36:5, 435-451.

⁹⁰ E.g. FRA Opinion on the proposal for a Passenger Name Record (PNR) Directive, 15/06/2011

<http://fra.europa.eu/sites/default/files/fra_uploads/1491-FRA-opinion-PassengerNR_EN.pdf> accessed 20 December 2014.

⁹¹ I.e. that of the European Court of Human Rights or the UN Human Rights Committee. E.g.

http://fra.europa.eu/sites/default/files/fra_uploads/959-FRA_Opinions_Bodyscanners.pdf.

⁹² E.g. <http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-EIO-Directive-15022011.pdf> at 7, citing CJEU, joined cases T-125/03 and T-253/03, *Akzo Nobel Chemicals Ltd and Akros* accessed 20 December 2014. *Chemicals Ltd v. Commission*, or <http://fra.europa.eu/sites/default/files/fra_uploads/1490-FRA-Opinion-

ratione personae), the FRA suggested to broaden the focus from citizens' rights to 'individual rights/rights of people living in Europe' in the comments on the Presidency Draft Stockholm Programme.⁹³

As to the 'theory' of fundamental rights, the FRA conceptualises rights as both a 'shield' and a 'sword':

Fundamental rights should not be reduced to a function of imposing limits on legislation and public administration. Fundamental rights have a dual role: they do not act just as a shield; they are also an enabling 'sword' that can point towards the design, adoption and implementation of certain initiatives, thereby fencing potential violations'⁹⁴

This means that not only non-interference, but often active, facilitative steps are required by the state or the EU for a full guarantee of fundamental/human rights.

This part will begin by discussing the role of the Charter in conceptualising human rights. Then we discuss individual rights (both civil-political rights and social-economic rights), and then collective rights in particular in the context of environmental protection. After these sections, the enquiry will turn to the EU's conceptualisation of human rights in its external action.

2. Human rights and the EU Charter

The provisions of the Charter tell much about the EU's conceptualisation of human rights. These provisions show that in some ways the EU human rights protection system differs significantly from the universal and regional systems.

In the first place, the Charter does not make a distinction between the three so-called generations of human rights.⁹⁵ Consequently, the Charter is not divided along the familiar categorization of civil and political rights, socio-economic and cultural rights, and group-oriented rights. Rather, the Charter presents a holistic picture of rights.⁹⁶ It includes all types of human rights, dividing them under the

EIO-Directive-15022011.pdf> at 10 note 57 citing CJEU accessed 20 December 2014, joined cases C-92 and 93/09, Volker und Markus Schecke GbR and Hartmut Eifert v. Land Hessen.

⁹³ FRA Comments on the Presidency Draft Stockholm Programme (03.11.2009)

<http://fra.europa.eu/sites/default/files/fra_uploads/621-OP-Stockholm-Prog-Presidency-Draft_en.pdf> accessed 20 December 2014.

⁹⁴ FRA Annual Report. Fundamental Rights. Challenges and Achievements in 2013,

<http://fra.europa.eu/sites/default/files/fra-2014-annual-report-2013_en.pdf> accessed 20 December 2014 at 12, citing de Schutter, O. (n.d.), The new architecture of fundamental rights policy in the EU,

<http://cms.horus.be/files/99907/MediaArchive/Presentation_110215_ODeSchutter_2FRAND.pdf> accessed 20 December 2014.

⁹⁵ Karel Vasak, 'Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights' (1977) 30 (11) UNESCO Courier 28.

⁹⁶ This is supported in EU policy documents such as the EU Strategic Framework on Human Rights and Democracy. For example, the Strategic Frameworks states that: 'The EU reaffirms its commitment to the promotion and protection of all human rights, whether civil and political, or economic, social and cultural.' Council of the

following six titles: dignity, freedoms, equality, solidarity, citizens' rights and justice. Of the general universal human rights documents it is the UDHR of 1948 that displays a similar solution. The UN later codified the first and second generation of rights in separate Covenants. A similar solution was chosen by the Council of Europe when separately adopting the European Convention on Human Rights and the Social Charter. Moreover, the Charter does not only merge civil-political rights and socio-economic and cultural rights, it also chooses a diverging path by enshrining rights belonging to the third generation, e.g. the right to a healthy environment. Apart from the African charter of human rights there is no other international treaty that chose a similar solution.⁹⁷

De Witte writes that, by transcending the traditional dichotomy between civil and political rights on the one hand and social and economic rights on the other hand, the Charter:

Represents the endorsement of two core ideas that have slowly matured over the years in national constitutional law and in international human rights law, namely: (a) the idea that all rights require some measure of positive action on the part of the state, so that it is no longer correct to make a sharp distinction between rights implying a negative duty of abstention and rights implying a positive duty to act; and (b) the idea that rights that are not self-executing (to use the international law term) or are not 'subjective rights' (to use a term familiar to continental constitutional lawyers) can nevertheless have important legal and political effects.⁹⁸

Second and third generation rights are mainly included in title IV named solidarity. This title also nominates social rights, for instance fair and just working conditions (article 31), health care (article 35), social security and social assistance (article 34) and it also includes the so called right of the third generation: environmental protection and the principle of sustainable development (article 37). In fact, well before the adoption of the Charter, when laying down the basis of the social welfare system the ECJ also referred in its case law to the principle of social solidarity.⁹⁹

Another peculiarity of the Charter is that it responds to new human rights issues that have arisen as a result of technological development, for example, it contains guarantees on bioethics (Article 3) and provisions on data protection (Article 8). The Charter is of course a relatively new document. The Commission has emphasised that 'With the Charter, the Union has equipped itself with an array of

European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12), ch IV/12

<http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf>. accessed 20 December 2014.

⁹⁷ African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986.

⁹⁸ Bruno de Witte, 'The Trajectory of Fundamental Social Rights in the European Union' in Burca, de G and Witte, de B (eds), *Social Rights in Europe* (Oxford University Press 2005) 153, 159.

⁹⁹ Alexander Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) University of Iowa Legal Studies Research Paper No. 07-13 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=987346> accessed 12 November 2014.

fundamental rights, updated to keep abreast of changes in society and scientific and technological developments’.¹⁰⁰

Chapter VII of the Charter (Articles 51-54) lays down its general provisions. Articles 51 and 52 delineate the scope of the Charter. The provisions of the Charter apply to EU institutions but not to member states unless they implement EU law. To assuage fear on the part of Member States, a provision was included stating that extending the power of the EU is not possible by way of referring only to the provisions of the Charter. ‘This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.’ 51(2). Next, Article 52 makes a distinction between rights and principles. Unlike rights, the application of principles requires legislative acts. Article 52(5) of the Charter explains the distinction between rights and principles in the following way: ‘The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the EU, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.’ This distinction has been termed the ‘internal fault line within the text of the Charter’.¹⁰¹ The Charter makes this distinction between principles and rights because of the Members States’ diverging views on social rights. The United Kingdom, in particular, did not want to accept the label ‘economic and social rights’, and preferred the word ‘principles’ instead.¹⁰²

This brings us to the contested nature of the Charter. Two member states, Poland and the United Kingdom, wanted to step back from the binding provisions of the Charter. According to Protocol No. 30 to the Lisbon Treaty, the Charter does not give national or European Courts any new powers to strike down or reinterpret UK or Polish law including social law or labour law legislation. Nevertheless the possibility of opting out as formulated in the protocol was not successful either according to legal literature¹⁰³ or according to EU institutions. The European Parliament pointed out that Protocol No 30 ‘is not an ‘opt-out’, it does not amend the Charter and it does not alter the legal position which would prevail if it were not to exist. The only effect it has is to create legal uncertainty not only in Poland and the United Kingdom but also in other Member States.’¹⁰⁴ Thus, the Parliament considered the Protocol

¹⁰⁰ Commission, ‘Strategy for the Effective Implementation of the Charter of Fundamental Rights by the European Union’ (Communication), COM (2010) 573 final, 3.

¹⁰¹ Bruno de Witte, ‘The Trajectory of Fundamental Social Rights in the European Union’ in Burca, de G and Witte, de B (eds), *Social Rights in Europe* (Oxford University Press 2005) 153, 160.

¹⁰² Catherine Barnard, ‘The ‘Opt-Out’ for the UK and Poland from the Charter of Fundamental Rights: Triumph of Rhetoric over Reality?’ in Stefan Griller and Jacques Ziller (eds), *The Lisbon Treaty – EU Constitutionalism without a Constitutional Treaty?* (Springer 2008), 275.

¹⁰³ See e.g. *ibid.*

¹⁰⁴ European Parliament resolution of 22 May 2013 on the draft protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic (Article 48(3) of the Treaty on European Union’ (00091/2011 – C7-0385/2011 – 2011/0817(NLE)), para J

<<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2013-0209+0+DOC+XML+V0//EN>> accessed 13 November 2014.

as a factor giving rise to legal uncertainty and thereby endangering the rule of law.¹⁰⁵ On the other hand, the Court of Justice also stressed that if a national regulation is incompatible with an EU Directive, the related ‘article of the Charter cannot be invoked in a dispute between individuals in order to disapply that national provision’.¹⁰⁶ Later, the Court of Justice made a highly important decision, stating that:

‘European Union law precludes a judicial practice which makes the obligation for a national court to disapply any provision contrary to a fundamental right guaranteed by the Charter of Fundamental Rights of the European Union conditional upon that infringement being clear from the text of the Charter or the case-law relating to it, since it withholds from the national court the power to assess fully, with, as the case may be, the cooperation of the Court of Justice of the European Union, whether that provision is compatible with the Charter’.¹⁰⁷

According to this case (*Åkerberg Fransson*) and the *Melloni* case¹⁰⁸ the fundamental rights guaranteed in European Law are applicable in all situations that fall under the scope of European Union law and even in situations where ‘the links to the Union law are indirect and partial’.¹⁰⁹ The judgments try to establish the supremacy of the Charter of Fundamental Rights over domestic law.¹¹⁰

3. Individual rights: civil-political and socio-economic

As was already mentioned, the Charter contains both civil-political and socio-economic individual rights. The Charter does not support the old suggestion that rights can be positive or negative. Nor does it support the viewpoint that civil and political rights are negative rights. Article 48 (2) of the Charter, for example, states that ‘respect for the rights of the defence of anyone who has been charged shall be guaranteed.’ European documents support the viewpoint that rights themselves cannot, but only rights-related obligations can be positive or negative.¹¹¹

Notwithstanding the rhetoric of indivisibility, social rights are deeply contested in the EU, as is shown by the United Kingdom’s opposition to applying the term ‘rights’. De Búrca has remarked that: ‘it seems that the very idea of social and economic rights raises deeply redistributive questions in such a direct

¹⁰⁵ According to the EU documents the principle of rule of law also includes legal certainty. See, e.g. Commission, ‘A new EU Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158 final, 5.

¹⁰⁶ Case C-176/12 *Association de médiation sociale v Union locale des syndicats CGT, Hichem Laboubi, Union départementale CGT des Bouches-du-Rhône, Confédération générale du travail (CGT)*.

¹⁰⁷ Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*.

¹⁰⁸ Case C-399/11 *Stefano Melloni v Ministerio Fiscal*.

¹⁰⁹ Nóra Chronowski, ‘Enhancing the Scope of the Charter of Fundamental Rights?’ (2014) 20 (1) JURA 13, 16.

¹¹⁰ Nikos Lavranos, ‘The ECJ’s Judgments in Melloni and Åkerberg Fransson: Une Ménage à Trois Difficulté’ (2013) 4 European Law Reporter 133.

¹¹¹ See to this: Mátyás Bódig *Doctrinal Innovation and State Obligations: The Patterns of Doctrinal Development in the Jurisprudence of the UN Committee on Economic, Social and Cultural Rights* (2014) /manuscript/; Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008).

and immediate way that it gives rise to sharper political and ideological opposition.’¹¹² More than civil and political rights, social and economic rights are sometimes perceived to be in tension with democratic values. When social rights are adjudicated, judges are sometimes accused of taking the place of democratically legitimated political decision makers.¹¹³ In brief, the argument is that social policy is a matter for the political process not for the courts.

De Witte has argued that ‘the legal regime of social rights remains quite distinctive’ in the EU.¹¹⁴ As was mentioned above, the crucial fault line in the Charter is the one between ‘rights’ and ‘principles’. Principles are only limitedly ‘judicially cognisable’ (Article 52(5) Charter). To discover whether a social right from the Charter is in fact a ‘fully justiciable’ right or a ‘marginally justiciable’ principle, requires a case-by-case analysis.¹¹⁵ It is clearly a misconception to conceive of all social rights as principles: there are social rights whose individual-right nature was recognised by the EU long before the adoption of the Charter. In the *Defrenne* case, for example, the ECJ held that the principle of equal pay for equal work as laid down in the founding treaty provides a subjective right to equal wages.¹¹⁶ Indeed, the Charter itself uses the form of ‘everyone has a right to’ for some social rights. The provision of Article 30 on protection in the event of unjustified dismissal, for instance, establishes a right: ‘Every worker has the right to protection against unjustified dismissal, in accordance with Union law and national laws and practices.’ The provision of Article 15 is similarly formulated: ‘Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.’ It was necessary to create a system of social rights protection to balance the economic freedoms (the freedom of movement of goods, capital, services and people), which was provided to enhance integration.

4. Collective rights and environmental protection

The old concept of binding third generation rights in international law undoubtedly had an influence on the Charter. Thus, the preamble of the Charter states that: ‘Enjoyment of these rights entails responsibilities and duties with regard to other persons, to the human community and to future generations.’ Article 37, entitled ‘environmental protection’ provides that: ‘a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development’. Ensuring this is the joint responsibility of those organs in the Union vested with legislative, judicial and executive powers. The notions of intergenerational equality and sustainable development also recur in the Treaty

¹¹² Gráinne de Búrca, ‘The Future of Social Rights Protection in Europe’ in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 4.

¹¹³ Cf, e.g. Tamara Hervey, ‘Health Equality, Solidarity and Human Rights in European Union Law’ in Alessandra Silveira, Mariana Canotilho and Pedro Madeira Froufe (eds), *Citizenship and Solidarity in the European Union – From the Charter of Fundamental Rights to the Crisis, the State of the Art* (P.I.E. Peter Lang 2013) 355.

¹¹⁴ Bruno De Witte ‘The Trajectory of Fundamental Social Rights in the European Union’ in Gráinne de Búrca and Bruno de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 153.

¹¹⁵ *ibid* 161.

¹¹⁶ Case 149/77 *Defrenne v Sabena* [1978] ECR 1 -365.

on European Union and in the Treaty on the Functioning of the European Union. For instance, Article 11 of the TFEU declares that 'Environmental protection requirements must be integrated into the definition and implementation of the Union's policies and activities, in particular with a view to promoting sustainable development.'¹¹⁷ Thus, European Union primary law documents have a preference for the term 'sustainable development', as is also evidenced by the wording of Article 37 of the Charter. Because different approaches and conceptualisations exist of third-generation rights, in the following both international law and domestic regulations will be discussed.

The Explanation of the Charter mentions that the Charter 'also draws on the provisions of some national constitutions.'¹¹⁸ Though member state legislation take on different forms and its substance is varied, the desire for protecting the environment appears in the constitution of numerous European Union member states.¹¹⁹ The various methods of regulation differ in terms of whether they formulate a right that all citizens can lay a claim to, as the Spanish, Portuguese and Belgian constitutions do, or a requirement incumbent on the state instead. The latter approach was chosen by the Austrian Constitution and the German Basic Law, for example.¹²⁰ There are also instances when it is both an individual right and a state obligation, which is the route taken by the Latvian Constitution.

Occasionally the notion of sustainable development¹²¹ also shows up in constitutions. Pursuant to Article 2 (3) of the Swedish Constitution, for example, public institutions must support sustainable development, which creates a 'good' environment for present and future generations. Furthermore, this provision declares the realisation of environmental protection objectives to be a state obligation. Article Q paragraph (1) of the Hungarian Fundamental Law also mentions this notion with the following wording: 'in order to create and maintain peace and security, and to achieve the sustainable development of humanity, Hungary shall strive for cooperation with all the peoples and countries of the world.'

The concept behind solidarity rights/third generation of rights is undoubtedly interesting, but the difficulty is how to square the vision of third generations of human rights with our rights-based view. The problem with this approach is that third generation rights cannot be regarded as anything but an

¹¹⁷ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community [2007] OJ C306/1.

¹¹⁸ Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/02.

¹¹⁹ E. Orth, 'Umweltschutz in den Verfassungen der EU-Mitgliedstaaten' (2007) 4 *Natur und Recht* 229, at 229.

¹²⁰ *ibid.*

¹²¹ The Brundtland Commission's renowned 1987 report has defined the concept as saying that it satisfies the needs of the current generation without endangering the like needs of future generations. Hence the concept entails the desire for intergenerational equality. This 'equality' is undoubtedly a creation of international law from whence it found its way into the national legal systems. See Edith Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers, 1989).

element of utopia grounded in common human values.¹²² And in this way, uncertain - though appealing - elements of utopia of international law have seeped into European and domestic legal systems. Ultimately, the inclusion of environmental protection in constitutions and European international human rights documents implies a value judgment on the importance of this issue. It generally does not provide a new individual right, but it does enrich the substance of fundamental rights, including individual rights.

5. Conceptualizing human rights in external action

Without doubt, *universality* is the key to the EU's conceptualisation of human rights in its external actions. The EU Strategic Framework and Action Plan on Human Rights and Democracy, which is highly informative as well as the most authoritative document when it comes to conceptualizing human rights, emphasises that: 'Human rights are universally applicable legal norms.'¹²³

More specifically, the EU emphasises what has been termed 'international legal universality.'¹²⁴ This impression was confirmed during interviews with EEAS officials – especially those whose work relates to Asia. They emphasised the importance of the UDHR in their work, as the UDHR provides common ground and provides a refutation of the notion that human rights are just a Western invention.¹²⁵ The Strategic Framework also refers to universality in the sense of international legal universality.¹²⁶

What in the literature has been termed 'formal universality' is less strongly accentuated.¹²⁷ Formal universality entails that *all* humans have human rights (without having to earn them or being able to lose them). In other words, this refers to the universality in terms of rights-holders. The Strategic Framework does emphasise that the EU will 'fight discrimination in all its forms', but it does so under the section called 'Implementing EU priorities on human rights' rather than the section entitled 'promoting the universality of human rights'. Moreover, the Strategic Framework does not particularly emphasise that all humans – also people belonging to unpopular groups – have human rights. Accordingly, the Strategic Framework tends to emphasise universality more on the side of the duty-bearers (the States) than on the side of the rights-holders.

¹²² On occasion specific utopian ideas were formulated in the context of these rights. Such are for instance the concepts relating to 'ecotopia', that is most ideal societies living in harmony with the environment. For the emergence of the designation see Ernest Callenbach, *Ecotopia* (Rotbuch 1984).

¹²³ Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12) 1.

¹²⁴ See *supra* footnote 31.

¹²⁵ Interviews with 2 EEAS officials (Brussels, September 2014).

¹²⁶ Under the section entitled 'promoting the universality of human rights', the Strategic Framework states: 'The EU calls on all States to implement the provisions of the Universal Declaration of Human Rights and to ratify and implement the key international human rights treaties, including core labour rights conventions, as well as regional human rights instruments. The EU will speak out against any attempt to undermine respect for universality of human rights.' Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12) 1-2.

¹²⁷ See *supra* footnote 30.

Indivisibility is the other key-word to the EU's conceptualisation of human rights in its external actions, at least theoretically. In line with the Charter, which – as was just discussed – does not make a distinction between the generation of rights, the EU consistently emphasises the need to promote the indivisibility of rights. The Strategic Framework declares that 'the EU reaffirms its commitment to the promotion and protection of all human rights, whether civil and political, or economic, social and cultural'.¹²⁸ In practice however, civil and political rights have been prioritised over economic, social and cultural rights. This is reflected in the Action Plan attached to the Strategic Framework, where these rights have not been included within the EU's priorities in Section V of the Action Plan ('Implementing EU priorities on human rights') but in Section III ('Pursuing coherent policy objectives').¹²⁹ During interviews, officials from the COHOM indicated that they are well aware of this disjuncture between the theory and the practice of the indivisibility of rights and that they were thinking about ways in which this can be addressed.¹³⁰ Such deficiencies, however, appear not only on the supranational level but constitutional democracies themselves grapple with similar problems in the field of e.g. ensuring economic, social and cultural rights.

6. Conclusion

To sum up, just like the UDHR, the Charter does not differentiate between generations of rights. Rather, it makes a distinction between rights and principles, and divides them into groups according to the extent of their institutionalisation. When the Charter declares demands related to the environment, the use of not clearly delineated concepts makes the interpretation of content difficult.

The indivisibility of both civil and political rights and economic, social and cultural rights is recognised within the EU and in external action. Both internally and externally, however, it is extremely difficult to bring this commitment into practice.

¹²⁸ Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy', Luxembourg, 25 June 2012 (11855/12) 1.

¹²⁹ See also FRAME Deliverable 5.1 (which discusses the same disconnect in the EU's activities at the UN; and Muguruza, Cristina Churrua, Isa, Felipe Gómez, San José, Daniel García, Sánchez, Pablo Antonio Fernández, Carrasco, Carmen Márquez, Nogal, Ester Muñoz, Casas, María Nagore) FRAME Deliverable 12.1, 19.

¹³⁰ Interviews with COHOM officials (Brussels, September 2014).

D. Conceptualisation of rule of law

1. Introduction

As was discussed in Deliverable 3.1, there is agreement in the academic literature that there are ‘thin’/formal and ‘thick’/substantive conceptions of the rule of law.¹³¹ In the recent ground-breaking communication from the Commission to the Parliament and the Council, entitled *A new EU Framework to strengthen the Rule of Law* (which will be further discussed below), the EU itself acknowledges this distinction.¹³² The EU has explicitly opted to include both substantive and formal elements in the concept, as will be shown below. Generally speaking, two core functions of rule of law are identified: to protect people from the government (this is the traditional take on the rule of law) and to protect people from each other (this is a more recent addition).¹³³ These two functions of the rule of law are undoubtedly present in European law as well.¹³⁴ Due to its peculiarities (e.g. direct effect,¹³⁵ primacy,¹³⁶ effective and uniform application¹³⁷) European law uses a definition of the rule of law similar to that of democratic states.¹³⁸

According to the preamble of the TEU, the rule of law as a fundamental value of the EU follows ‘from the cultural, religious and humanist inheritance of Europe.’¹³⁹ That is, the European regulation of the rule of law is related to a moral reading of the good law resting on a certain type of European inheritance. In its 2011 report,¹⁴⁰ approved by the European Commission,¹⁴¹ the Venice Commission (an advisory body of the Council of Europe that focuses on constitutional matters) similarly claims that the

¹³¹ FRAME Deliverable 3.1, 28 <<http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf>> accessed 13 November 2014.

¹³² Commission, ‘Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law’ COM (2014) 158 final 5, 4.

¹³³ See FRAME Deliverable 3.1 <<http://www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf>> accessed 13 November 2014.

¹³⁴ Nicolas Hachez and Jan Wouters, ‘Promoting the Rule of Law: A Benchmarks Approach’ (2013) Leuven Centre for Global Governance Studies, Working Paper No. 105, 4.

¹³⁵ Case 26/62 *Van Gend en Loos v Netherlands Inland Revenue Administration* [1963] ECR 11; Case 9/70 *Grad v Finanzamt Traunstein* [1970] ECR 825, para 5; Case 8/81 *Becker v Finanzamt Münster-Innenstadt* [1982] ECR 53 para 29; Case 181/73 *Haegeman v Belgian State* [1974] ECR 449, para 2.

¹³⁶ Case 92/78 *Simmenthal v Commission* [1979] ECR 777, para 39.

¹³⁷ ECJ Joined Cases 205-215/82 *Deutsche Milchkontor et al* [1983] ECR 2633, para 22.

¹³⁸ Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done’ (2014) 51 *Common Market Law Review* 59, 64.

¹³⁹ Consolidated Version of the Treaty on European Union [2012] OJ C326/1, Preamble.

¹⁴⁰ European Commission for Democracy through Law (Venice Commission), ‘Report on the Rule of Law’, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (CDL-AD(2011)003rev).

¹⁴¹ Commission, ‘Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law’ COM (2014) 158 final/2, 3 <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 13 November 2014.

rule of law is ‘a fundamental and common European standard to guide and constrain the exercise of democratic power’.¹⁴² Though member states conceptualise the rule of law differently, it is possible to find common elements in the Member States’ constitutional traditions. The 2011 Venice Commission report nominates the accepted elements of the rule of law in Europe: ‘it seems that a consensus can now be found for the necessary elements of the rule of law as well as those of the *Rechtsstaat* which are not only formal but also substantial or material (*materieller Rechtsstaatsbegriff*).’¹⁴³ What these elements of the rule of law are, as conceptualised by the EU, will be further discussed below.

The FRA regularly emphasises in its publications that the rule of law ought to be viewed substantively. The Agency thereby particularly emphasises individual procedural rights. For instance, the FRA warns that harmonization and mutual recognition in cooperation in the area of criminal matters should not be accomplished in a way that does not aim at a ‘strong common reading of fundamental rights protection,’¹⁴⁴ since ‘there can be no Europe of law if not based on and nurtured by the rule of law.’¹⁴⁵ Similarly, when arguing for the respect of fundamental rights even in the area of surveillance and border control, the FRA presents its views under the title ‘Secure that access to EU territory is dealt with under the rule of law.’¹⁴⁶

As to the relationship between rights and the rule of law, the FRA explicitly claims that the strengthening of mechanisms for the protection of fundamental rights would broaden the protection of the rule of law in the EU. The FRA suggested to complement the Commission’ rule of law framework by a ‘strategic fundamental rights framework,’ in line with the more ‘encompassing’ and ‘substantial’ reading of rule of law. The FRA argues that fundamental rights are ‘proactive’ means to ‘prevent crises of the rule of law’, since ‘less regard for fundamental rights can indicate deficiencies in the rule of law.’¹⁴⁷ Thus, rule of law in this understanding encompasses a general, structural concept while (fundamental/human) rights are seen as more discreet, distinct or particular points which in fact function as reflections or indications about the state of the rule of law in general.

In what follows, we will first examine how the rule of law is given shape in the EU treaties; then we will discuss the elements of the rule of law based on the case law of the ECJ; next we discuss a particular aspect of the rule of law namely the EU and international law; and, before concluding, we discuss the conceptualisation of the rule of law in EU external action.

¹⁴² European Commission for Democracy through Law (Venice Commission), ‘Report on the Rule of Law’, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (CDL-AD(2011)003rev) 14.

¹⁴³ European Commission for Democracy through Law (Venice Commission), ‘Report on the Rule of Law’, Strasbourg, 4 April 2011, Study No. 512/2009, Council of Europe (CDL-AD(2011)003rev) 10.

¹⁴⁴ FRA Comments on the Stockholm Programme, <http://fra.europa.eu/sites/default/files/fra_uploads/540-FRA-comments-on-Stockholm-Programme.pdf> 6, accessed 20 December 2014.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.* 7.

¹⁴⁷ FRA Annual Report. Fundamental Rights. Challenges and Achievements in 2013

<http://fra.europa.eu/sites/default/files/fra-2014-annual-report-2013-0_en.pdf at 9> accessed 20 December 2014

2. Rule of Law in the EU treaties

Of the founding treaties, it was the Treaty of Maastricht whose preamble first referred to the rule of law (even though the Member States had already committed themselves to respect it through their membership in the Council of Europe). The present formulation in Article 2 TEU first appeared in the founding treaties with Article 6(1) of the Treaty of Amsterdam.

The treaties themselves do not define the concept of the rule of law. From the interrelated European Union values enshrined in Article 2 of TEU ('respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights'), from other documents of the EU¹⁴⁸ and from the case law of the ECJ to be discussed below, it follows that the EU seeks a thick definition of the rule of law: a definition containing substantive (e.g. equality, dignity) and formal (e.g. general, clear, certain) elements.¹⁴⁹ Von Bogdandy and Ioannidis argue that 'Article 2 TEU, by distinguishing the rule of law from the respect for human dignity, freedom, democracy, and equality, seems to opt for a rather 'thin' understanding.'¹⁵⁰ This might be true if one looks at the text of Article 2 TEU in isolation, but looking at EU documents as a whole it is beyond doubt that the EU conceptualises the rule of law as including both formal and substantive elements. As former Vice President of the European Commission Viviane Reding mentioned in one of her speeches: 'by 'rule of law', we mean a system where laws are applied and enforced (so not only 'black letter law') but also the spirit of the law and fundamental rights, which are the ultimate foundation of all laws.'¹⁵¹ In what follows, this report does not specifically address the distinction between formal and substantive elements since in European law both elements of the rule of law are present and it is furthermore highly questionable whether one can completely tell the two apart.

The only explicit reference to 'rule of law' in the Charter of Fundamental Rights is found in the preamble, where it says that the Union 'is based on the principles of democracy and the rule of law'. Laurent Pech has pointed out that that this presents a change of vocabulary as compared with the TEU: Article 2 TEU calls the rule of law a 'value', whereas the Charter calls it a 'principle'.¹⁵² A value seems more indeterminate and less suitable for the creation of legal rules through adjudication.¹⁵³ To what extent this variety in terminology really matters is unclear, however.

¹⁴⁸ Commission, 'Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final/2 <http://ec.europa.eu/justice/effective-justice/files/com_2014_158_en.pdf> accessed 13 November 2014.

¹⁴⁹ See e.g. Brian Z. Tamanaha, *On the Rule of Law: History, Politics Theory* (Cambridge University Press 2004), 91.

¹⁵⁰ Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done' (2014) 51 *Common Market Law Review* 59, 62-63.

¹⁵¹ Viviane Reding, 'The EU and the Rule of Law – What Next?', European Commission (SPEECH/13/677 Brussels, 4 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-677_hu.htm> accessed 13 November 2014

¹⁵² Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 (3) *European Constitutional Law Review* 359, 366.

¹⁵³ *ibid.*

Even though explicit references to the rule of law are sparse in the Charter, the provisions of the Charter are relevant to the EU's conceptualisation of the rule of law. Especially the provisions laid down in Title 6 entitled 'Justice'. The European Court of Human Rights has noted that the rule of law is 'a concept inherent in all the Articles of the Convention'.¹⁵⁴ Analogously, it could perhaps be argued that the rule of law is inherent in all the provisions of the EU Charter.

3. Elements of the rule of law

When examining how the European institutions use the concept of the rule of law, it is vital to study the case law of the ECJ,¹⁵⁵ while bearing in mind that as an independent judiciary the ECJ is also the guarantor of the European rule of law. The Court shaped the content of concept to a significant extent already before its explicit use in the treaty. In its judgement in Case *Les Verts* in 1986 the Court emphasises that the community was founded on the rule of law and claimed that neither Member States nor institutions 'can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty'.¹⁵⁶ That is, it has to be monitored whether the measures adopted by the various institutions are in compliance with the constitutional documents of the EU.

The case law of the ECJ has indicated several, sometimes overlapping, elements of the rule of law. These elements have been helpfully summarized in the above-mentioned Commission communication entitled *A new EU Framework to strengthen the Rule of Law* and its annexes.¹⁵⁷ Thus, according to its practice, the Court includes the following conceptual elements within the rule of law:

- *Legality*:¹⁵⁸ the Commission notes that this 'includes a transparent, accountable, democratic and pluralistic process for enacting laws'.¹⁵⁹ The 2011 report of the Venice Commission adds that this means that law must be supreme: both individuals and public authorities must follow the law.¹⁶⁰
- *legal certainty*: according to this principle, the legal rule shall always be clear and predictable. Related to this is prohibition on the retroactive application of legal rules.¹⁶¹

¹⁵⁴ *Stafford v United Kingdom* App no 46295/99 (ECtHR, 28 May 2002) para 63.

¹⁵⁵ See e.g. Laurent Pech, 'A Union Founded on the Rule of Law: Meaning and Reality of the Rule of Law as a Constitutional Principle of EU Law' (2010) 6 (3) *European Constitutional Law Review* 359.

¹⁵⁶ Case 294/83 '*Les Verts*' v *European Parliament* [1986] ECR 01339, para 23.

¹⁵⁷ Commission, 'Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, 4; Commission, 'Annexes to the Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, Annexes 1-2.

¹⁵⁸ See e.g. Case C-496/99 P *Commission v CAS Succhi di Frutta* [2004] ECR I-03801, para 63.

¹⁵⁹ Commission, 'Annexes to the Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, Annex I, 1.

¹⁶⁰ European Commission for Democracy through Law (Venice Commission), 'Report on the Rule of Law – Adopted by the Venice Commission at its 86th plenary session (Venice, 25-26 March 2011)', Strasbourg, 4 April 2011, Study No 512 / 2009, Council of Europe (CDL-AD(2011)003rev) 11.

- *prohibition of arbitrariness of the executive powers*:¹⁶² all actions of public authorities must have a legal basis (which is rule *by law*), be justified on the grounds laid down by law, and not be arbitrary or disproportionate.¹⁶³
- *independent judiciary*:¹⁶⁴ in this context the Court has referred to the principle of the separation of powers.¹⁶⁵ The Court has stated that: '[...] the general principle of [Union] law under which every person has a right to a fair trial, inspired by Article 6 of the ECHR [...] comprises the right to a tribunal that is independent of the executive power in particular'.¹⁶⁶
- *Effective judicial review including respect for fundamental rights*; this involves that the Court has to review the compatibility of acts and institutions of the EU with fundamental rights.¹⁶⁷ 'Individuals are entitled to effective judicial protection of the rights they derive from the Union legal order'.¹⁶⁸
- *Equality before the law*: the Court has emphasised that equal treatments is a general principle of EU law.¹⁶⁹

This list of different elements immediately shows that the EU's conception of the rule of law is linked to – and indeed partially overlapping with – human rights, because it includes respect for fundamental rights (particularly the right to a fair trial) and equality before the law. As noted above,¹⁷⁰ the Commission also links the rule of law to democracy, via the element of legality which would require that laws are enacted through a democratic process. Common mechanisms of sanction (which are further discussed below, see Chapter III.C), like infringement proceedings and proceedings under Article 7 of TEU, also indicate the connection of the three concepts.¹⁷¹

This list of rule of law elements applies both to the Member States and the EU itself, so that European law can be uniformly applied. In respect of the rule of law the EU has requirements concerning the

¹⁶¹ Joined cases 212 to 217/80 *Amministrazione delle finanze dello Stato v Srl Meridionale Industria Salumi and others* [1981] ECR 02735, para 10.

¹⁶² Joined cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 02859, para 19.

¹⁶³ Commission, 'Annexes to the Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, Annex I, 1.

¹⁶⁴ Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] para 91; Case C-550/09 *Criminal proceedings against E and F* [2010] ECR I-06213, para 44; Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 38, 39.

¹⁶⁵ Commission, 'Annexes to the Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final, Annex I, .2

¹⁶⁶ Joined cases C-174/98 P and C-189/98 P *Netherlands and Van der Wal v Commission* [2000] ECR I-00001, para 17.

¹⁶⁷ Case C-583/11 P *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013], para 91; Case C-550/09 *Criminal proceedings against E and F* [2010] ECR I-06213, para 44.

¹⁶⁸ Cf Case Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECR I-06677, para 39.

¹⁶⁹ Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2010] ECR I-08301, para 54.

¹⁷⁰ See *supra* text accompanying footnote 159.

¹⁷¹ Commission, 'Communication from the Commission to the European Parliament and the Council – A new EU Framework to strengthen the Rule of Law' COM (2014) 158 final 5.

structure and national law of the (aspiring) Member States precisely to be able to ensure the uniform application and effectiveness of European law. As Reding points out: ‘The principle of the rule of law in the Union’s context is obviously meant to apply not only to the Union itself, but also to its component parts, to the Member States themselves.’¹⁷² European rule of law cannot function properly only on the EU level, without effectiveness in the member states. Therefore, systematic problems in the member states threaten the effectiveness of European law.¹⁷³ This report includes a case study on Hungary which illustrates this point clearly. In this context it is a fundamental question to what extent the EU can enforce its rule of law concept in the member states, in some cases even against the will of the latter. As it was mentioned in the introduction, the international and transnational promotion of the rule of law by certain countries or organizations (like the UN or the EU) has been criticized on grounds of neo-imperialism.¹⁷⁴ It will be discussed below that similar arguments are put forth by new member states in defence of their national integrity when the EU demands the effectiveness of the rule of law and democracy in these states.

It appears from this list of elements that the EU’s internal conception of the rule of law is quite thick. There are, however, conceptions of the rule of law which go even further and explicitly include dignity or elements of social welfare in the concept. FRAME Deliverable 3.1 discussed this. Notably, as will be discussed further below, the EU includes more substantive elements in its external conceptualisation of the rule of law.

4. The EU and the rule of international law

European Union documents often support the concept of the rule of international law, which privileges international and European law over national law, recognizing the primacy of international human rights documents over domestic legal documents.¹⁷⁵ Indeed, the protection of fundamental rights in the Union builds not only on EU documents but also on international human rights conventions. According to Article 6 (3) of the TEU ‘Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] shall constitute general principles of the Union’s law.’ Not only the Member States but the EU itself undertakes international obligations and joins international conventions (e.g. accession to the ECHR and ratification of the CRPD). Accordingly,

¹⁷² Viviane Reding, ‘The EU and the Rule of Law – What Next?’, European Commission (SPEECH/13/677 Brussels, 4 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-677_hu.htm> accessed 13 November 2014 What is the meaning of the rule of law and why is it of specific importance for the European Union?.

¹⁷³ Armin von Bogdandy and Michael Ioannidis, ‘Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done’ (2014) 51 Common Market Law Review 59.

¹⁷⁴ See e.g. Rosa Ehrenreich Brooks, ‘The New Imperialism: Violence, Norms, and the ‘Rule of Law’’ (2003) 101 (7) Michigan Law Review 2275; Stephen Humphreys, *The Theatre of the Rule of Law – Transnational Legal Intervention in Theory and Practice* (Cambridge University Press 2010).

¹⁷⁵ See to this interpretation of the international rule of law: S. Chesterman, ‘An International Rule of Law?’ (2008) 56 American Journal of Comparative Law 331.

the EU concept of the rule of law has to be open towards international law and has to fit a wider (i.e. UN) framework for the rule of law.

It appears that the EU conception of the rule of law is quite similar to that of the UN. The UN also explicitly espouses a thick/substantive definition of the rule of law. A report of the Secretary-General of the UN has described the rule of law as follows:

‘[The rule of law is 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, as well, measures to ensure adherence to the principles of supremacy of 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.’¹⁷⁶

In comparison with this definition of the UN only the role of human dignity is more emphatic in European law. The Court of Justice links the rule of law to the concept of human dignity and equality through compatibility with human rights when it mentions equal treatment as a general principle of EU law – the latter concept has persons of equal dignity in its focus.¹⁷⁷

However, one important caveat applies: whereas the above-quoted definition of the rule of law has gained traction within the UN,¹⁷⁸ there is no single UN definition of the rule of law. Much the same as within the EU, the rule of law is contested in the UN. The World Bank, for example, which is a specialized agency working within the UN system, deploys a more restrictive definition of the rule of law.¹⁷⁹ Deliverable 3.4 will provide an in-depth examination of how the EU’s conception of human rights, democracy and rule of law compare to the conceptions held by other international organisations such as the UN.

5. Conceptualizing the rule of law in EU external action

The rule of law, along with democracy and respect for fundamental human rights, has been formally referred to as a key objective of the Union’s foreign policy since the Maastricht Treaty of 1992. The EU does not, however, offer a definition of the rule of law in its external actions.¹⁸⁰ Laurent Pech has

¹⁷⁶ Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616), para 6.

¹⁷⁷ Case C-550/07 P *Akzo Nobel Chemicals and Akcros Chemicals v Commission* [2010] ECR I-08301, para 54.

¹⁷⁸ See for example this website, which refers to the definition: <http://www.un.org/en/ruleoflaw/>.

¹⁷⁹ ‘Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence.’ See: <http://info.worldbank.org/governance/wgi/index.aspx#doc> and Deliverable 3.1 34.

¹⁸⁰ Laurent Pech, ‘Rule of Law as a Guiding Principle of the European Union’s External Action’ (2012) Cleer Working Papers 2012/3, 12.

mapped the ways in which the various instruments that the EU uses to promote its values abroad refer to the rule of law.¹⁸¹ He has come to the conclusion that the references to the rule of law in these instruments are rather superficial and not always entirely consistent.¹⁸² Pech states: ‘The EU, when acting as an exporter of values, tends to pay little attention to conceptual issues and largely equates the rule of law with a soft ideal whose content is largely delineated on a case-by-case basis.’¹⁸³

It is without doubt, however, that the EU seeks to promote a *thick* understanding of the rule of law abroad, in the sense that – externally – the EU always links the rule of law to democratic governance and the enjoyment of human rights. Pech notes that the rule of law is hardly ever mentioned as stand-alone principle in EU external action: the rule of law is almost always mentioned together with democracy and human rights.¹⁸⁴ It is therefore somewhat surprising that the current Strategic Framework and Action Plan on Human Rights and Democracy does not include the rule of law as a central concept.

¹⁸¹ *ibid* 22-23.

¹⁸² *ibid* 22-23. This is the overview that Pech has created:

<i>Guidelines on HR Dialogues</i>	The rule of law is identified as a priority issue but no definition is offered
<i>EIDHR Regulation</i>	The objective of strengthening the rule of law is associated with the objectives of promoting access to justice, the independence of the judiciary, and encouraging and evaluating legal and institutional reforms
<i>ENPI Regulation</i>	The rule of law is linked with the promotion of good governance, and both concepts are said to encompass an effective public administration, an impartial and effective judiciary as well as the fight against corruption and fraud
<i>IPA Regulation</i>	The strengthening of the rule of law, including its enforcement, is associated with the strengthening of democratic institutions
<i>DPI Regulation</i>	The rule of law is described as one of the key elements that any political environment must guarantee in order to favour long-term development, and its strengthening is linked with improving access to justice and good governance, including actions to combat corruption
<i>EU's Bilateral Agreements</i>	The rule of law, along with democracy and respect for human rights, is normally considered an essential element on which these agreements are based but most agreements do not explain what the rule of law stands for, with the exception of the Cotonou Agreement which refers to effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law, as core elements of the rule of law

¹⁸³ *ibid* 8.

¹⁸⁴ *ibid* 10.

In the first Communication that substantially clarified the concept,¹⁸⁵ the Commission already linked the rule of law to democracy and human rights and listed the following, non-exhaustive, elements of the rule of law:

- a legislature respecting and giving full effect to human rights and fundamental freedoms;
- an independent judiciary;
- effective and accessible means of legal recourse;
- a legal system guaranteeing equality before the law;
- a prison system respecting the human person;
- a police force at the service of the law;
- an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society.¹⁸⁶

More recent EU documents have added these elements to the list:

- an executive which is itself subject to the law
- a military that operates under civilian control within the limits of the constitution.¹⁸⁷

The EU's broad yet ill-defined conception of the rule of law poses several dangers. The first is that the rule of law is conceived so broad that it covers *everything* – it almost becomes a complete social philosophy – and thereby loses all independent meaning.¹⁸⁸ A statement from a press release by the European Union Integrated Rule of Law Mission for Iraq is illustrative in that respect; the press release claims that: 'The elements of the Rule of Law are: legality, democracy and Human Rights.'¹⁸⁹ However, while the above-mentioned list of rule of law elements is long, it does not encompass all ingredients for 'the good life'. In particular, the effective protection of vulnerable groups is not an explicit part of the rule of law (only implicitly via the elements of 'giving full effect to human rights' and 'equality before the law').¹⁹⁰ Moreover, Andrew Williams points out that 'the rule of law discourse possesses a much more restricted application in practice than some of the rhetoric might suggest'.¹⁹¹ In particular, in practice

¹⁸⁵ Andrew Williams, *The Ethos of Europe – Values, Law and Justice in the EU* (Cambridge University Press 2010), 99.

¹⁸⁶ Commission, 'Communication from the Commission to the European Parliament and the Council – Democratisation, the Rule of Law, Respect for Human Rights and Good Governance: the Challenges of the Partnership between the European Union and the ACP States' COM (98) 146 final 4.

¹⁸⁷ European Commission, 'Handbook on Promoting Good Governance in EC development and Co-operation, 57 <http://ec.europa.eu/europeaid/sites/devco/files/handbook-promoting-good-governance-ec-2004_en.pdf> accessed 13 November 2013.

¹⁸⁸ Andrew Williams, *The Ethos of Europe – Values, Law and Justice in the EU* (Cambridge University Press 2010), 106.

¹⁸⁹ EUJUST LEX-Iraq Press Release, 'The Rule of Law and the Universal Declaration on Human Rights' <http://www.eeas.europa.eu/csdp/missions-and-operations/eujust-lex-iraq/pdf/20131208-press-release-eujust-lex-iraq_en.pdf> accessed 13 November 2014.

¹⁹⁰ Cf Andrew Williams, *The Ethos of Europe – Values, Law and Justice in the EU* (Cambridge University Press 2010), 102.

¹⁹¹ *ibid.*

there is a lot of emphasis on the fight against corruption in external action.¹⁹² *A propos*, the fight against corruption is not one of the elements of the internal conception of the rule of law as examined *supra*.¹⁹³

The second danger of leaving the meaning of the rule of law so open (and not adopting an authoritative policy document on the topic), Pech points out, is that 'EU institutions may adopt unconvincing or undemanding rule of law policies for reasons of pure political convenience.'¹⁹⁴ At the same time, representatives from third-countries might find it hard to grasp what is asked of them if the EU offers no clear understanding of the rule of law.¹⁹⁵

Part of the difficulty lies in the lack of a commonly agreed international framework. An official of the EEAS suggested that it is easier to discuss human rights than rule of law or democracy with third-country partners, because only in respect of human rights are their binding international documents that provide a common ground (i.e. at a minimum the UDHR and the two Covenants).¹⁹⁶ Moreover, out of the regional organizations (the Organisation of American States, the African Union, the League of Arab States, the Association of Southeast Asian Nations and the Council of Europe), it is only the Council of Europe that mentions the rule of law as an objective besides the other two pillars, human rights and democracy. The protection of the rule of law is a peculiarity of the European regional and supranational framework, distinguishing it from any other regional human rights protection systems. Thus, rule of law promotion is again an area where the tension between universalism and particularism surfaces.

This leads to the third danger that accompanies the EU's broad and fairly vague conception of the rule of law, namely that the EU's partners might think differently about it. While it appears that a thin conception of the rule of law can count on nearly universal support,¹⁹⁷ thick conceptions are more contested because they depend on notions of what constitutes a just political-legal order.¹⁹⁸ This is an issue that Deliverable 3.3 will examine further.

6. Conclusion

Internally, the EU professes a fairly thick conception of the rule of law. Based on the case law of the ECJ, this includes the following elements: legality; legal certainty; prohibition of arbitrariness of the executive

¹⁹² Cf n 163. The ENPI and DPI regulations explicitly mention corruption.

¹⁹³ Cf Stefan Martini, 'Book Review: Francis G Jacobs, *The Sovereignty of Law. The European Way* and Erik O Wennerström, *The Rule of Law and the European Union*' (2010) 21 (1) 245, 273 ('The Commission specifically focuses on the independence of the judiciary as well as on corruption, the latter completely missing in the general EC definition. Although effectiveness of the administration is mentioned as a criterion for accession.').

¹⁹⁴ Laurent Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action' (2012) Cleer Working Papers 2012/3, 26.

¹⁹⁵ *ibid*.

¹⁹⁶ Interview with EEAS official (Brussels, September 2014).

¹⁹⁷ Randall Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?', (2004-2005) 36 *Georgetown Journal of International Law* 809, at 825.

¹⁹⁸ *ibid* 828.

powers; independent judiciary; effective judicial review including respect for fundamental rights; and equality before the law. While this constitutes a fairly thick notion of the rule of law, it is still limited.

The EU's conceptualisation of the rule of law in its external action is even broader/thicker. Externally, the rule of law also refers to social wellbeing. The elements that the EU ranges under the rule of law in its external action include: a legislature respecting and giving full effect to human rights and fundamental freedoms; an independent judiciary; effective and accessible means of legal recourse; a legal system guaranteeing equality before the law; a prison system respecting the human person; a police force at the service of the law; an effective executive enforcing the law and capable of establishing the social and economic conditions necessary for life in society; an executive which is itself subject to the law; and a military that operates under civilian control within the limits of the constitution. Externally, the EU focuses decidedly more on the guardian institutions upholding the rule of law; especially on enforcement bodies (e.g. the police, the prison system and the military) and anti-corruption. As was highlighted in Deliverable 3.1 based on a paper by Rachel Kleinfeld Belton,¹⁹⁹ defining the rule of law in terms of its institutional attributes rather than in terms of the substantive ideals it embodies is risky. Deliverable 3.1 noted that '[w]hen the rule of law is defined in terms of its institutional structures, it is usually not conceived of as an *end* in itself, but as a *means* towards another end – most commonly economic growth.'²⁰⁰

This ambivalence between focusing on rule of law *institutes* or rule of law *ideals* (which would then include human rights protection and democratic governance) is captured in the work of Andrew Williams. His diagnosis in relation to the EU is this: 'There appears to be a constant battle between viewing law as a functional system of control, on the one hand, and as a force for achieving a transformation of society (whether internally or externally) on the other.'²⁰¹

¹⁹⁹ FRAME Deliverable 3.1, 30 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 13 November 2014.

²⁰⁰ *ibid.*

²⁰¹ Andrew Williams, *The Ethos of Europe – Values, Law and Justice in the EU* (Cambridge University Press 2010), 107.

E. Conceptualization of democracy

1. Introduction

Human rights and the rule of law are not the only concepts which the EU has slowly but surely conceptualised in a more ‘thick’ manner. In the area of democracy the EU has expanded its conception as well. Koen Lenearts, Vice-President of the Court of Justice, explains: ‘democracy is a dynamic concept which evolves hand in hand with societal changes. Whilst some components of democracy are always constant, others have appeared more recently (eg the birth of non-majoritarian agencies, the democratization of alternative means of policy-making and the principle of transparency).’²⁰²

The debate on the EU’s conception of democracy has long been intense. A watershed document was the Commission’s White Paper on Governance from 2001.²⁰³ This paper promulgated five principles of good governance, which the Commission saw as ‘important for establishing more democratic governance’:

- Openness
- Participation
- Accountability
- Effectiveness
- Coherence²⁰⁴

This paper has been discussed and criticized extensively in scholarly literature.²⁰⁵

The present report will focus on the EU’s conception of democracy in recent years, i.e. since the Lisbon Treaty became binding. This part will first discuss what democratic principles are codified in the EU treaties. Then it will shortly revisit the debate on democratic deficit and the question of to what extent the concept of democracy is applicable to the EU itself. Finally, this part will discuss how the EU conceptualises democracy in its external action, thereby paying specific attention to the recent notion of ‘deep democracy’.

²⁰² Koen Lenearts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) 62 (02) *International and Comparative Law Quarterly* 271, 281.

²⁰³ Commission, ‘European Governance – A White Paper’ COM(2001) 428 final (2001/C 287/01).

²⁰⁴ *ibid* 7.

²⁰⁵ See e.g. Deirdre Curtin, ‘Private Interest Representation or Civil Society Deliberation? A Contemporary Dilemma for European Union Governance’ (2003) 12 *Social Legal Studies* 55; Andreas Follesdal, ‘Scrutiny: The Political Theory of the White Paper on Governance: Hidden and Fascinating’ (2003) 9 *European Public Law* 73; and Ludger Radermacher, ‘The European Commission’s White Paper on European Governance: The Uneasy Relationship Between Public Participation and Democracy’ (2002), 3 *German Law Journal*.

2. Democratic principles in the EU treaties

The first time that ‘democracy’ appeared in a provision of an EU treaty was with the Treaty of Maastricht (1992), but this only related to the Member States’ political systems. It was only in the Treaty of Amsterdam (1997) that mention was first made of democracy as relating to the EU itself.²⁰⁶ Then the Lisbon Treaty took a leap forward. A key aim of the Lisbon Treaty is to ‘put the citizen back at the heart of the European Union’; the idea was that citizens had lost their interest in the EU and that the Union had become too remote.²⁰⁷ Under Title II (‘Provisions on Democratic Principles’, the Treaty of Lisbon enshrines three main principles of democratic governance: (1) democratic equality; (2) representative democracy; and (3) participatory democracy.²⁰⁸ In what follows, these principles will be discussed one by one.

Democratic equality is in the first place codified in Article 9 TEU, which provides that: ‘In all its activities, the Union shall observe the principle of the equality of its citizens, who shall receive equal attention from its institutions, bodies, offices and agencies. Every national of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.’ Thus, all citizens are equal for the EU.

The second principle, that of *representative democracy*, is in the first place enshrined in Article 10 TEU: ‘the Union is founded on the principles of representative democracy.’ The fact that an organisation rests on the principles of representative democracies does not mean that it is necessarily a representative democracy. The statement refers rather to the fact that decisions are made in the Council, which represents the interests of national governments and in the Parliament, which represents the interests of citizens. That is, the EU’s political system represents European citizens through different channels: through the European Parliament and through their governments in the Council. Before the Treaty of Lisbon took effect, the principle of representative democracy had been visible in the case law of the CJEU since the early 1980s.²⁰⁹ The CJEU has sought to protect the prerogatives of the European Parliament: ‘the fundamental democratic principle that the people should take part in the exercise of power through the intermediary of a representative assembly’.²¹⁰

²⁰⁶ Armin von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations’ (2012) 23 (2) The European Journal of International Law 315, 318.

²⁰⁷ Summaries of EU Legislation, ‘The Strengthening of European Democracy’ <http://europa.eu/legislation_summaries/institutional_affairs/treaties/lisbon_treaty/ai0021_en.htm> accessed 13 November 2014.

²⁰⁸ Treaty of Lisbon: Taking Europe into the 21st Century – A more democratic and transparent Europe <http://europa.eu/lisbon_treaty/glance/democracy/> accessed 13 November 2014.

²⁰⁹ Koen Lenaerts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) 62 (02) International and Comparative Law Quarterly 271, 281 et seq; Armin von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations’ (2012) 23 (2) The European Journal of International Law 315, 318.

²¹⁰ Case C-138/79 *Roquette Frères v Council* [1980] ECR 3333 para 33.

As regards the principle of *direct/participatory democracy*; the Lisbon Treaty introduced the possibility of citizens' initiatives (Articles 10(3) and 11(4) TEU, and Article 24 TFEU). Provided citizens bundle their powers with 'not less than one million citizens who are nationals of a significant number of Member States',²¹¹ they can take the initiative to ask the Commission to initiate legislation. This implies that every citizen is to have the right to participate in the democratic life of the Union.²¹² The citizen's initiative is an exceptional tool of direct democracy.

Equality, representation and participation are not, however, the only democratic principles enshrined in the Treaty of Lisbon. *Transparency* and *deliberation* are two other important principles, which both aim at democratic legitimization beyond elections.²¹³ Transparency is laid down in Article 11(2) TEU: 'The institutions shall maintain an open, transparent and regular dialogue with representative association and civil society.' And also in Article 15 TFEU, which states that the EU shall conduct its work 'as openly as possible'. With these provisions, the EU 'places itself at the forefront of constitutional developments', according to Von Bogdandy.²¹⁴ At the same time, deliberation has also become an important principle underlying the EU's conception of democracy. Indeed, the EU has increasingly conceived itself as a deliberative political system.²¹⁵ Briefly put, the idea of deliberative democracy, prominently theorized by Jürgen Habermas, entails that decisions are made on the basis of an exchange of reasonable arguments by equal individuals.²¹⁶ The respective parties then reach an agreement, whereby the best argument prevails.²¹⁷ The ideal of deliberation is institutionalized in the form of the EU's dialogue with civil society (Article 11(2) TEU). This dialogue is meant to ensure that parties participate in making the decisions that affect them. Critics have pointed out many pitfalls however.²¹⁸ First is again the issue of how to ensure the representation of 'vulnerable groups': the civil dialogue risks being dominated by well-organised groups. Another issue is that '[t]he logic underpinning governance is . . . more functional than democratic: the purpose of institutionalized practices of deliberation in the EU arena has mainly been to make policies more efficient, that is, to foster output legitimacy.'²¹⁹

²¹¹ Article 11 (4) of the Treaty on The European Union.

²¹² Regulation (EU) 211/2011 of the European Parliament and of the Council of 16 February 2011 on the citizens' initiative [2011] OJ L65/1.

²¹³ Cf. Armin von Bogdandy, 'The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations' (2012) 23 (2) The European Journal of International Law 315, 330-331.

²¹⁴ *ibid* 330.

²¹⁵ Amandine Crespy, 'Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict' (2014) 62 (S1) Political Studies 81, 86.

²¹⁶ Jürgen Habermas, *The Theory of Communicative Action – Reason and the Rationalization of Society*, vol 1 (Thomas McCarthy tr, Beacon Press Boston 1984).

²¹⁷ FRAME Deliverable 3.1, 21 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 13 November 2014; see also Amandine Crespy, 'Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict' (2014) 62 (S1) Political Studies 81, 83.

²¹⁸ For an overview, see e.g. Amandine Crespy, 'Deliberative Democracy and the Legitimacy of the European Union: A Reappraisal of Conflict' (2014) 62 (S1) Political Studies 81.

²¹⁹ *ibid* 87.

To conclude this overview of how democratic principles are enshrined in the EU treaties, it should be noted that the Charter of Fundamental rights also upholds democracy. In particular, Articles 39 and 40 include the ‘right to vote and to stand as a candidate at elections to the European Parliament’ and the ‘right to vote and to stand as a candidate at municipal elections’. Like the provisions from the TEU discussed above, these rights are vested in EU citizens. Note that the EU citizens who rely on the Charter for their enfranchisement are those who live in another country than the one of their underlying nationality.²²⁰ This follows from the wording of both articles that provide for voting rights ‘under the same conditions as nationals of that State’.

3. Debate on democratic deficit

How to gauge to what extent the EU is a constitutional democracy remains a vexed question. Discourse on democratic deficit is divided in respect of whether one can speak of democratic deficit after the Lisbon Treaty. Andrew Moravcsik claims that the Union is legitimate, ‘its institutions are tightly constrained by checks and balances’,²²¹ and arguments about the democratic deficit are wrong. Others, like Føllesdal and Hix,²²² believe that it is still relevant to speak about the democratic deficit phenomenon. They argue that European integration raises ‘questions of democratic legitimacy analogous to those which have classically been addressed in the state context.’²²³

Many, like Lenearts, maintain that ‘the EU model of democracy cannot be measured by reference to traditional nation-State standards’.²²⁴ The problem is that the EU is not easily definable.²²⁵ It is ‘defined neither as a confederation of states (*Staatenbund*) nor as a federal state (*Bundesstaat*)’, and cannot be described as an international organisation.²²⁶ Literature sometimes refers to this transnational federal polity as, for example a ‘confederation with some federal qualities,’ or as an ‘intergovernmental organisation with supranational elements’. The most appropriate definition of the EU has been ‘unidentified political object,’ this term at least does not aim at defining indirectly what the EU is not. The unidentifiable nature of the EU is best illustrated by the fact that in the EU the subjects of the constitutional documents (the founding treaties) are characteristically the ‘citizens’ and the ‘states’.

²²⁰ Sergio Carrera, Elspeth Guild E and Nicolas Hernanz, ‘The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU - Towards an EU Copenhagen Mechanism, Study for the European Parliament’ (2013) PE 493.031, 33.

²²¹ Andrew Moravcsik, ‘Reassessing Legitimacy in the European Union’ (2002) 40 (4) *Journal of Common Market Studies* 603, 603.

²²² Andreas Føllesdal and Simon Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 (3) *Journal of Common Market Studies* 533.

²²³ Gráinne De Búrca, ‘Developing Democracy beyond the State’ (2008) 46 (2) *Columbia Journal of Transnational Law* 101, 116.

²²⁴ Koen Lenearts, ‘The Principle of Democracy in the Case Law of the European Court of Justice’ (2013) 62 (02) *International and Comparative Law Quarterly* 271, 280.

²²⁵ Armin von Bogdandy, ‘The European Lesson for International Democracy: The Significance of Articles 9–12 EU Treaty for International Organizations’ (2012) 23 (2) *The European Journal of International Law* 315.

²²⁶ Jürgen Habermas, ‘The Crisis of the European Union in the Light of a Constitutionalization of International Law’ (2012) 23 (2) *European Journal of International Law* 335, 342.

That 'EU citizens and the European people are recognised as equal partners in all legislative functions'²²⁷ shows that the EU displays features of both international organisations and states. Even if the sovereign member states transferred a part of their sovereignty to the EU, they did not lose control over transferred powers completely since they remained the lords of the treaties (*Herren der Verträge*). The TEU expressly provides for the member states that possibility of leaving the EU. According to Article 50 (1) 'any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.'

4. EU external action and the notion of 'deep democracy'²²⁸

Regarding the Strategic Framework, FRAME Deliverable 12.1 notes that '[a]lthough there is a clear position on the EU's understanding of human rights, democracy is an 'aspiration' that it is not defined.'²²⁹ It appears that the EU has intentionally remained vague. The EU explicitly recognises that there are multiple models of democracy; it does not a priori seek to advance any specific kind.²³⁰ For example, the 2009 Council conclusions on Democracy Support in the EU's External Relations just states that 'there is no single model of democracy' and that '[t]hough democratic systems may vary in forms and shape, democracy has evolved into a universal value'.²³¹ Thus the EU's conceptualization of democracy in its external action is by no means uniform. Kurki's thesis is that the EU's democracy support is 'diversity-accommodating and complexity-appreciating', which reflects the EU's own reality of diversity at the level of the Member States.²³²

However, it is clear that the EU has long conceptualised democracy in a fairly substantive manner in its external action – far exceeding the classic minimum interpretation of democracy as 'institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.²³³ In 1998, a Commission communication concerning the EU's partnership with the African, Caribbean and Pacific Group of States (ACP) already proclaimed that:

²²⁷ *ibid* 344.

²²⁸ Alexandra Timmer wishes to thank Elise Ketelaars (Legal Research Master student, Utrecht University) for her work on the concept of deep democracy. This part of the report draws on Ketelaars' paper entitled 'Democracy promotion in third countries: How deep is the EU willing to go?'.

²²⁹ FRAME Deliverable 12.1, 170 <<http://www.eframeproject.eu/fileadmin/Deliverables/Deliverable12.1.pdf>> accessed 13 November 2014.

²³⁰ Milja Kurki, *How the EU can adopt a new type of democracy support* – Working Paper No. 112, FRIDE, Madrid (2012), 3.

²³¹ Council of the European Union, Council conclusions on Democracy Support in the EU's External Relations, 2974th External Relations Council meeting, Brussels (17 November 2009), 3.

²³² Milja Kurki, *How the EU can adopt a new type of democracy support* – Working Paper No. 112, FRIDE, Madrid (2012), p. 3.

²³³ FRAME Deliverable 3.1, 19 (quoting Møller & Skaaning (2013), 144-145, who quote Schumpeter).

‘As an end in themselves, elections alone will not necessarily make a country a democracy or give it the political stability necessary for it to flourish.’²³⁴ And:

A democratic system enables human rights to flourish in a climate of respect and recognition of the different cultures making up the country by basing political power on the will of the people and every individual’s voluntary contribution to the life of the community. A democratic State is therefore a precondition for the exercise of human rights. It is a defining characteristic of a democracy, whatever the system or model adopted, that it formalises a non-violent dialectic between the aspirations of the majority and those of a minority according to a body of rules accepted by all and based on respect for human rights and fundamental freedoms.²³⁵

This quote not only illustrates that the EU has long conceptualised democracy as much broader than just ‘free elections’, it also shows the EU’s linkage of democracy and human rights. Though this quote does not mention ‘vulnerable groups’, it is clear that in this conception of democracy minorities ought to be protected and *each* individual’s contribution should be taken to count.

One recent development in the EU’s conceptualisation of democracy in its external action, which is also mentioned in the FRAME project description, requires further investigation: the introduction of the notion of ‘*deep democracy*’. This notion first emerged in responses of High Representative Catherine Ashton to the events in Egypt and Tunisia of February 2011.²³⁶ Thus, the introduction of ‘deep democracy’ is part of a reframing of the European Neighborhood Policy (ENP) following the events of the Arab Spring.²³⁷ This reframing has been described as a ‘*mea culpa*’ on the part of the EU towards the MENA region.²³⁸

What does deep democracy entail? In a 2011 op-ed for *The Guardian*, Ashton writes:

democracy is, of course, about votes and elections – but it is also about far more than that. What we in Europe have learned the hard way is that we need ‘deep democracy’: respect for the rule of law, freedom of speech, an independent judiciary and impartial administration. It

²³⁴ COMMISSION COMMUNICATION TO THE COUNCIL AND PARLIAMENT, Democratisation, the rule of law, respect for human rights and good governance: the challenges of the partnership between the European Union and the ACP States, 24 February 1998, COM(98) 146, 5.

²³⁵ Id.

²³⁶ The Guardian, ‘The EU wants ‘deep democracy’ to take root in Egypt and Tunisia, Comment by Catherine Ashton’, February 2011. Available at: <http://www.theguardian.com/commentisfree/2011/feb/04/egypt-tunisia-eu-deep-democracy>; and European Commission, SPEECH/11/122 - Catherine Ashton EU High Representative for Foreign Affairs and Security Policy and Vice President of the European Commission Remarks at the Senior officials’ meeting on Egypt and Tunisia, Brussels, 23 February 2011. Available at: http://europa.eu/rapid/press-release_SPEECH-11-122_en.htm.

²³⁷ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A new response to a changing Neighbourhood*, JOIN(2011) 303 final, Brussels (May 2011).

²³⁸ Kurki (2012), 6.

requires enforceable property rights and free trade unions. It is not just about changing government but about building the right institutions and attitudes. In the long run, 'surface democracy' – people casting their votes freely on election day and choosing their government – will not survive if deep democracy fails to take root.²³⁹

The renewed ENP describes the following elements the following elements of deep democracy:

- 'free and fair elections;
- freedom of association, expression and assembly and a free press and media;
- the rule of law administered by an independent judiciary and right to a fair trial;
- fighting against corruption;
- security and law enforcement sector reform (including the police) and the establishment of
- democratic control over armed and security forces'.²⁴⁰

Later reviews of the ENP added several elements to the list (although these elements were also already mentioned in the 2011 document):²⁴¹

- civil society
- gender equality²⁴²
- anti-discrimination

Especially the 2014 ENP review has put increasing emphasis on including 'vulnerable groups' in the democratic process. It mentions discrimination against women and minorities; gender based violence (and gender is not just a short-hand for 'women' here but refers also to violence against LGBTI people);

²³⁹ The Guardian, 'The EU wants 'deep democracy' to take root in Egypt and Tunisia, Comment by Catherine Ashton', February 2011. Available at: <http://www.theguardian.com/commentisfree/2011/feb/04/egypt-tunisia-eu-deep-democracy>.

²⁴⁰ JOIN(2011) 303 final, 3.

²⁴¹ See European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering on a new European Neighbourhood Policy, JOIN(2012) 14 final, Brussels (May 2012), 7; and European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - European Neighbourhood Policy: Working towards a Stronger Partnership*, JOIN(2013) 4 final, Brussels (March 2013); and European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Neighbourhood at the crossroads: implementation of the European Neighbourhood Policy in 2013*, JOIN(2014) 12 final, Brussels (March 2014).

²⁴² European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, *Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Delivering on a new European Neighbourhood Policy*, JOIN(2012) 14 final, Brussels (May 2012), 7.

and discrimination and violence against children.²⁴³ Thus the definition of deep democracy changes over time and adapts to circumstances.

The effect of this notion on wider policy seems limited. Wetzel and Orbie note that ‘The most recent *EU Strategic Framework and Action Plan on Human Rights and Democracy* do not elaborate on the substance of what should be promoted and remain conspicuously silent on the notion of deep democracy.’²⁴⁴ Indeed, democracy is given much less attention than human rights in the Strategic Framework.

Moreover, whether the emergence of the concept of ‘deep democracy’ brings much news to the EU’s conception of democracy is doubtful.²⁴⁵ And since the conception of deep democracy changes over time – adding more and more elements – it is also doubtful whether it will bring more conceptual clarity to the EU’s external promotion of democracy generally.²⁴⁶ Ketelaars conclude that with the introduction of the notion of ‘deep democracy’ the EU has broadened rather than deepened its conception of democracy.²⁴⁷ Ultimately, deep democracy is a container-term that can be filled up according to the context: it is more a shorthand for general ‘good governance’, than a theorized model of democracy.

5. Conclusion

This part of the report has described five principles, or ideals, underlying the EU’s conception of democracy: democratic equality; representative democracy; participatory democracy; transparency and deliberation. These ideals are all reflected in the Lisbon Treaty. Despite the innovations of the Lisbon Treaty on this terrain, the debate regarding the democratic deficit of the EU is still ongoing.

This part of the report has also investigated what conception of democracy the EU promotes abroad. We have thereby paid specific attention to the concept of ‘deep democracy’, as this concept has been prominent in EU materials in recent years since the Arab Spring. The conclusion is that the EU’s conception of democracy abroad is very broad, and that the introduction of the idea of ‘deep democracy’ does not provide much clarity: its content is again broad and depends on context.

²⁴³ European Commission & High Representative of the European Union for Foreign Affairs and Security Policy, Joint communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Neighbourhood at the crossroads: implementation of the European Neighbourhood Policy in 2013, JOIN(2014) 12 final, Brussels (March 2014), 7-8.

²⁴⁴ Anne Wetzel & Jan Orbie, ‘The EU’s Promotion of External Democracy: In search of the plot – CEPS Policy Brief No. 281’, CEPS (2012), 2.

²⁴⁵ Kurki concludes that ‘despite the reference to deep democracy in the latest reforms, little then has changed in terms of the EU’s conceptual approach: a generically liberal, albeit fuzzy at the edges, democratic capitalist model still forms the core of the efforts to build ‘deep democracy’. Kurki 2012, 8.

²⁴⁶ See also Anne Wetzel & Jan Orbie, ‘The EU’s Promotion of External Democracy: In search of the plot – CEPS Policy Brief No. 281’, CEPS (2012).

²⁴⁷ Elise Ketelaars, ‘Democracy promotion in third countries: How deep is the EU willing to go?’, 2014 (paper on file with Alexandra Timmer).

The issue of how to ensure the inclusion of vulnerable groups is again relevant in this content. Many of the key democratic principles of the EU which were discussed above - democratic equality; representative democracy; and participatory democracy – are grounded in the idea of EU *citizenship*. EU citizens shall receive equal attention from the EU institutes (Article 9 TEU); EU ‘citizens are directly represented at Union level in the European Parliament’ (Article 10(2) TEU); and EU citizens can participate in citizen’s initiatives. Though this is not always the case,²⁴⁸ by and large this excludes third-country nationals residing in one of the Member States.²⁴⁹ The resulting problem is obvious: a limited group of residents selects the representatives whose decisions will affect everybody. People who reside in a country of which they are not nationals are often in a more vulnerable position than nationals: they might have difficulties with language, with finding a job, with creating social support networks, etc. Exclusion from the political process renders these people more vulnerable.²⁵⁰ Arguably, therefore, at the very heart of the EU’s conceptualization of democracy lays exclusion as well as inclusion.

²⁴⁸ See Case C-145/04 Spain v. United Kingdom (Gibraltar). In this case, following a ruling by the ECtHR, the UK conferred the right to vote for elections of the European Parliament to third-country nationals living in Gibraltar. The CJEU ruled that this was within the competence of the UK.

²⁴⁹ See generally Jo Shaw, *The Transformation of Citizenship in the European Union: Electoral Rights and the Restructuring of Political Space* (Cambridge University Press 2007).

²⁵⁰ Which is why John Hart Ely has famously argued that restrictions on the rights of minorities’ who are excluded from the political process require heightened judicial scrutiny (‘strict scrutiny’). J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* 103 (1980).

F. Conclusion

In the EU, the concepts of human rights, democracy, and the rule of law are intimately tied together. In fact they are in some formulations hardly distinguishable from each other. The question then necessarily arises, whether such a stance is tenable or inherently contradictory. There is a vast debate on that in political philosophy, going back to at least Greek debates about the perfect constitution, not ending to this day. It is certainly not an issue which can be decided once and for all on these pages, and, certainly not an issue with which *any* real life constitutional or quasi-constitutional entity, such as the EU, can be realistically expected to come to terms in practice. Even within the theoretical approach of liberal democracy, views diverge about whether the connection between democracy, rights, and rule of law is that of mutual limitation, or quite to the contrary, reinforcement. To put it simply, classical liberalism saw rights and the rule of law as safeguards against democracy understood as tyranny of the majority. The idea that democracy needs to be tamed by rights of the individual is an application of the idea of limited government to the condition of democracy, i.e. a constitutional argument.²⁵¹

As it was visible throughout this chapter, the EU opts in each three cases, including democracy, for a thick or substantive conception of these values, at least in its rhetoric. The EU's use of these concepts can be seen as elements of a philosophy of history; temporalised concepts, in the sense of Reinhart Koselleck.²⁵² In that light, democracy, human rights, and rule of law are concepts of expectation (*Erwartungskonzepte*), in a sense replacing the old debate on the *finalité* of the Union.²⁵³ The introduction to this report highlighted why (at least some degree of) clarity regarding the EU's conceptions of human rights, democracy and rule of law is desirable. But one could also argue the other way round, namely that, ultimately, the function of these concepts is in their ambiguity rather than in their clarity: it is to constantly recreate at the normative level the tensions Europeans live in.

III. Operationalisation of concepts internally

A. Introduction

Both on the member state and the European levels, in order that democracy can function properly, there is a need for interaction between the fundamental rules and values of a polity and its members. As it has been pointed out, the lack of democratic substructures necessarily has an adverse effect on the proper functioning of democracy on the European level. But certain member states are not free of

²⁵¹ For a clear exposition on that see András Sajó, *Limiting Government* (CEU Press, 1997).

²⁵² Reinhart Koselleck, *Futures Past. On the Semantics of Historical Time*, (Keith Kribe tr. Columbia University Press, 1985).

²⁵³ Cf. Thierry Chopin's argument for an 'horizon de sens' at <<http://www.robert-schuman.eu/fr/questions-d-europe/0100-l-union-europeenne-en-quete-de-sens-queelles-finalites-pour-l-europe>> accessed 20 December 2014

democratic deficit either. Democratic deficit in a member state is a danger to values enshrined in Article 2 of TEU and compromises the effectiveness of EU law, the rule of law, and human rights, and the lack of effectiveness of EU law in certain member states might lead to justice deficit. According to Article 6 (3) of the TEU, fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, shall constitute general principles of the Union's law. But after the populist backlash in some member states the very question whether there are common constitutional traditions among the member states has become debatable.

As was mentioned above, according to Article 4(2) TEU the Union shall respect the identity of member states 'inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government.' There is no hierarchy between this paragraph and the aforementioned Article 2 of the Treaty. It is not surprising that, before the Eastern enlargement, the EU had a fear from a nationalistic backlash in the new democracies. After the accession and after the populist backlash which is best illustrated by the Hungarian example, those fears proved to be justified.²⁵⁴

Before accession to the EU, former state-socialist countries became constitutional democracies and according to the Commission they fulfilled the political criteria of European accession (stability of institutions, democracy, the rule of law, human rights and respect for and protection of minorities.) However, as Sajó pointed it out, the legal systems of the new member states included pre-modern and problematic elements (e.g. authoritarian elements of the past, pre-modern, nationalistic values) in their constitutional systems.²⁵⁵ Furthermore, they were centralized states in comparison with Western democracies, with substructures not functioning properly. The civic-constitutional tradition was relatively weak and after a dictatorial period the interaction between society and politics was not strong enough. What is more, in some CE countries like Hungary, neither historical dictatorial periods, nor past national historical traumas have been adequately reflected on.²⁵⁶ The difference between new and old member states in this context can refer also to the fact that the democratic phase of history in most new member states is much shorter than that in old member states. This is not a negligible factor either. The EU formed a more benign image of certain new member states than the real situation would have allowed for, despite the fact that the EU raised some of its concerns at the time. For instance EU accession reports on Bulgaria and Romania raised the problems of organized crime, corruption, and a weak judiciary,²⁵⁷ which all threaten the rule of law. At the same time, as A. von Bogdandy and M.

²⁵⁴ Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done' (2014) 51 *Common Market Law Review* 59.

²⁵⁵ András Sajó, 'Constitution without the Constitutional Moment: A View from the New Member States' (2005) 3 *Icon-International Journal of Constitutional Law* 243.

²⁵⁶ One of the examples could be the Trianon Trauma in the case of Hungary. Hungary lost, through the Treaty in 1920, two-thirds of its territory and half of its population, and more than three million ethnic Hungarians ended up outside Hungary. Treaty of Peace Between The Allied and Associated Powers and Hungary And Protocol and Declaration, signed at Trianon on June 4, 1920.

²⁵⁷ Commission, 'Report from the Commission to the European Parliament and the Council – On Progress in Bulgaria under the Cooperation and Verification Mechanism' COM (2012) 411 final, 5; Commission, 'Report from

Ioannidis point out,²⁵⁸ systematic deficiency in the rule of law can be found these days not only in the new member states. Beyond Bulgaria, Romania and Hungary, the authors highlight Italy and Greece too. In both these latter countries corruption and the length of court proceedings are serious problems. Yet, these issues get attention primarily in relation to the new member states, especially Hungary. In her speech entitled 'The EU and the Rule of Law – What next?', Viviane Reding mentioned three rule of law crises in the framework of the European Union: the limitation of Roma rights in France in 2010, the Romanian rule of law crisis in 2012 (non-respects of constitutional courts decisions) and the ongoing Hungarian rule of law crisis since the end of 2011.²⁵⁹ There is no doubt that, nowadays, Hungary presents the most obvious case where all elements of constitutional democracy are threatened: checks and balances, fundamental rights, the rule of law – all protected under Article 2.²⁶⁰ In what follows, Hungary will therefore be further discussed as a case study to learn how it came to operationalise the concepts of human rights, democracy and rule of law in this situation of crisis.

the Commission to the European Parliament and the Council – On Progress in Romania under the Cooperation and Verification Mechanism' COM (2012) 410 final, 3.

²⁵⁸ Armin von Bogdandy and Michael Ioannidis, 'Systemic Deficiency in the Rule of Law: What it is, what has been done, what can be done' (2014) 51 Common Market Law Review 59.

²⁵⁹ Viviane Reding, 'The EU and the Rule of Law – What Next?', European Commission (SPEECH/13/677 Brussels, 4 September 2013) <http://europa.eu/rapid/press-release_SPEECH-13-677_hu.htm> accessed 13 November 2013

²⁶⁰ See e.g. *European Parliament resolution of 10 March 2011 on Media Law in Hungary*, P7_TA(2011)0094; *European Parliament resolution of 16 Feb. 2012 on the Recent Political Developments in Hungary* (2012/2511(RSP)), P7_TA(2012)0053; Council of Europe, 'Opinion of the Commissioner for Human Rights on Hungary's Media Legislation in Light of Council of Europe Standards on Freedom of the Media', 25 Feb. 2011, CommDH (2011) 10; European Commission for Democracy through Law (Venice Commission), 'Opinion on the New Constitution of Hungary – Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)', Strasbourg 20 June 2011, Opinion no. 618 / 2011, Council of Europe (CDL-AD (2011) 016), para 91 et seq. See also Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012); Miklós Bánkúti and others, 'Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws', (Gábor Halmai and Kim Lane Scheppele eds 2012), <<https://sites.google.com/site/amicusbrieffhungary>> accessed 12 December 2014.

B. Case study: the EU and the Hungarian ‘National Cooperation System’

1. Introduction

‘where liberal democracy and the rule of law cease to function, there Europe ends.’²⁶¹

This case study analyses the ineffectiveness of the European conception of democracy, the rule of law and the protection of fundamental rights (‘democratic rule of law with fundamental rights’) from the perspective of recent Hungarian constitutional changes.²⁶²

There are no European standards directly applicable to questions concerning the national identity of states like, for example, the concept of the nation or ideological references used in a constitution. According to Article 4 paragraph 2 TEU, the EU shall respect the identity of member states. But the national identity of member states might cause legitimate concerns for domestic human rights protection, dignity and equality, the rule of law and democracy. Through the example of Hungary this study focuses on the clash between the national sovereignty of states and the values of the EU, and on the issue how the respect for the identity of member states can limit the effectiveness of the EU’s internal human rights system.

It is an often cited viewpoint that the archetypal liberal subject of human rights protection was the ‘white Christian male propertied citizen,’²⁶³ or, more generally, somebody who did not belong to a vulnerable group. Therefore nowadays international and European law, as well as constitutional democracies attempt to compensate vulnerable subjects and take measures to achieve the equality of these groups.²⁶⁴ One of the main questions is ‘how to take into account the position of vulnerable groups’²⁶⁴ in the frame of human rights protection, i.e. how human rights protection can grapple with not only the formal but also the substantive concepts of equality. Against this trend the Hungarian illiberal constitution does not take into account the substantive, let alone the formal concepts of

²⁶¹ Jan Werner Müller, ‘Brussels as a Supranational Guardian of Liberal Order’, in Seyla Benhabib and David Cameron and Anna Dolidze and Gábor Halmai and Gunther Hellmann and Kateryna Pishchikova and Richard Youngs (eds), *The Democratic Disconnect: Citizenship and Accountability in the Transatlantic Community* (Transatlantic Academy, 2013) 87.

²⁶² Sergio Carrera, Elspeth Guild and Nicholas Hernanz, *The Triangular Relationship between Fundamental Rights, Democracy and the Rule of Law in the EU: Towards an EU Copenhagen Mechanism* (Justice and Home Affairs, CEPS Paperbacks 2013) 30.

²⁶³ FRAME Deliverable 3.1, 36 <www.fp7-frame.eu/wp-content/materiale/reports/01-Deliverable-3.1.pdf> accessed 11 November 2014, 10.

²⁶⁴ *ibid* 37.

equality and it has a clear anti-egalitarian character, as will be further discussed below.²⁶⁵ Despite the fact that the EU defines itself as a community of liberal democracies, Hungary is institutionalising an illiberal, majoritarian approach to democracy.²⁶⁶ As will be discussed, practically every formal and substantive element of the rule of law is threatened in Hungary. Universal and European human rights protection can gain important insights from the lessons that can be drawn from illiberal and anti-democratic ideas that influence constitution-making. In the following the study analyses through the illiberal turn of Hungary the conflict between the principles of constitutionalism and the national identity of the states and its impact on human rights protection. It examines how the ethnic concept of a nation has been given primary role in the Hungarian Fundamental Law (2011).²⁶⁷ The case study of Hungary helps to grasp the operationalisation of EU's concepts of human rights, democracy and the rule of law.

2. The detractor's viewpoint of the case study and literature review

Concerning the literature on the new constitution in Hungary, Gábor Attila Tóth mentions that,²⁶⁸ since the constitutional changes there have been two main types of constitutional lawyers: detractors,²⁶⁹ who are against the new constitutional system, and apologists,²⁷⁰ who support it. According to the detractors' viewpoint, the Fundamental Law 'does not fulfil the integrative function of the modern constitutions. It is biased in favor of the winners of 2010 elections and against everybody else. It

²⁶⁵ Kriszta Kovács, 'Equality: The Missing Link' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012).

²⁶⁶ See e.g. András Bozóki, 'The Crisis of Democracy in Hungary' (2012) <www.boell.de/de/node/276334> accessed 13 November 2014

²⁶⁷ Balázs Majtényi, 'Alaptörvény a nemzet akaratából' (Fundamental Law from the Will of the Nation) (2014) 55 *Állam- és Jogtudomány* 1, 77.

²⁶⁸ Gábor Attila Tóth, 'Az alkotmányjog akadémiai diskurzusai az Alaptörvényről' (Academic discourses on the Fundamental Law); 'Alkotmányjog az Alaptörvény után című konferencia' (conference presentation) (ELTE TÁTK, Budapest, 23 November 2012); Katalin Gacs, Nóra Finszter and Orsolya Sidó, 'Alkotmányjog az Alaptörvény után – Konferenciabeszámoló' (2012) 4 *Fundamentum* 123.

²⁶⁹ For more on the 'detractor's' viewpoint, see e.g. Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012), Nóra Chronowski, Tímea Drinóczi and Miklós Kocsis, 'Mozaikok, azaz milyen értelmezési kérdéseket vethet fel az Alaptörvény?' in Drinóczi Tímea (ed), *Magyarország új alkotmányossága*, (PTE Állam- és Jogtudományi Kar Pécs 2011) 45 or Tímea Drinóczi and Nóra Chronowski and Miklós Kocsis, 'What Questions of Interpretation May Be Raised By The New Hungarian Constitution' (2012) 1 *International Constitutional Law Online Journal*, 41, or see the following opinions for the Venice Commission written by detractor constitutional lawyers: Zoltán Fleck and others, '*Opinion on the Fundamental Law of Hungary*' (Andrew Arato, Gábor Halmai and János Kis eds 2011), Miklós Bánkúti and others, '*Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws*' (Gábor Halmai and Kim Lane Scheppele eds 2012), Miklós Bánkúti and others, '*Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary*' (Gábor Halmai and Kim Lane Scheppele eds 2013). These opinions are available in Hungarian and in English at the following website: <<https://sites.google.com/site/amicusbriefhungary>> accessed 20. December 2014.

²⁷⁰ The viewpoint of apologists clearly appears, for instance, in the following volume: Lóránt Csink, Balázs Schanda, and András Zs. Varga (eds), *The Basic Law of Hungary – A First Commentary* (National Institute of Public Administration, Clarus Press 2012).

provides a mythical historical narrative that goes against the grain of republican traditions.²⁷¹ Because of the differing theoretical backgrounds and different approaches of these two groups of lawyers, the analysis was aided by an examination of the constitution's detractors. Of course, the representatives of the two positions cannot in every case be definitely separated. In fact, if the two groups were considered from the viewpoint of constitutionalism, and not from the aspect of one's standpoint on the Fundamental Law, the designations may be the reverse, arguing that those who defend the Fundamental Law 'detract' from the values and standards of modern constitution-making. The documents of international organisations that deal with Hungarian constitutional changes support the critical viewpoint of detractors.

It is important to mention that the institutions of the EU and the Council of Europe were following the Hungarian constitution-making process and they were aware of its nature. The Venice Commission issued opinions on the adoption of the Fundamental Law,²⁷² on the Fundamental Law,²⁷³ on the Fourth Amendment²⁷⁴ and on some new acts.²⁷⁵ On behalf of the EU the Tavares report²⁷⁶ provided a thorough

²⁷¹ Gábor Attila Tóth, 'Preface' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation: On Hungary's 2011 Fundamental Law* (Central European University Press 2012), IX.

²⁷² European Commission for Democracy through Law (Venice Commission), 'Opinion on three legal questions arising in the process of drafting the New Constitution of Hungary – Adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011)', Strasbourg, 28 March 2011, Opinion no. 614/2011, Council of Europe (CDL-AD(2011)001).

²⁷³ European Commission for Democracy through Law (Venice Commission), 'Opinion on the new Constitution of Hungary – Adopted by the Venice Commission at its 87th Plenary Session (Venice, 17-18 June 2011)', Strasbourg, 20 June 2011, Opinion no. 621 / 2011, Council of Europe (CDL-AD(2011)016).

²⁷⁴ European Commission for Democracy through Law (Venice Commission), 'Opinion on the Fourth Amendment to the Fundamental Law of Hungary – Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)', Strasbourg, 17 June 2013, Opinion no. 720 / 2013, Council of Europe (CDL-AD(2013)012).

²⁷⁵ European Commission for Democracy through Law (Venice Commission), 'Opinion on Act CLXII of 2011 on the Legal Status and Remuneration of Judges and Act CLXI of 2011 on the Organisation and Administration of Courts of Hungary – Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012)', Strasbourg 19 March 2012, Opinion no. 663 / 2012, Council of Europe (CDL-AD(2012)001); 'Opinion on Act CCVI of 2011 on the Right to Freedom of Conscience and Religion and the Legal Status of Churches, Denominations and Religious Communities of Hungary – Adopted by the Venice Commission at its 90th Plenary Session (Venice, 16-17 March 2012)', Strasbourg 19 March 2012, Opinion no. 664 / 2012, Council of Europe (CDL-AD(2012)004); 'Opinion on Act CLXIII of 2011 on the Prosecution Service and Act CLXIV of 2011 on the Status of the Prosecutor General, Prosecutors and other Prosecution Employees and the Prosecution Career of Hungary – Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)', Strasbourg 19 June 2012, Opinion no. 668 / 2012, Council of Europe (CDL-AD(2012)008); 'Opinion on Act CLI of 2011 on the Constitutional Court of Hungary – Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)', Strasbourg 19 June 2012, Opinion no. 665 / 2012, Council of Europe (CDL-AD(2012)009); 'Opinion on the Act on the Rights of Nationalities of Hungary – Adopted by the Venice Commission at its 91st Plenary Session (Venice, 15-16 June 2012)', Strasbourg 19 June 2012, Opinion no. 671 / 2012, Council of Europe (CDL-AD(2012)011); 'Opinion on Act CXII of 2011 on Informational Self-determination and Freedom of Information of Hungary – Adopted by the Venice Commission at its 92nd Plenary Session (Venice, 12-13 October 2012)', Strasbourg 18 October 2012, Opinion no. 672 / 2012, Council of Europe (CDL-AD(2012)023).

²⁷⁶ Rui Tavares, 'Report on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012)' (2012/2130(INI)), European Parliament, Committee on Civil Liberties, Justice and Home Affairs (A7-0229/2013).

analysis of the Hungarian changes from the perspective of European law, and the EP adopted a resolution based on the report.²⁷⁷

About the Fourth Amendment to the Fundamental Law the Venice Commission stated that ‘these constitutional amendments are not only problematic because constitutional control is blocked in a systematic way, but also in substance because these provisions contradict principles of the Fundamental Law and European standards.’²⁷⁸ The European Parliament concluded in its resolution of 3 July 2013 on the situation of fundamental rights in Hungary that ‘the systemic and general trend of repeatedly modifying the constitutional and legal framework in very short time frames, and the content of such modifications, are incompatible with the values referred to in Article 2 TEU [...] this trend will result in a clear risk of a serious breach of the values referred to in Article 2 TEU.’²⁷⁹ All in all, the detractive critical standpoint of Hungarian constitutional lawyers is echoed by these evaluations of the international organisations.

3. Building illiberal democracy in Hungary

In May 2010 the National Assembly of the Republic of Hungary accepted the government programme of the Fidesz-KDNP party alliance (Young Democrats -Hungarian Civic Alliance and the Christian Democratic People’s Party) that obtained more than two-thirds of the seats in the parliamentary election. The party alliance received more than 50 percent of the votes, and two-thirds of the seats.²⁸⁰ Shortly thereafter, in June 2010 the National Assembly approved the Declaration on National Cooperation as a political document, in which it declared that ‘a new social contract was laid down in the April general elections through which the Hungarians decided to create a new system: the National Cooperation System.’²⁸¹ In the government discourse the new constitutional system was established as a result of a ‘revolution in the polling booths’, meaning simply the victory of Fidesz in the elections.²⁸²

The democratic constitution of the republic, which was formally adopted in 1949 but was revised in light of the principle of the rule of law, democracy and fundamental rights after the political transition in

²⁷⁷ *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))*.

²⁷⁸ European Commission for Democracy through Law (Venice Commission), ‘Opinion on the Fourth Amendment to the Fundamental Law of Hungary – Adopted by the Venice Commission at its 95th Plenary Session (Venice, 14-15 June 2013)’, Strasbourg 17 June 2013, Council of Europe (CDL-AD(2013)012) CDL-AD(2012)001-e, Conclusions, 31.

²⁷⁹ *European Parliament resolution of 3 July 2013 on the situation of fundamental rights: standards and practices in Hungary (pursuant to the European Parliament resolution of 16 February 2012) (2012/2130(INI))* 58.

²⁸⁰ See Gábor Halmai, ‘An Illiberal Constitutional System in the Middle of Europe’ (2014) in Wolfgang Benedek, Florence Benoît-Rohmer and Wolfram Karl and Matthias C. Kettemann and Manfred Nowak (eds.), *European Yearbook of Human Rights* (2014) 512.

²⁸¹ Political Declaration 1 of 2010 (16 June) of the Hungarian National Assembly on National Cooperation <http://www.kulugyminiszterium.hu/NR/rdonlyres/1EC78EE5-8A4B-499C-9BE5-E5FD5DC2C0A1/0/Political_Declaration.pdf> accessed 20 December 2014

²⁸² See Viktor Orbán, Revolution in the Polling Booths <http://www.miniszterelnok.hu/in_english_article/revolution_in_the_polling_booths> accessed 20 December 2014

1989, was considered to be a ‘pile of technocratic legal rules’ by Prime Minister Viktor Orbán in 2009, and he announced that the government would start working on the elaboration of a new constitution. Meanwhile, in possession of the necessary two-thirds majority, the government amended the Constitution of 1989 on several occasions to serve its actual political ends. In November 2010, for example, it decided to restrict the powers of the Constitutional Court with respect to the revision of legal norms when it made it impossible for the Court to review tax and budget legislation.

One of the reasons why the government restricted the powers of the Constitutional Court was that the latter had annulled the law that imposed retroactively a 98 per cent tax on the severance pay of civil servants who had worked in the former administration. The Court held that such regulation was unconstitutional and struck it down by referring to the requirements of legal certainty.²⁸³ Here the Court was making an argument which was directly linked to the rule of law, as legal certainty (or legality) is one of its main tenets. Later on, however, the Parliament passed the law,²⁸⁴ which led to the European Court of Human Rights’ finding in several cases that the Hungarian government violated the property rights of the dismissed civil servants.²⁸⁵

Measures taken by the government made it clear that it puts aside the constitutional system of the past two decades, and it intends to base the functioning of the state on new premises. The measures to follow were already the signposts of the new constitutional system: the further restriction of the powers of the Constitutional Court, the nationalisation of private pension funds, as well as turning openly against the IMF in the name of a ‘war of economic independence.’²⁸⁶ The government started to pay the state debts from market-based loans with unfavourable conditions, which it partly received from Eastern markets.²⁸⁷

In 2010, the Hungarian Parliament adopted an amendment to the Act on Hungarian citizenship and in light of the ethnic concept of nation it introduced a new naturalisation procedure for ethnic Hungarians living outside Hungary’s borders. It offered extraterritorial citizenship for ethnic Hungarians living abroad, arguing that the new citizenship policies serve the symbolic ‘national reunification beyond borders’.²⁸⁸ Behind the explicit argument that the new law serves the interests of ethnic Hungarians living abroad, there lies the undisclosed intention to gain votes without real representation. (According

²⁸³ 184/2010. (X. 28.) AB határozat/Hungarian Constitutional Court Decision 184/2010 (X. 28.)

²⁸⁴ 2010. évi XC. törvény az egyes gazdasági és pénzügyi tárgyú törvények megalkotásáról, illetve módosításáról (Act XC of 2010 on the creation and amendment of certain economic and financial acts) <<http://www.kozlonyok.hu/nkonline/MKPDF/hiteles/mk10132.pdf>> accessed 20. December 2014.

²⁸⁵ See e.g. CASE OF N.K.M. v. HUNGARY (Application no. 66529/11).

²⁸⁶ Interview with Viktor Orbán. Az igazság hiányzott a rendszerváltoztatásból. (The justice was missing from the change of the regime) <<http://www.fidesz.hu/hirek/2009-01-05/az-igazsag-hianyzott-a-rendszervaltoztatatsbol/>> accessed 20. December 2014.

²⁸⁷ Balázs Horváthy and Tamás Dezső Ziegler, ‘Europeanisation of the Hungarian Legal Order – from Convergence to Divergence’ in William B. Simons and Tom Hashimoto (eds), *Reviewing the 10 Years of CEE Accession: Spillover Effects, Unexpected Results, and Externalities* (Brill 2014).

²⁸⁸ Szabolcs Pogonyi, ‘Non-Resident Hungarians Get Voting Rights’ (2012) <<http://eudo-citizenship.eu/search-results/591-non-resident-hungarians-get-voting-rights>> accessed 13 November 2014.

to the electoral law in Hungary, everyone can vote for the party list and cast their vote for individual candidates as well.²⁸⁹ Ethnic Hungarians living outside the borders (non-resident Hungarian citizens), however, have only one of these two votes, i.e. they cannot vote for individual candidates in single member districts, but only for the party lists.) The votes of Hungarian kin minorities are not handled separately in the party lists from the votes of resident Hungarian citizens, and as a result, it is not known which member of the Parliament is elected with the votes of non-resident citizens, or who represents the ethnic Hungarians living abroad. What is more, it is difficult to check because of the sovereignty of the states the fairness of elections on the territory of another state the international observers (e.g. the OSCE/ODIHR has deployed a Limited Election Observation Mission)²⁹⁰ also concentrated its activity on territory of Hungary – in the 2014 elections 98 percent of voters and beyond the borders voted for Fidesz-KDNP and 43.5 percent in Hungary and the party alliance gained two third of the seats.

On 5 July 2010 the governing coalition passed an amendment to the constitution with two-thirds majority, whereby it repealed the constitutional provision that stipulated the requirement of a four-fifths majority for a constitutional amendment. The Hungarian Parliament passed Hungary's new constitution (entitled the Fundamental Law) on 18 April 2011, which entered into force on 1 January 2012 and superseded the previous constitution (Constitution of 1989). The Fundamental Law and its five amendments were passed by the members of parliament belonging to the governing party alliance (Fidesz, KDNP), without the support of the opposition parties.

In general, the reconstruction of the legal order since 2010 has led to serious legal uncertainty. When the Fundamental Law entered into force, most cardinal acts had not yet been passed. In the case of several acts that had been passed before the Fundamental Law important enforcement provisions were missing. With several new acts, whose provisions came into effect at various points of time, it was often not clear which regulation should be applied at a particular point of time.²⁹¹ Sometimes even the two-thirds majority character of the act was ambiguous.²⁹² This obviously led to legal uncertainty, the most conspicuous example of which is that the new constitution has been amended five times since its adoption. It has become a usual practice on the part of MPs to submit bills drawn up by the government. In the normal procedure where the government draws up and submits a bill to the Parliament, it is obliged by law to initiate social consultation and invite interested civil society groups and opposition

²⁸⁹ According to Section 3 (2) of the Act CCIII of 2011 on the Election of the Members of Parliament, 'One hundred and six Members of Parliament shall be elected in single-member constituencies and ninety-three from national lists.' <http://www.valasztas.hu/en/ovi/241/241_1_11.html> accessed 13 November 2014.

²⁹⁰ Elections in Hungary <<http://www.osce.org/odihr/elections/hungary>> accessed 13 November 2014.

²⁹¹ For instance in the case of the Act CLXXIX of 2011 on the Rights of Nationalities it was not clear which parts of the text have already entered into force and which will later and when. Some parts of the Act enter into force with the date of its promulgation, other parts on 1 January 2012, other parts again on 31 March 2012, certain parts on 1 September 2012, yet again other ones on 1 January 2013, some on 1 September 2013, and some in 2014 at the time of minority municipal elections.

²⁹² For instance in the case of the Act CLXXIX of 2011 on the Rights of Nationalities it is difficult to understand Article 158 of the Act, which lists the articles of the law that can only be changed by a vote of a two---thirds majority, whereas Article 158 itself does not need two---thirds majority. It could mean that it is possible to modify the parts of the law that require a two---thirds vote without a two---thirds majority.

parties to the preparation of the draft. If, however, an MP proposes a bill in his/her own name, there is no need for social consultation, in this way, submitting bills through MPs the government can skip the consultation procedure. The government has submitted almost half of the cardinal acts and the majority of constitutional amendments in this way as private member bills.²⁹³ To illustrate the extent of changes: in the first twenty months of being in office, the Parliament 'passed 365 laws, including twelve amendments to the old constitution that together changed more than 50 individual constitutional provisions.'²⁹⁴

The government has increasingly committed itself to the majoritarian conception of democracy, meaning that nobody and nothing, not even independent state institutions can stand in the way of the will of the majority serving national interests.²⁹⁵ The undermining of the independence of autonomous state institutions and the removal of their heads will be discussed in the following chapter of the case study. Following the restriction of powers of independent state institutions (e. g. Constitutional Court, ombudspersons, judiciary), from August 2013 on steps were taken by the government together with state bodies against NGOs, including tax inspections and criminal procedures, in the manner familiar from authoritarian states.²⁹⁶ Criticism by the international community and the EU has been interpreted by the new-born system as the violation of national sovereignty – in one of his speeches, entitled 'Hungary will not be a colony!' the Prime Minister accused the EU of imperialism and compared the EU to the Soviet Union.²⁹⁷

In the utterances of government members NGOs appear as pseudo-civil society and as paid agents of the West: 'These organizations kept for millions of dollars, what these organizations do, all they have to do in exchange of the American money, is to attack the Hungarian government, attack Fidesz, and attack the Prime Minister of Hungary in all possible forums.'²⁹⁸ The biggest scandal came about when in 2014 the government began to investigate funds received from the Norwegian NGO Fund in order to exert

²⁹³ Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, 4.

²⁹⁴ Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, 6.

²⁹⁵ Zoltán Miklósi, 'Demokrácia: liberális, alkotmányos és egyéb' (Democracy: Liberal and Other) (2014) <<http://szuveren.hu/politika/demokracia-liberalis-alkotmanyos-es-egyeb>> accessed 13 November 2014.

²⁹⁶ Governmental attacks against Hungarian NGO sphere <http://tasz.hu/files/tasz/imce/timeline_of_gov_attacks_against_hungarian_ngos_20140921.pdf> accessed 13 November 2014.

²⁹⁷ Nem leszünk gyarmat! Orbán Viktor ünnepi beszéde, Budapest 2012. március 15. (Hungary will not be a colony! Viktor Orbán Speech on 15 March 2012.< http://www.miniszterelnok.hu/beszed/nem_leszunk_gyarmat> or Kester Eddy, 'Orbán Compares EU to Soviet Union' <<http://www.ft.com/cms/s/0/6feaca90-6ecb-11e1-afb8-00144feab49a.html#axzz2w7mGgf8H>> accessed 13 November 2014.

²⁹⁸ Péter Hoppál the spokesperson of the governing party Fidesz, at a press conference on 17 August 2013. Documents for Side Event - Going Liberal: the Rule of Law and NGOs in Hungary. <<http://www.osce.org/odihr/124145?download=true>> accessed 13 November 2014.

pressure on such organisations. Even human rights NGOs appear as ‘paid political activists’²⁹⁹ of the West in spite of the fact that some of these NGOs do not accept governmental support at all so that they can fulfil their watchdog function independently, i.e. so that they can watch the government and not vice versa. Pressure was exerted with the methods of authoritarian rule, namely, the government restricted the NGOs’ right to access to funds and resources,³⁰⁰ and police raided their offices, seized their computers and servers. Interestingly, when the police raided NGO offices, there was a proposal in the European parliament for a plenary debate but the European People’s Party (PP) did not support the proposal. Esteban Gonzales Pons, a Portuguese MEP for the PP, said in the debate that the ‘party’s group had rejected the proposal since there was no reason to hold a debate in the assembly rather than in the EP’s human rights committee.’³⁰¹ However, the restriction of powers of independent state and civil institutions clearly goes against the European conceptualisation of democracy and against democratic principles (*transparency* and *deliberation*) enshrined in the Treaty of Lisbon (see *infra* Chapter III.C).

According to many, the speech of Premier Viktor Orbán delivered before an ethnic Hungarian audience on 26 July 2014 in Băile Tușnad (Tusnádfürdő), Romania, defines clearly the character of the new Hungarian constitutional system, the so called ‘National Cooperation system’:

‘We have abandoned liberal methods and principles of organizing society, as well as the liberal way to look at the world [...]. Today, the stars of international analyses are Singapore, China, India, Turkey, Russia [...] We are [...] parting ways with Western European dogmas, making ourselves independent from them [...]. If we look at civil organizations in Hungary, (...) we have to deal with paid political activists here. [...] This is about the ongoing reorganization of the Hungarian state. Contrary to the liberal state organization logic of the past twenty years, this is a state organization originating from national interests.’³⁰²

The Prime Minister presumably wished the speech to be symbolical since it was given in a part of a neighbouring country inhabited mostly by Hungarians. As opposed to the liberal conception of democracy, it argues for an illiberal, majoritarian conception, opening thereby a new chapter in the constitutional history of Hungary after the political transition in 1989. By pulling down liberal democracy and the rule of law, Hungary diverged from the values of the EU. But since Hungary does not want to

²⁹⁹ Speech of Viktor Orbán on 26 July 2014 in Băile Tușnad (Tusnádfürdő), See the English translation of the speech, visit: <<http://budapestbeacon.com/public-policy/full-text-of-viktor-orbans-speech-at-baile-tusnad-tusnadfurdo-of-26-july-2014/>>The official English translation of the speech provided by the PM’s Office tried to avoid the usage of the term ‘illiberal’. See <<http://www.kormany.hu/en/the-prime-minister/news/the-era-of-the-work-based-state-is-approaching>> accessed 13 November 2014.

³⁰⁰ Isabelle Scherer and others (ed), *Violations of the right of NGOs to funding: from harassment to criminalisation - 2013 Annual Report*. <http://www.omct.org/files/2013/02/22162/obs_annual_report_2013_uk_web.pdf> accessed 20. December 2014.

³⁰¹ No Plenary Debate on Hungary in European Parliament see <<http://hungarytoday.hu/cikk/918-2-no-plenary-debate-on-hungary-in-the-ep/>>, accessed 13 November 2014.

³⁰² Speech of Viktor Orbán on 26 July 2014 in Băile Tușnad (Tusnádfürdő).

leave the EU, it will remain an illiberal member state, as there is no procedure for 'ejecting' a member state.³⁰³

The following subsection will examine the text of the Fundamental Law and that of its modification, presenting some of the most contradictory and much criticised parts.

4. The Fundamental Law of Hungary

a) National Avowal

The Fundamental Law is introduced by a lengthy preamble called National Avowal, which defines the characteristics of the legal order. It is in the preamble that the legislator defined the identity of the political community.

The constitutions of liberal democracies are founded on the acceptance of a pluralistic political community, the separation of church and state, the primary use of the concept of the political nation, and the assumption of the moral equality of citizens. These constitutions do not commit themselves to specific moral conceptions but intend to give everybody the possibility to live a good life by ensuring secular political values and freedoms that were mainly born in the period of the Enlightenment. The most serious charge against the preamble of the Fundamental Law is the absence of such values. Instead, starting from a moral approach it tries to form the constitutional identity of the country in a way that might lead to certain restriction of rights. The use of the concept of nation in the Fundamental Law best illustrates this. The preamble provides a pre-modern list of non-neutral cohesive values such as fidelity, faith and love,³⁰⁴ while it does not mention, for instance, the principle of equality,³⁰⁵ the list clearly diverges from the values of the European Union that appear in Article 2 of the TEU.

Although the republic remains to be the form of government, the Hungarian Holy Crown, appearing as the embodiment of national unity, retrieves some of its constitutional function. This is in compliance with the statement of the present Prime Minister made in 2006: 'the nation is the body, whereas the republic is only the clothes.'³⁰⁶ The preamble furthermore includes reference to 'the achievements of our historical constitution',³⁰⁷ which, however, unlike the Anglo-Saxon development of constitutional

³⁰³ Gábor Halmai, 'The Rise and Fall of Hungarian Constitutionalism' in Seyla Benhabib and David Cameron and Anna Dolidze and Gábor Halmai and Gunther Hellmann and Kateryna Pishchikova and Richard Youngs (eds), *The Democratic Disconnect: Citizenship and Accountability in the Transatlantic Community* (Transatlantic Academy 2013).

³⁰⁴ 'Our fundamental cohesive values are fidelity, faith and love.' (National Avowal).

³⁰⁵ Kriszta Kovács, 'Equality: The Missing Link' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 186.

³⁰⁶ Orbán Viktor a miniszterelnök-jelölt. Viktor Orbán is the candidate for prime minister (2006) <<http://2001-2006.orbanviktor.hu/hir.php?aktmenu=2&id=2447&printing=1>> accessed 13 November 2014.

³⁰⁷ See to this Zoltán Sente, 'A historizáló alkotmányozás problémái – a történeti alkotmány és a Szent Korona az új Alaptörvényben' (2011) 3 *Közjogi Szemle* 1, Zoltán Sente 'The doctrine of the Holy Crown in the Hungarian Historical Constitution' (2013) 1 *Journal on European History of Law* 4, 109.

law, does not point towards the continuous expansion of rights, since Hungarian legal history has been frequently halted by rights restricting dictatorial periods.

National and ethnic minorities cannot participate in the creation of the constitution. This is made clear in the very first sentence of the document which begins with the following: 'WE, THE MEMBERS OF THE HUNGARIAN NATION, at the beginning of the new millennium, with a sense of responsibility for every Hungarian, hereby proclaim the following'.³⁰⁸ The Preamble thus introduces an ethnic (cultural) concept of the nation,³⁰⁹ especially when it goes on to explain that 'We promise to preserve the intellectual and spiritual unity of our nation torn apart in the storms of the last century.'³¹⁰ As János Kis points it out, the Fundamental Law defines the nation 'as a community, the binding fabric of which is 'intellectual and spiritual': not political, but cultural. There is no place in this community for the national minorities living within the territory of the Hungarian state.'³¹¹

The sense of belonging to the nation does not extend in this constitution to all residents of the state. There is not a single reference to the political nation: the phrase 'we the people' and the sense of identity expressed therein do not appear.³¹² It follows that members of recognised national minorities³¹³ become secondary and other, non-ethnic Hungarians who do not form a national minority, such as Jews, become third-rate citizens; they are not equally part of the constitutional power. According to the Fundamental Law national minorities only 'form part of the Hungarian political community and are constituent parts of the State'.³¹⁴ (The former constitution also mentioned that national and ethnic minorities 'participate in the sovereign power of the people'. The new text does not contain this provision.) This is even more problematic if we take into account that the Hungarian state is not even neutral in name and not all citizens may, regardless of identity, belong to the privileged nation. The state grants special minority rights as compensation to national minorities, in return for which it expects the loyalty of said groups. All of this makes it at least doubtful whether the state of the Hungarian ethnic cultural nation follows the aspirations of those with non-Hungarian identity with equal attention and whether it grants them equal respect. Such regulation does not comply with the demand of moral equality.

³⁰⁸ NATIONAL AVOWAL (Fundamental Law).

³⁰⁹ Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws (2014), at 7, or Zsolt Körtvélyesi, 'From 'We the People' To 'We the Nation,' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation Hungary's New Fundamental Law* (Central European University Press 2012).

³¹⁰ NATIONAL AVOWAL (Fundamental Law).

³¹¹ See Opinion on Hungary's New Constitutional Order: Amicus Brief to the Venice Commission on the Transitional Provisions of the Fundamental Law and the Key Cardinal Laws, 7.

³¹² See in detail Zsolt Körtvélyesi, 'From 'We the People' To 'We the Nation,' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation Hungary's New Fundamental Law* (Central European University Press 2012) 22.

³¹³ The following ethnic groups qualify by Act on nationalities as national minorities (nationalities) of Hungary: Bulgarian, Roma, Greek, Croatian, Polish, German, Armenian, Romanian, Ruthenian, Serbian, Slovakian, Slovenian and Ukrainian.

³¹⁴ NATIONAL AVOWAL (Fundamental Law).

It was due to the appearance of the modern term of the nation that the members of political communities became capable of seeing each other as equals. In contrast, the Fundamental Law has a clear anti-egalitarian character and institutionalises a pre-modern concept of the nation.³¹⁵ It addresses only Hungarians (the ethnic nation), who thus constitute the subjects of the constitution, leading to the erosion of the theoretical basis of minority rights on which the former constitution was based, namely the fundamental principles of the multi-cultural model.³¹⁶ According to the preamble 'Our Fundamental Law shall be the basis of our legal order: it shall be a covenant among Hungarians past, present and future.'³¹⁷ There are several possible interpretations of this provision. First, with the word 'covenant' it invokes social contract theory. However, without saying why in the official explanation of the bill,³¹⁸ the Fourth Amendment replaced 'covenant' (szerződés) with 'alliance' (szövetség). It is a step back from the concept of the social contract: in the Hungarian language, the word 'szövetség' has less of a legal than a symbolic meaning. Finally, it can also refer to the transcendent, non-secular layer of contract, because in the Hungarian language the name of the Old and New Testaments are Ó and Új Szövetség. This interpretation is even more likely as the Preamble of the Constitution (National Avowal) links the nation to Christianity, stating that 'we recognise the role of Christianity in preserving nationhood.' In this case, the most appropriate translation would be: the Fundamental Law is a testament 'among Hungarians past, present and future'.

It should not be surprising that, as Küpper remarks, in the Hungarian constitution even sustainable development and environmental protection gain a national character: Article P (Basic Provisions, Part entitled FOUNDATION) declares that 'all natural resources [...] form part of the nation's common heritage'.³¹⁹ Or, for instance, the National Avowal mentions that 'we commit to promoting and safeguarding our heritage [...] along with all man-made and natural assets of the Carpathian Basin.' (The Carpathian Mountains bordered Hungary before the Trianon Treaty 1920.)

The National Avowal also declares that 'we believe that our children and grandchildren will make Hungary great again with their talent, persistence and moral strength.'³²⁰ The wording of the provision is highly problematic because it invokes the historical 'greatness', i.e. greatness in size, of the country: it might be understood as referring to an intention of territorial revision, in particular the revision of the

³¹⁵ Kriszta Kovács, 'Equality: The Missing Link' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 171.

³¹⁶ See e.g. Balázs Majtényi, 'What Has Happened to Our Model Child? The Creation and Evolution of the Hungarian Minority Act' (2005) 6 *European Yearbook of Minority Issues* 5, 397.

³¹⁷ The Fundamental Law's preamble is entitled National Avowal. For the 'official' English translation of the Fundamental Law, at:

<http://www.parlament.hu/angol/the_fundamental_law_of_hungary_consolidated_interim.pdf> accessed 13 November 2014.

³¹⁸ See the official interpretation of the Fourth Amendment, Indokolás (Justification), at

<<http://www.parlament.hu/irom39/09929/09929.pdf>> accessed 13 November 2014

³¹⁹ Herbert Küpper, 'Hol vagyok én a szövegben?' [Where am I in the text?] in Benedek Molnár and Márton Németh and Péter Tóth (eds), *Mérlegen az Alaptörvény - Interjúkötet hazánk új alkotmányáról* (HVG ORAC 2013) 89.

³²⁰ NATIONAL AVOWAL (Fundamental Law).

post-World War I Treaty of Trianon, where Hungary lost two-thirds of its territory and three-fifths of its population. The size of the population lost was 10.6 million of which the number of ethnic Hungarians was 3.5 million (today it is less than 2.2 million). Reference to the Holy Crown confirms this interpretation as it has traditionally been a unifying symbol for territories outside the current borders of Hungary. If we interpret this sentence together with other constitutional provisions though, the revisionist connotation fortunately fades; it might also refer to politics that serve, for instance, the improvement of the scientific or athletic importance of Hungary. Still, since the provision in this form is subject to misunderstanding, it would be better if the legislator annulled it.

To sum up, constitutional identity must remain distinct from the cultural identity of the state. Since the Fundamental Law uses the concept of an ethnic nation, the ethnicity-based form of national identity defines the constitutional identity of Hungary. The primary role of the ethnic nation can also endanger the egalitarian character of the state, which once linked together nation- and state-building.³²¹

b) Introductory provisions – the Chapter entitled ‘Foundations’

Article A of the introductory provisions of the Chapter ‘Foundations’ changed the name of the state from the Republic of Hungary to Hungary, thus emphasising the decreasing role attributed to the republic as a form of government in comparison to the former constitution.

Article L (1) protects the family as the basis of the ‘nation’s survival’. Family as understood in the constitution is based on marriage between a man and a woman and the relationship between parents and children.³²² The provision has the potential to restrict women’s autonomy, the rights of sexual minorities and the rights of childless couples.³²³ The Fourth Amendment overrules the former Constitutional Court decision³²⁴ with this provision.

Article R (3) of the Foundations endows the preamble with a normative character and it refers to the historical constitution when it declares that ‘the provisions of the Fundamental Law shall be interpreted in accordance with their purposes, the National Avowal contained therein and the achievements of our historical constitution.’ Reference to the historical constitution of itself endangers legal certainty as in Hungary the content of the historical constitution and its relationship with the written constitution is

³²¹ See on the possible conflict of state and nation building in Central and Eastern Europe. Zsuzsa Csergő and James M. Goldgeier, ‘Kin-State Activism in Hungary, Romania, and Russia: The Politics of Ethnic Demography’ in Tristan James Mabry and John McGarry and Margaret Moore and Brendan O’Leary (eds) *Divided Nations and European Integration* (University of Pennsylvania Press 2013).

³²² According to the Fourth amendment Article L(1) of the Fundamental Law shall be replaced by the following provision: ‘(1) Hungary shall protect the institution of marriage as the union of a man and a woman established by voluntary decision, and the family as the basis of the nation’s survival. Family ties shall be based on marriage and the relationship between parents and children.’

³²³ At the end of 2012, the Constitutional Court had annulled the definition of the family in the Act on the protection of families because it was too narrow, excluding all families other than very traditional ones of opposite sex married parents with children. See 43/2012. (XII. 20.) AB határozat/Hungarian Constitutional Court Decision 43/2012 (XII. 20).

³²⁴ 43/2012. (XII. 20.) AB határozat/Hungarian Constitutional Court Decision 43/2012 (XII. 20).

disputable. Reference to the National Avowal also involves dangers. According to the Dworkinian teleological interpretation there is always a moral conviction underlying a constitution, on which those interpreting and applying the law continuously rely.³²⁵ Relying on an interpretation that follows from the values included in the National Avowal (such as fidelity, faith and love, belonging to Christian Church, belonging to the Hungarian ethnic nation) might, however, lead to a restriction of rights not acceptable in constitutional democracies. Principles laid down in the Avowal shall be the moral basis and foundation of the legal order, therefore they can be invoked in the case of legislative gaps and dispute.

Article U (1) of the Fourth Amendment mentions ‘The form of government based on the rule of law, established in accordance with the will of the nation’ Subparagraph a) further on claims that ‘the Hungarian Socialist Workers’ Party and its legal predecessors and other political organisations established to serve them in the spirit of communist ideology were criminal organisations [...] and betraying the nation’. With the intention to restrict the rights of political opponents, the provision might violate the principle of *nullum crimen sine lege*, therefore the principle of the prohibition of retroactivity, furthermore the possibility of conducting a procedure at an inappropriate time might lead to the violation of the right to a fair trial. The rule of law concept of the EU is administered by an independent judiciary and right to a fair trial (see *supra* Chapter II.D). The provision itself is very similar to Robespierre’s concept that the nation’s will is expressed in law, which can be derived from Rousseau’s ‘general will’.³²⁶ According to Jacobin ideology ‘the state represents the people’s will, and the existence of plural institutions and social forces only fragments that will.’³²⁷ In the Hungarian Constitutional regulation the ‘general will’ appears as the ethnic nation’s will. (In contrast to this, the general will meant the political nation’s will for the Jacobins. In the Jacobin political concept of nation ‘state and nation, and citizenship and nationality are congruent’.)³²⁸ In addition to this Article, the ‘will of the nation’ also appears in the preamble, which states that ‘our Fundamental Law shall be the basis of our legal order: it [...] expresses the nation’s will.’ That is, under Article U(1) read in conjunction with the preamble, in the name of the ‘nation’s will’ the government can limit human rights, for instance the rights of their political opponents who ‘betray’ the nation. Under Article U, the Hungarian Socialist Workers’ Party, its legal predecessors and other political organisations are the enemies of the nation in the Jacobin sense. Arguably, it is not the ideology that is common between Jacobins and the present Hungarian government, but rather the way they exercise power and the assumption that the laws express the nation’s will.

c) The Chapter on fundamental rights and obligations: Freedom and Responsibility

In this section, the study will outline what impact the new constitutional identity of the state might have on human rights protection. When states reject the application of international and European human

³²⁵ Ronald Dworkin, *Law’s Empire* (Harvard University Press 1986).

³²⁶ Jean-Jacques Rousseau, *The Social Contract* (Book 2, Section 6, Penguin Books, 1968).

³²⁷ William Safran, ‘Pluralism and Multiculturalism in France: Post-Jacobin Transformations’ (2003) 3 *Political Science Quarterly* 118, 439.

³²⁸ *ibid* 465.

rights standards, they usually refer to the protection of constitutional values.³²⁹ The theoretical curiosity of the Hungarian Fundamental Law is that it combines the term 'nation' with the aforementioned pre-modern constitutional values which in turn determine who belong to the ethnic nation. If human rights are interpreted with reference to pre-modern values, in practice it might result in human rights limitations.

The Fundamental Law reflects an intention not to stay neutral in respect of the life and ideology of citizens, and besides their rights it emphasises their obligations and responsibilities, thereby narrowing down possible choices and guiding citizens towards the moral conviction and way of life deemed to be right by the legislator.³³⁰ The new constitutional concept of the nation in Hungary can serve as a basis of human rights limitations and divides the political community. It means that members of minorities (ethnic, sexual, political, social and other) become, in principle, secondary citizens; they are not part (national minorities)³³¹ or not equal part (other minorities, such as sexual minorities) of the 'we' (the ethnic nation) in whose name the constitution was adopted.

In the spirit of the 1989 Constitution, the Hungarian Constitutional Court exercised a moral reading³³² of the constitution, putting the right to human dignity on the top of the hierarchy of human rights, and connecting it with equality or 'the right to equal dignity constituted the basis of the most important decisions.'³³³ The moral concept behind human rights is based on personal autonomy, freedom and equality. The former Constitutional Court's understanding of equality was based on Dworkin's theory of equality of resources.³³⁴ The Court underlined that everybody must be treated as persons with equal dignity. The Court defined the general equality rule 'according to which the law should treat every person with equal respect'.³³⁵ This required that all members of society must have equal human rights. The right to human dignity in Art. 54 (1) of the 1989 Constitution was a natural right of which no one could be deprived. This right included, inter alia, the right to free personal development, to self-determination, to privacy or the general freedom of action. It was a 'mother right,' (as termed by the

³²⁹ See, e.g. Anne Peters, 'Supremacy Lost: International Law Meets Domestic Constitutional Law' (2009) 3 Vienna Journal on International Constitutional Law 3, 170.

³³⁰ Tamás Győrfi, 'Jogok az új alkotmánykonceptióban' [Rights in the Conception of the Constitution] (2011) <<http://szuveren.hu/vendeglap/gyorfi-tamas/jogok-az-uj-alkotmanykonceptioban>> accessed 13 November 2014

³³¹ Named nationalities in the text of the Fundamental Law.

³³² 'Most contemporary constitutions declare individual rights against the government in very broad and abstract language ... The moral reading proposes that we all—judges, lawyers, citizens—interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice.' Ronald Dworkin, 'The Moral Reading of the Constitution' (The New York Review of Books 1996) <www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/> accessed 13 November 2014.

³³³ László Sólyom, 'The Role of Constitutional Courts in the Transition to Democracy with Special Reference to Hungary' (2003) 1 International Sociology 18, 133.

³³⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1977).

³³⁵ 9/1990. (IV. 25.) AB határozat/Hungarian Constitutional Court Decision 9/1990 (IV. 25).

Hungarian Constitutional Court) a subsidiary fundamental right which might be relied upon to protect an individual's autonomy when no particular, specified fundamental right was applicable.³³⁶

The text of the Fundamental Law no longer supports the former moral reading³³⁷ of the Constitution, which was based on personal autonomy, freedom and equality.³³⁸ (And it clearly differs from the EU's concept on dignity and equality, see *infra* Chapter II.B). This in itself can restrict the use of the previous decisions of the Hungarian Constitutional Court. Additionally, the Fourth Amendment adopted in 2013 effectively annuls all Court decisions prior to the entry into force of the Fundamental Law, stating that 'Constitutional Court rulings given prior to the entry into force of the Fundamental Law are hereby repealed. This provision is without prejudice to the legal effect produced by those rulings.'³³⁹

Article II ensures the right to life and the right to human dignity. The declaration that 'the life of the foetus shall be protected from the moment of conception' and the provision that 'every human being shall have the right to life' is included in one sentence, which might later on serve as a basis for acknowledging the foetus' right to life by the Constitutional Court.

According to Kovács, the Fundamental Law has provisions that are explicitly against the Roma minority.³⁴⁰ For instance Article V ensures the following: 'Everyone shall have the right to repel any unlawful attack against his or her person or property, or one that poses a direct threat to the same, as provided for by an Act.' The article is denounced for protecting the ethnic Hungarian middle class from the socially excluded (among whom Roma are overrepresented). As Kovács points out, 'this article is about a right to self-defence in a state of nature described by Hobbes, and not a basic right in a constitutional state.'³⁴¹ This constitutional provision contributes to a violent climate and it is an indirect form of discrimination against socially marginalized groups.

By virtue of Article VII modified by the Fourth Amendment the state can differentiate between churches and other religious organisations and the state shall cooperate to promote community goals only with churches.³⁴² Since the term 'ethnic nation' is linked to Christianity,³⁴³ discriminatory legislation and

³³⁶ 8/1990. (IV. 22.) AB határozat/Hungarian Constitutional Court Decision 8/1990 (IV. 22).

³³⁷ Ronald Dworkin, 'The Moral Reading of the Constitution' (The New York Review of Books 1996) <www.nybooks.com/articles/archives/1996/mar/21/the-moral-reading-of-the-constitution/> accessed 13 November 2014.

³³⁸ In March 2013, the Hungarian Parliament adopted the Fourth Amendment, re-enacting a number of controversial provisions that had been annulled by the Constitutional Court.

³³⁹ CLOSING AND MISCELLANEOUS PROVISIONS of the Fundamental Law

³⁴⁰ Kriszta Kovács, 'Equality: The Missing Link' in Gábor Attila Tóth (ed), *Constitution for a Disunited Nation. On Hungary's 2011 Fundamental Law* (Central European University Press 2012) 190.

³⁴¹ *ibid* 190.

³⁴² Due to the critique of international organizations (COE, EU) the Fifth Amendment of the Fundamental Law changed the Article but the possibility of discriminatory legislations stayed According to the new text: „The State and religious communities may cooperate to achieve community goals. At the request of a religious community, the National Assembly shall decide on such cooperation. The religious communities participating in such cooperation shall operate as established churches.’ (4) VII. Article of the Fundamental Law.

practices can follow. The application of this new rule can lead to the end of the freedom to establish new churches in Hungary.

Article IX prohibits political advertising in electronic media. Further restrictions were implemented during the electoral campaign: in the 50 days preceding the day of elections political parties can advertise themselves only in public (but not commercial) media. Upon the disapproval of international organisations the Fifth Amendment changed this provision, however, the new provision, which ensures the possibility to broadcast the political ad without receiving consideration therefore, essentially upholds the restriction in practice, since the likelihood that a market participant will ensure the possibility of broadcasting an ad free of charge is practically zero.

The Fourth Amendment supplemented Article IX with the following paragraph: 'The right to freedom of speech may not be exercised with the aim of violating the dignity of the Hungarian nation'. In the European tradition human dignity is linked to the individual, not the community. Human dignity 'generally protects the individual personality', not the dignity of the community, and especially not that the majority community.³⁴⁴ The parliamentary majority restricts more and more the term 'nation' according to its political interests. One is concerned that the above amendment will be an effective tool to prohibit criticism against the government. Since the parliamentary majority exercises constitutional power in the name of the ethnic nation, criticism of the Fourth Amendment might amount to a violation of the dignity of the Hungarian nation.

Article X (3) as supplemented with Article 6 of the Fourth Amendment violates the autonomy of universities as it makes it possible for the government to interfere more widely with their functioning: 'The Government shall, within the framework of an Act, lay down the rules governing the management of public higher education institutions and shall supervise their management.'

As part of the right to work Article XII stipulates the obligation to work according to one's abilities and possibilities: 'Everyone shall be obliged to contribute to the enrichment of the community through his or her work, in accordance with his or her abilities and possibilities.' Like Article V, this provision has the potential to be directed against the Roma community, which is the biggest minority in Hungary afflicted by unfavourable social conditions and widespread prejudices. The provision removes those fundamental rights guarantees that prevent the introduction of measures which bind the provision of unemployment aid to work or to activity deemed to be socially useful.

³⁴³ 'We recognise the role of Christianity in preserving nationhood...' (NATIONAL AVOWAL).

³⁴⁴ Gábor Halmai and Kim Lane Scheppele (eds), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2013) 53 <<https://sites.google.com/site/amicusbriefhungary>> accessed 20 December 2014.

The Fundamental Law authorises the legislator to punish homelessness³⁴⁵ as part of the right to adequate housing. Article XXII (1) stipulates the right to housing, stating that ‘Hungary shall strive to ensure decent housing conditions and access to public services for everyone.’ And as part of the same right, Paragraph (3) further establishes that ‘in order to protect public order, public security, public health and cultural values, an Act of Parliament or a local ordinance may declare illegal staying in a public area as a permanent abode with respect to a specific part of such public area.’ The limitation of the rights of homeless people particularly reinforces the anti-egalitarian character of the Fundamental Law. According to the paragraph above, the rights of homeless people may be restricted by law in order to protect some social values, in particular ‘public order, public security, public health and cultural values.’ It should be underlined that it is highly unusual to restrict a fundamental right in order to protect ‘cultural values.’³⁴⁶ The human dignity of the individual, which stands at the pinnacle of human rights protection, cannot be limited in the name of cultural values. Moreover, the law has a discriminatory impact on those living in poverty and belonging to disadvantaged social groups. It also misinterprets the right to housing. Since Article XXII goes against the former moral concept behind human rights protection, it violates internationally protected human rights (e.g., right to dignity, right to housing). According to the legislator, the rights of those who do not live according to the declared values of the imagined ethnic nation (e.g., homeless people) will be restricted.

d) *Changes concerning institutions – Chapter entitled ‘the State’*

As a result of the new constitution institutions entrusted with fundamental rights protection were abolished, reshuffled and their powers were restricted. The curbing of powers of the Constitutional Court, which played a prominent and determining part in the 1989 transition to the rule of law, best illustrates the nature of changes. Article 37 of the part on public finances stipulates that financial acts can be reviewed by the Constitutional Court only in connection with the right to life and human dignity, the protection of personal data, freedom of thought, conscience and religion, or the rights related to Hungarian citizenship. This restriction of powers shall remain in force as long as the state debt does not drop below the half of the Gross Domestic Product. The fact that financial acts are not subject to constitutional control causes uncertainty in economic life, too. Individuals without being personally affected by a legal rule can no longer turn to the Constitutional Court, this right is reserved for the President of the Curia (the Supreme Court), the Prosecutor General, the Commissioner for Fundamental Rights, and one-fourth of the Members of Parliament. Several Constitutional Court judges have been recently appointed (quite flagrantly, a former Fidesz politician and MP has been elected into the body) and judges are now elected for twelve years, i.e. three parliamentary cycles. According to Article 24(5) ‘the Constitutional Court may review the Fundamental Law or the amendment of the Fundamental Law

³⁴⁵ Bálint Misesics, ‘The Criminalisation of Homelessness in Hungary in Mean Streets’ in Samara Jones (ed) *A Report on Criminalisation of Homelessness in Europe* (2013) <<http://www.housingrightswatch.org/sites/default/files/Mean%20Streets%20-%20Full.pdf>> accessed 13 November 2014.

³⁴⁶ Gábor Halmai and Kim Lane Scheppele (eds), *Amicus Brief for the Venice Commission on the Fourth Amendment to the Fundamental Law of Hungary* (2013) 53 <<https://sites.google.com/site/amicusbriefhungary>> accessed 20 December 2014.

only in relation to the procedural requirements laid down in the Fundamental Law for its making and promulgation', i.e. a new constitution or any modification of the present Fundamental Law cannot be subject to constitutional control.

As opposed to the former constitution the Fundamental Law does not list the ordinary court levels. Under Article 26(2) judges' retirement age was lowered from 70 years to the general retirement age of 62 years. As a result, 274 senior judges, among them 20 Supreme Court (renamed 'Curia') judges and 4 presidents out of the 5 Regional Courts were forced to retire.³⁴⁷ The ECJ declared a violation of European Law on grounds of age discrimination violating Directive 2000/78/EC on equal treatment in employment and occupation, which led to a compensation of judges, but only a few judges resumed their office.³⁴⁸

In the course of the constitutional changes the mandate of certain elected heads of public institutions was terminated ahead of time. The Supreme Court was renamed Curia, the mandate of its President was terminated ahead of time, as was that of the members of the National Council of Justice, the body responsible for the management of the courts. The President of the Supreme Court brought the case before the European Court of Human Rights, which ruled against the government of Hungary.³⁴⁹ Instead of the National Council of Justice, the President of the National Office for the Judiciary is entrusted with the central management of the courts, the President is supported by Vice-Presidents and an office. Article 27(4) authorised the President of the NOJ to transfer any case to a court other than the one territorially competent to hear the case, as well as the Prosecutor-General to order to bring a charge before a court other than the competent one. It is hardly compatible with Article XXVIII of the Fundamental Law itself, under which 'everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an independent and impartial court established by an Act.' Some cases appearing to have been politically motivated have been subject to transferral. It was based, for example, on a decision of the President of the NOJ on 16 February 2012 that the case involving fictitious contracts concluded by the former vice mayor of Budapest and opposition party politician, Miklós Hagyó was transferred to the Tribunal of Kecskemét, though it surely did not make the provision of evidence easier for the former vice mayor. It is not surprising that in the case the ECtHR held that Hungary violated Article 5(4). Upon pressure by the EU and international organisations the Fifth Amendment eliminated the possibility of case transferral.³⁵⁰ (The rule of law concept of the EU is administered by an independent judiciary, see *supra* Chapter II.D).

According to the 1989 constitution, the ombudsinstitution is based on the conception of ombudspersons of equal rank, namely ombudsperson, specialised ombudsperson for data protection,

³⁴⁷ Katalin Kelemen, 'The final Blow to the Hungarian Law Lowering Judges' Retirement Age Struck By the European Court of Justice' (2012) <<http://www.diritticomparati.it/2012/11/the-final-blow-to-the-hungarian-law-lowering-judges-retirement-age-struck-by-the-european-court-of-j.html>> accessed 13 November 2014.

³⁴⁸ Case C-286/12, *European Commission v Hungary* [2012] ECR I-0000.

³⁴⁹ See Application no. 20261/12, *András Baka against Hungary*, lodged on 14 March 2012.

³⁵⁰ Case of Hagyó v. Hungary (application no. 52624/10) judgment Strasbourg 23 April 2013.

specialised ombudsperson for future generations,³⁵¹ specialised ombudsperson for national and ethnic minorities. The 1989 constitution specified that Parliament can create ombudsman positions for the protection of any fundamental right, or interrelated fundamental rights, pertaining to sensitive social issues provided that their everyday violation threatens the freedom of citizens. The institutions of the minority and data protection and freedom of information ombudspersons served as guarantees for the implementation of relevant directives of the EU. This system was now replaced by the institution of one ombudsperson and its deputies, thereby the number of independent opponents of the government were reduced. The ombudsperson for future generations and national minorities became deputies of the general ombudsperson, and with this reshuffle they lost their right to independent investigation. The commissioner for data protection, responsible for the openness of public data and the protection of private data, lost its office ahead of time due to the Fundamental Law. In an infringement procedure, the CJEU decided that the way the position of the specialised ombudsperson for data protection was abolished breached EU law.³⁵² Later on the Minister of Justice apologised to András Jóri and the ombudsman received a compensation of 69 million HUF. However, as civil organisations legitimately protested, nobody apologised to Hungarian citizens and the institution itself was not re-instituted.

Under Article 36 of the Fundamental Law the Hungarian government could impose special taxes as a result of failing to comply with EU Law or European human rights law. This implied that if, for example the ECHR ruled against the government of Hungary in a case, the government could have imposed the burden of compensation on those whose human rights had been violated. The Fifth Amendment repealed this provision, however, the main point has not changed: the procedures against Hungary before the ECtHR regularly result in the Court's ruling against Hungary, meaning that the government violated some fundamental rights, but these findings as well as measures taken by EU institutions are not followed by changes in the nature of the system. The compensation for violation of rights is ultimately imposed on the tax-paying citizens of the state.

C. Ensuring compliance: tools at the disposal of the EU and the Hungarian example

If there are problems concerning the effectiveness of the rule of law in a member state, the EU Commission can resort to two proceedings: it can institute a proceeding for failure to fulfil an obligation before the Court of Justice under Article 258 of the Treaty on the Functioning of the EU, and/or it institutes the proceeding under Article 7 of TEU that protects the fundamental values of the EU and the member states from systematic deficiencies.³⁵³

³⁵¹ This specialised ombudsperson was responsible for environmental issues.

³⁵² Case C-288/12 *Commission v Hungary* [2014] ECR I-237.

³⁵³ Communication from the Commission to the European Parliament and the Council. A new EU Framework to strengthen the Rule of Law. COM (2014) 158 final.

In the event of an action for failure to fulfil an obligation, the Court investigates the allegations and if the country is found to be at fault, it must put things right at once. The proceeding is applied to examine if individual member state regulations and the practice of state authorities comply with EU law, like in the above mentioned cases of forced retirement³⁵⁴ and ahead-of-time loss of office, but it is not an instrument with which to treat the systematic breach of the rule of law.

The other opportunity is the so called 'nuclear option'. The proceeding under Article 7 is also initiated by the Commission based on the principle of subsidiarity, i.e. if the member state institutions cannot handle the democratic deficit effectively. It shows the importance of Article 7 that besides the judicial processes it is the only supervisory institution 'in the hands of the European institutions to monitor and evaluate Member States' respect of the Union's founding principles enshrined in Article 2 TEU.³⁵⁵ This legal instrument of the EU on the one hand resembles the militant democracy instruments of national democracies: it is a legal instrument to protect values enshrined in Article 2. The term militant democracy, introduced by Loewenstein,³⁵⁶ provides the constitutional democracy with legal means to defend itself against non-democratic processes. According to this theory democracy must be capable of self-defence, which means that 'democracy must become militant'.³⁵⁷ The EU, which defines itself through the concept of democratic rule of law with fundamental rights, needs these instruments. The application of Article 7 can lead to suspend rights deriving from the application of the Treaties to the Member State. On the other hand, in the sense that Article 7 sanctions member states by restricting rights following from membership, it resembles the legal instruments of international organisations. It is very similar to the instrument under Article 8 of the sister organisation, namely, the Council of Europe and because of this fact Article 7 rather seems to have the peculiarities of the instruments of international law than those of an instrument of European Law. The nuclear option has never been used in practice. What is more, according to some scholars, Article 7 was not constructed for usage, but rather has a symbolic meaning.³⁵⁸ This opinion is also supported by the experience of the Hungarian case, where it had the theoretical foundation of its application.

Beyond the legal instruments (Article 7) the EU also developed policy instruments for the protection of rule of law, fundamental rights and democracy. Policy instruments help the EU to evaluate, benchmark

³⁵⁴ Katalin Kelemen, 'The final Blow to the Hungarian Law Lowering Judges' Retirement Age Struck By the European Court of Justice' (2012) <<http://www.diritticomparati.it/2012/11/the-final-blow-to-the-hungarian-law-lowering-judges-retirement-age-struck-by-the-european-court-of-j.html>> accessed 13 November 2014

³⁵⁵ Sergio Carrera and Elspeth Guild and Nicholas Hernanz 'The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU - Towards an EU Copenhagen Mechanism' (2013) PE 493.031

³⁵⁶ Karl Loewenstein 'Militant Democracy and Fundamental Rights' (1937) 3 American Political Science Review 31, 417.

³⁵⁷ *ibid* 423.

³⁵⁸ Armin von Bogdandy and others, 'Ein Rettungsschirm für europäische Grundrechte – Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten' (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 54.

and monitor the state of democratic rule of law with fundamental rights in member states.³⁵⁹ These policy instruments are very important because they inform the EU about the situation of democracy, human rights and the rule of law in the member states, and they form a ‘communicative relationship’ (to put it simply they establish communication) between institutions of the Union and the member states. Policy instruments discuss important issues and make recommendations, which, however, are not binding and since they do not lead to sanctions these instruments can be effective only where Member States have the intention to communicate and change policy and legislation.

As it has been pointed out, due to the European and international monitoring mechanisms the EU is well informed about the human rights, democracy and the rule of law situation in Hungary. But without the support of legal instruments these policy instruments are not enough strong in themselves in case where there is no will for substantial dialogue on behalf of the member state with the European Institutions. In such cases the EU institutions also need legal tools such as the proceeding for failure to fulfil an obligation. In the above mentioned cases as a first step the Commission sought communication with the Hungarian government: before the legal procedures, in 2011, the Vice-President of the European Commission wrote a letter to the Hungarian Deputy-Prime Minister, indicating that ‘certain aspects of the recent reform process raise serious concerns from an EU law perspective, inter alia: the retirement age of judges, which appears to be on the way to be drastically reduced from 70 to 62 only to be raised again shortly afterwards and the independence of the Data Protection Supervisor.’³⁶⁰ But the Hungarian government was unwilling to engage in a true dialogue, and the proceeding for failure to fulfil an obligation which was used in these two cases was not constructed for solving systematic problems in the fields of democratic rule of law with fundamental rights.

Some scholars suggest the introduction of a so called ‘reverse Solange-doctrine’.³⁶¹ According to this doctrine, which is not widely recognised,³⁶² the Member States remain autonomous in respect of fundamental rights protection as long as they ensure fundamental rights according Article 2 of the TEU. If a member state does not meet the obligations following from Article 2 Union citizens can seek redress before national courts and the ECJ. The Hungarian case shows, however, the weakness of this ‘reverse Solange-doctrine’: the anti-democratic systems can limit also the independence of the judiciary, whereas it is only an independent judiciary that can effectively protect the values of the European

³⁵⁹ Sergio Carrera and Elspeth Guild and Nicholas Hernanz ‘The Triangular Relationship between Fundamental Rights, Democracy and Rule of Law in the EU - Towards an EU Copenhagen Mechanism’ (2013) PE 493.031.

³⁶⁰ See the letter of Viviane Reding, Vice-President of the European Commission to Tibor Navracsics, Vice-Prime Minister of Hungary, and Minister of Justice, dated Brussels, 12 December 2011, at <http://lapa.princeton.edu/hosteddocs/hungary/letter_from_vp_of_the_european_commission.pdf> accessed 13 November 2014.

³⁶¹ Armin von Bogdandy and others, ‘Ein Rettungsschirm für europäische Grundrechte – Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten’ (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 45.

³⁶² See the contributions by Mattias Kumm, Renáta Uitz, Peter Lindseth, Dimitry Kochenov, Daniel Thym and others at <<http://www.verfassungsblog.de/category/schwerpunkte/rescue-english/#.UMMa2oPWiu>>, accessed 13 November 2014.

Union. The ‘reverse Solange-doctrine’ might not be able to function if there are systematic deficiencies in the field of human rights, the rule of law and democracy -- the ECJ cannot secure Article 2 without the support of national courts.³⁶³

Jean Monnet said that ‘Europe would be built through crises.’³⁶⁴ The issue today is what Europe can do with the democratic deficits of member states and how it can assert the principles laid down in Article 2 of TEU. It was in connection to this issue that the idea was raised that a new mechanism should be set up so that the violation of values enshrined in Article 2 could be addressed.

The EU is trying to find effective tools against the democratic deficits in member states: one of the European Parliament’s non-binding resolutions on the situation of fundamental rights in the EU mentions the ‘difficulties in applying the monitoring, evaluation and sanctioning mechanisms provided for in the existing treaties, in particular the requirements under Articles 2 and Article 7 of the EU Treaty.’³⁶⁵ The resolution underlines the importance of establishing a new ‘Copenhagen mechanism’,³⁶⁶ i.e. a mechanism that monitors compliance with the Copenhagen criteria in member states and so to avoid double standards among member states and candidate countries. Therefore this mechanism could contribute to strengthening the coherence in human rights policy and the value basis of the European Union.³⁶⁷ It asks for setting objective indicators ‘on the basis of existing or already developed and recognised fundamental rights standards – such as those developed at UN and Council of Europe level’ in a transparent and objective manner.³⁶⁸ The cornerstones of such a system would be political dialogue with the country, including an early warning system and effective sanctioning of human rights breaches, e.g. penalties that act as deterrents, like the temporary suspension of fund commitments.³⁶⁹ But there is also a need for a political will to apply such types of economic sanctions. The Union has recently had the possibility of applying ex ante equality conditionalities in ensuring access to European funds. Regulation No 1303/2013 mentions among general conditionalities (Part II of Annex XI) anti-discrimination, disability and gender. In spite of the existing equality conditionalities in August 2014 the European Union and Hungary adopted the Partnership Agreement. The document ‘paves the way for investing €21.9 billion in total Cohesion Policy funding over 2014-2020 (current prices, including European Territorial Cooperation funding and the allocation for the Youth Employment Initiative). Hungary also

³⁶³ Armin von Bogdandy and others, ‘Ein Rettungsschirm für europäische Grundrechte – Grundlagen einer unionsrechtlichen Solange-Doktrin gegenüber Mitgliedstaaten’ (2012) 72 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 45.

³⁶⁴ Jean Monnet, *Memoirs* (Doubleday 1978) 417.

³⁶⁵ European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) (2013/2078(INI) section K at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0173%200%20DOC%20XML%20V0//EN>> accessed 13 November 2014.

³⁶⁶ *ibid* 8.

³⁶⁷ Wolfgang Benedek, ‘EU Action on Human and Fundamental Rights in 2013’ in Wolfgang Benedek, Florence Benoît-Rohmer and Wolfram Karl and Matthias C. Kettemann and Manfred Nowak (eds.), *European Yearbook of Human Rights* (2012) 88.

³⁶⁸ European Parliament resolution of 27 February 2014 on the situation of fundamental rights in the European Union (2012) 9 a).

³⁶⁹ *ibid* 9 i).

receives €3.45 billion for rural development and €39 million for fisheries and the maritime sector.³⁷⁰ It means that the Union did not apply sanctions against Hungary by means of ex ante equality conditionalities, in spite of the above mentioned anti-egalitarian character of the new Hungarian system.

D. Conclusion

The case study of Hungary examined the relationship between the national identity of the state and the protection of fundamental rights through the example of the Hungarian Fundamental Law. While, similarly to most democratic constitutions of Europe, the Constitution of 1989 used the political concept of nation, the present Hungarian constitution uses mainly the ethnic/cultural concept. The Fundamental Law defines the ethnic/cultural concept of the nation as a Christian community and institutionalizes an outmoded national-historical approach with religious, devotional overtones. This concept of the nation cannot be reconciled with the moral equality of citizens which requires states not to favour or disfavour anyone on the ground of their conception of the good life. The Fundamental Law follows the interests of the government rather than moral values, and it in itself threatens constitutional democracy and leads to a constitutional tragedy. In spite of the fact that Hungary is an EU member state, it diverges from the values enshrined in Article 2 of TEU and the concept of democratic rule of law with human rights. Criticism by international and European organisations has not been followed by changes affecting the fundamental characteristics of the newly setup constitutional system, which implies that the EU inadequately operationalises the concepts human rights, democracy and rule of law.

³⁷⁰ European Commission adopts 'Partnership Agreement' with Hungary on using EU Structural and Investment Funds for growth and jobs in 2014-2020 at <http://europa.eu/rapid/press-release_IP-14-955_en.html> accessed 13 November 2014.

IV. Operationalisation of concepts externally

A. Introduction: operationalisation in Human Rights Dialogues, Election Observation Missions and by the European Parliament

Building on the theoretical analysis of the EU's conceptualisation of human rights, democracy and the rule of law in Chapter II of this report, this Chapter will analyse the EU's concrete operationalisation through human rights dialogues (HRDs), election observations missions (EOMs) and resolutions by the European Parliament (EP). The key question of this analysis is thus, how the EU's external policy actors deploy in practice the conceptual principles, which have been developed. In particular: (1) How is the indivisibility of human rights, in particular in view of economic, social and cultural rights, operationalised in EU external action? (2) What importance does the EU give to the rule of law in its engagement with third countries and how does it understand it in this context? (3) How does the EU operationalise its commitment to act in partnership with civil society? (4) Are the rights of women, minorities and (other) vulnerable groups³⁷¹ a priority in practice? (5) Does the EU follow the concept of 'deep democracy' (cf. Chapter III.D.4) in its Neighbourhood Policy in recent years? A secondary question in the analysis is whether the EU acts consistently through these instruments i.e. whether it interprets and applies human rights, democracy and the rule of law in a similar way in its various external actions.

To study this operationalisation the report will first briefly describe how the EU understands human rights dialogues (HRDs) and election observation missions (EOMs) and how it defines the aims of these instruments (Chapter II). In a second part, two case studies will examine the EU's operationalisation of human rights, democracy and the rule of law in its relation to selected third countries in the European Neighbourhood (Egypt) and Asia (Pakistan). The criteria for selecting these two countries were the following: they have in common that the EU holds regular human rights dialogues with them, that at least one EU EOM was deployed to elections in these countries in recent years and that the EU Parliament has frequently dealt with the situation in the countries in debates and resolutions in its current (since July 2014) or previous (2009-2014) term.

Parliamentary debates and resolutions by the EP are undoubtedly an important example of the EU's conceptualisation and operationalisation of human rights, democracy and the rule of law through one of its major institutions. Moreover, EP resolutions are frequently either directly or indirectly addressed to the Council, the Commission or the High Representative of the Union for Foreign Affairs and Security Policy (HR/VP) and hence constitute a 'mandate for action' of these institutions. The EP has often called

³⁷¹ On the difficulties to define 'vulnerable groups' see above chapter I.B.C.2. The author of this chapter would not agree on including women among 'vulnerable groups' in a human rights context.

for the consistency of the EU's external actions with regard to human rights and their mainstreaming into all policy areas. In its yearly debates and resolutions on the annual report on Human Rights and Democracy in the World and the European Union's policy on the matter it has repeatedly formulated detailed positions on actions in favour of human rights, democracy and the rule of law in general but also specific contexts and vis-à-vis specific states.³⁷² Election support and human rights dialogues with third countries are regularly components of the annual resolutions and a number of times the EP has stressed the importance of transparency and adequate follow-up regarding these instruments.³⁷³ This report will thus not only analyse how the EP operationalises these concepts itself and which priorities it sets thereby but – where possible – it will also consider if/how the other major EU institutions have taken the EP's concerns into account in their actions.

Concerning the operationalisation through EU EOMs, a couple of specificities, which differentiate EOMs from the EU's other external actions, have to be borne in mind. First, they are conducted by teams of individual experts, whose composition is never identical and not by officials. Second, they are focused only on the electoral process and might thus only take human rights issues into consideration when they have a potential influence on elections. And third, EOMs are independent and therefore a lack of consistency of their reports with previous EU positions cannot be directly attributed to the EU institutions. In turn, if EU institutions do not follow-up on recommendations issued by EU EOMs, this would rightly raise questions about the latter's 'added value' as instruments of external action, as well as the EU's commitment to missions it deployed precisely to assist partner countries in their longer-term democratic development. The Council itself underlined the importance of follow-up to the recommendations of EU EOMs in the Strategic Framework and Action Plan on Human Rights and Democracy adopted in 2012.³⁷⁴ Therefore, the focus of the analysis will be on how EOMs interpret the concepts of human rights, democracy and rule of law in the election context, how they are linked to other instruments and also how EU institutions follow up on the recommendations issued by EU EOMs. In the case of Egypt, where the first EU EOM ever deployed to the country only published its final report in early July 2014, the operationalisation of these concepts through an EOM will be particularly analysed in light of the concept of 'deep democracy' in the European Neighbourhood Policy, whereby elections are but one essential element in a functioning democracy.³⁷⁵

³⁷² European Parliament resolution of 18 April 2012 on the Annual Report on Human Rights in the World and the European Union's policy on the matter, including implications for the EU's strategic human rights policy (2011/2185(INI)) (2012) [on the 2010 report]; European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter (2012/2145(INI)) (2012); European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter (2013/2152(INI)) (2013)

³⁷³ *ibid* (2010 report) 45-53; 41-44; (2011 report) 54-60; 61-68.; (2012 report) 22-24; 79-82.

³⁷⁴ Cf. Chapter III, point 6 (d) of the Action plan, Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (2012), 11855/12.

³⁷⁵ Cf. in particular European Commission / High Representative of the European Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A new response to a changing Neighbourhood' (COM(2011) 303 final). According to this Joint Communication, the key elements of a deep and sustainable democracy are: – free and fair elections;

Studying the operationalisation of human rights, democracy and the rule of law in HRDs with third countries in this report is limited to a theoretical analysis of the principles and internal procedures the EU uses in this context: mainly how it defines the corner stones of HRDs and how this instrument is linked to other foreign policy actions. Due to the strict confidentiality of human rights dialogues, it was not possible to obtain information about the concrete issues raised in the EU HRDs with Egypt and Pakistan.

B. The policy principles for the EU's human rights actions in external relations

1. General principles

The Treaty on European Union (TEU) establishes the general principles of the EU's human rights engagement in external relations and several policy documents further detailed these principles in recent years. Title V of the consolidated TEU starts with a strong affirmation of human rights, democracy and rule of law as guiding principles of all actions of the Union on the international scene³⁷⁶ and defines several aims to be achieved through the common foreign and security policies, among which 'to consolidate and support democracy, the rule of law, human rights and the principles of international law'. Based on these principles the Treaty also mandates the Council of the European Union to decide on the strategic interests and objectives of the Union, concerning both the relations of the Union with specific countries or regions or thematic approaches (Article 22).

Following a joint communication by the European Commission (EC) and the HR/VP of December 2011,³⁷⁷ the Council for the first time agreed on a common policy strategy on the promotion of human rights in the Union's external relations, by adopting the 'Strategic Framework and Action Plan on Human Rights and Democracy June 2012'.³⁷⁸ The Strategic Framework sets out key principles, objectives and priorities, while the Action Plan, valid until 31 December 2014, outlines envisaged actions in a certain number of focus areas but defines only few concrete benchmarks. Even though 'rule of law' is not expressly

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- freedom of association, expression and assembly and a free press and media;
 - the rule of law administered by an independent judiciary and right to a fair trial;
 - fighting against corruption;
 - security and law enforcement sector reform (including the police) and the establishment of democratic control over armed and security forces.

³⁷⁶ Cf. Article 21 paragraph 1 Consolidated version of the Treaty on European Union: '*The 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.*'

³⁷⁷ European Commission and High Representative of the Union for Foreign Affairs and Security Policy, 'Joint Communication to the European Parliament and the Council: Human Rights and Democracy at the Heart of EU External Action – towards a more effective approach' COM(2011) 886 final.

³⁷⁸ Council of the European Union, 'EU Strategic Framework on Human Rights and Democracy' (2012).

mentioned in the title of these documents, references to it can be found throughout the Strategic Framework (including in the first sentence) and the Action Plan encompasses a number of actions (e.g. administration of justice, accountability for human rights violations) which can be attributed to the promotion of the rule of law in external relations. The third component of the ‘package’ adopted was the decision to appoint an EU Special Representative for Human Rights (EUSR), which would become the first thematic EUSR mandate and should enhance the effectiveness and visibility of the new EU human rights policy. The holistic approach of this ‘human rights package’ is undoubtedly its most innovative aspect as it brings together different policy areas that have often operated independently in the past: trade and investment policy, development cooperation, environmental policies, conflict prevention, crisis management, counter-terrorism and the area of freedom, security and justice.³⁷⁹ The EU commits to put human rights ‘at the centre of its relations’ with all third countries, including through human rights dialogues but also appropriate sanction mechanisms in case of severe human rights violations. As part of the review of the EU’s human rights policy in external relations, the Council – with the technical support of the EEAS – started to develop local human rights country strategies for over 150 third countries, which were drafted and should be mainly implemented by the EU Delegation and Member States’ missions in third countries.³⁸⁰ As these strategies are not publicly available – despite the repeated call by the EP to publish at least the key priorities of each country strategy³⁸¹ – they cannot be considered for this report.

2. Human rights dialogues (HRDs)

Institutionalised HRDs are a fairly new instrument in the foreign policy repertoire. The EU started its first HRD in the late 1990s, after it had struggled for years (both internally and externally) to address in the UN Commission on Human Rights the human rights situation in China following the crackdown of peaceful protests on the Tiananmen Square in 1989.³⁸² As it became clear that a resolution could not be passed, a formalised HRD seemed like a less confrontational way out by opening the possibility to address human rights concerns directly with the authorities. In addition to the EU also some Member States started bilateral dialogues with China but this form of ‘handling with kid gloves’ was soon met with criticism by international NGOs and national constituencies, as it revealed a certain double standard in the international human rights diplomacy.³⁸³ Nevertheless, four years after starting a HRD with China, the Council set out the policy standards for such dialogues in the EU Guidelines on human rights dialogues with third countries.³⁸⁴ They were substantially revised in 2009 and now stipulate the

³⁷⁹ Engelbert Theuermann, ‘The Review of the EU Human Rights Policy: A Commitment to Strengthened EU Action on Human Rights’ in Wolfgang Benedek and others (eds), *European Yearbook on Human Rights 2013* (Intersentia 2013) 35.

³⁸⁰ *ibid* 39.

³⁸¹ European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union’s policy on the matter 49, 62; European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union’s policy on the matter 25.

³⁸² Katrin Kinzelbach and Hatla Thelle, ‘Taking Human Rights to China: An Assessment of the EU’s Approach’ (2011) 205 *The China Quarterly* 60, 60–61.

³⁸³ *ibid* 61.

³⁸⁴ EU guidelines on human rights dialogues with third countries (2001 (review adopted in 2009)).

procedures, basic principles, objectives, content, and assessment principles of EU HRDs. According to information provided by interview partners in the EEAS, there exists also an internal 'best practice'-paper, endorsed by the PSC in 2013, which should guide the planning, preparation and follow-up of HRDs and can be used as a 'check list' for EEAS officials involved in the process.³⁸⁵

There exist various forms of EU HRDs, in terms of the context in which they are held (e.g. with candidate countries, exchange with 'like-minded' states, 'difficult partners' etc.), their content (exclusively on human rights or in a broader political dialogue) and at various levels (at the level of human rights experts from capitals/the EEAS or at the level of heads of missions). HRDs with the African, Caribbean and Pacific Group of States, according to the Cotonou Agreement,³⁸⁶ are governed by Article 8 of that Agreement and thus follow a distinct procedure to that under the EU Guidelines. While the issues covered by a HRD will depend on the specific situation of the third country concerned, the Guidelines outline a number of 'standing items', which should be included on the agenda of every dialogue: ratification and implementation of international human rights instruments, cooperation with international human rights procedures and mechanisms, combating the death penalty, combating torture, combating all forms of discrimination, children's rights, and in particular those of children in armed conflicts, women's rights, freedom of expression, the role of civil society and the protection of human rights defenders, international cooperation in the field of justice, in particular with the International Criminal Court, promotion of the processes of democratisation and good governance, the rule of law and the prevention of conflict.³⁸⁷ Depending on the format of the HRD, also the objective of the HRD will vary and might include both the discussion of mutual interests and possible cooperation in multilateral fora, as well as expressing concern about the human rights situation in the partner country and requesting information in this regard. In this context, HRDs might also identify human rights problems at an early stage, which could potentially lead to a conflict in the future. During a HRD the EU might also hand over to the partner country a list of individual cases – mostly human rights defenders or detainees – in respect of which it expects to receive a response. The Guidelines underline that opening a HRD with a third country does not mean that the EU will henceforth refrain from addressing the human rights situation in that state at other occasions, notably in international fora.

In terms of procedure, HRDs are conducted by the EEAS on the EU's side (supported by experts from the EC and in some cases headed by the EU Special Representative for Human Rights) and should involve relevant government representatives on the side of the partner country.³⁸⁸ The preparation of talks and their follow-up processes by the EEAS geographical desks together with the Human Rights and Democracy Directorate should ensure the mainstreaming of human rights across the diplomatic

³⁸⁵ Information provided by interview partners in September 2014. The number and title of the document ('Best Practices in Human Rights Dialogues', Council Document number: ST 14819 2013 INIT) can be found on the Council online register, its content is not accessible though.

³⁸⁶ Partnership Agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States of the other part (Cotonou Agreement) (2010).

³⁸⁷ EU guidelines on human rights dialogues with third countries (2001 (review adopted in 2009)) 6.

³⁸⁸ Information provided by the EEAS through interviews in Brussels in September 2014. The Guidelines on HRDs still contain the 'pre-Lisbon'-procedure (i.e. the EU should be represented by the Troika).

relations with third countries.³⁸⁹ Member States' representatives can participate in the HRDs but are not allowed, in principle, to speak for the EU. The EEAS has, however, started to invite selected Member States' experts (e.g. from the justice sector) to HRDs to provide expertise for in-depth discussions on specific issues. HRDs are usually held alternately in Brussels and the country's capital and should last one full day, in intervals defined in each case (often once or twice a year).³⁹⁰

The Guidelines also foresee the involvement of civil society organisations in various stages of the HRDs: in the preliminary assessment and the preparation of HRDs, in the dialogues itself and in the follow-up. In practice, however, the role of civil society remains mostly limited to a consultative role, partly due to partner countries' resistance to their more active involvement.³⁹¹ At the moment civil society organisations are therefore only directly present at the EU-Moldova HRD. Usually the EEAS organises meetings with CSOs (both in Brussels and locally) before the talks to receive their input and also de-briefings afterwards.³⁹²

The transparency policy vis-à-vis civil society and the European public often also falls short of the Guidelines' commitment. The EEAS publishes at most short press releases after HRDs and at the time of writing the EEAS's website dedicated to HRDs³⁹³ did not even include a full list of countries with which HRDs were held. A NGO representative interviewed in September 2014 noted that it was difficult for NGOs to understand the process in-between dialogues as often there are only vague commitments by third countries ('we will take that into account') reported at the de-briefings and there is no information about the EU's further engagement on these issues provided. At the following preparatory meeting the same human rights issues may thus rise up again, leaving to NGOs the impression that there might be a general commitment by the EU (and maybe even by the third country) but no concrete effort to work on a solution to specific human rights problems, by defining concrete benchmarks.³⁹⁴ The lack of transparency around the opening and conduct of HRDs has also been criticised by the European Parliament, which repeatedly demanded more information from the Commission and the Council and a stronger role for itself in the preparation, conduct, follow-up and evaluation of HRDs.³⁹⁵ According to information provided by interview partners in the EEAS, the Secretariat of the European Parliament is invited to the briefings and de-briefings with civil society organisations before and after HRDs so that it can share this information with the MEPs. In addition, the internal reports about HRDs held with third

³⁸⁹ Information provided by the EEAS through interviews in Brussels in September 2014.

³⁹⁰ Information provided by the EEAS through interviews in Brussels in September 2014.

³⁹¹ *Wouters et al.* eg report an incident that happened at an EU-China HRD in 2007, where Chinese officials walked out because they refused to discuss the issues at hand in the presence of the two EU-nominated NGOs. Jan Wouters and others, *EU Human Rights Dialogues: Current situation, outstanding issues and resources* (2007) <https://ghum.kuleuven.be/ggs/publications/policy_briefs/pb01.pdf> accessed 09 July 2014, 2.

³⁹² Information provided by the EEAS and a NGO representative through interviews in Brussels in September 2014.

³⁹³ <http://eeas.europa.eu/human_rights/dialogues/index_en.htm> accessed 09 July 2014.

³⁹⁴ Interview with a NGO representative in Brussels in September 2014.

³⁹⁵ Cf. notably European Parliament resolution of 6 September 2007 on the functioning of the human rights dialogues and consultations on human rights with third countries (2007/2001(INI)) (2007); European Parliament resolution of 13 December 2012 on the annual report on Human Rights and Democracy in the World 2011 and the European Union's policy on the matter 67.

countries are presented to members of the DROI Subcommittee but only ‘in camera’ (i.e. they can have a look on them but do not receive a copy).³⁹⁶

In one of the few academic studies on HRDs, *Wouters et al.* suggest a stronger involvement of different actors in the process of HRDs, including academics, civil society but also the European Parliament.³⁹⁷ As a follow-up to the external evaluation of the EU’s Fundamental Rights Agency, the Agency’s Management Board also recommended to the Commission that a reference to HRDs with third countries be inserted into a revised mandate of the Agency to allow for its involvement e.g. by giving input on the situation of fundamental rights in the EU.³⁹⁸ Such an input might be helpful for the EU’s own credibility in HRDs as – contrary to the Guidelines’ principle that HRDs are held on a reciprocal basis (*‘which enables the third country to raise the human rights situation in the European Union’*³⁹⁹) – the EEAS is frequently not in a position to answer questions about the human rights situation in Member States, which on the other hand can frustrate dialogue partners.

Even though consistency of the various EU policies towards third countries should be ensured through joint meetings of the Council Working Group on Human Rights (COHOM), the pertinent geographical working parties and the Working Group on Development Cooperation, lack of consistency remains one of the strongest points of criticism towards HRDs. So far, the EU’s assistance in the area of human rights does not seem to be linked to progress in the HRDs with third countries, largely because HRDs are seen more as a ‘political instrument’ whose progress is not easy to translate into concrete commitments by governments.⁴⁰⁰ A critical question is also the coherence between bilateral HRDs held by some Member States with third countries and EU HRDs held with the same countries. The EP has stressed in this regard the role of COHOM in exchanging and coordinating the activities of Member States and the EU⁴⁰¹ and also the EU Guidelines consider information exchange as *‘essential if maximum consistency between Member States’ bilateral dialogues is to be ensured’*.⁴⁰² According to interview partners in the EEAS, Member States would normally inform the EEAS of HRDs they are holding with third countries but further information exchange (particularly before dialogues) happens only partly. The interlocutors, however, also suggested that separate HRDs by Member States have decreased over the years and now (mainly) only the various HRDs by Member States with China remain. There is yet neither a full list of EU HRDs nor that of Member States publicly available.

³⁹⁶ Information provided by the EEAS through interviews in Brussels in September 2014.

³⁹⁷ Wouters and others (n 391) 3.

³⁹⁸ FRA Management Board recommendations expressed in a letter by its chairperson Maija Sakslin to Commissioner Viviane Reding <http://fra.europa.eu/sites/default/files/fra-management-board-recommendations-external-evaluation_0.pdf>, accessed 18 July 2014.

³⁹⁹ EU guidelines on human rights dialogues with third countries (2001 (review adopted in 2009)) 6.

⁴⁰⁰ Information provided by DG DEVCO/EEAS during interviews held in Brussels in September 2014. According to the interview partners, HRDs would not provide a complete picture of the human rights situation in a certain country either, which is, however, necessary for the programming.

⁴⁰¹ European Parliament resolution of 6 September 2007 on the functioning of the human rights dialogues and consultations on human rights with third countries (2007/2001(INI)) (2007) 16.

⁴⁰² EU guidelines on human rights dialogues with third countries (2001 (review adopted in 2009)).

3. Election observation missions (EOMs)

Elections are an essential part of democratic governance and the right of every citizen to participate in free and fair elections is stipulated in Article 25 of the International Covenant on Civil and Political Rights (ICCPR).⁴⁰³ Observing an electoral process is thus not only important to assess the quality of the election itself but also the development of a democratic system and the respect for the individuals' right to political participation. Electoral observation is consequently particularly important in situations of democratic transition. For this reason, election observation by impartial international groups or organisations has developed as a form of 'democracy assistance' to states during election processes. The presence of international observers should enhance the transparency of elections, help to assess their conduct and in a wider sense help to promote democratic values and individual human rights.⁴⁰⁴ In contrast to election monitors or election assistants, the role of election observers is a purely passive one in the electoral process: they collect information, observe the actual conduct of voting and counting and finally make an overall assessment. They are, however, neither allowed to provide technical or administrative support nor to intervene in the process.⁴⁰⁵

Over the last decades, several international organisations and civil society organisation have developed competence in election observation. Apart from the EU, other organisations regularly deploying observers to EOMs are e.g. the Organization for Security and Co-operation in Europe (OSCE), the Organization of American States (OAS), the African Union (AU), the Asian Network for Free Elections, the Commonwealth Secretariat, and the Carter Center – some of the regional organisations only within their respective regions. Whether an international EOM can be deployed usually depends on an official invitation or at least informal acceptance by the country concerned which is, however, free to invite also more than one organisation. Even though organisations sometimes cooperate on a technical level and might exchange information, the presence of several EOMs can ultimately also lead to different assessments – a result which clearly contravenes the intention to provide transparency and reliability to the electoral process.⁴⁰⁶ Different conclusions might result from the different assessment criteria used by organisations and not least also from the political judgement (and political interests) of the organisations.⁴⁰⁷ In recognition of this problem, major organisations involved in EOMs, joined by the

⁴⁰³ 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions [...] (b) to vote and to be elected at genuine periodic elections, which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expressions of the will of the electors.' Article 25 ICCPR.

⁴⁰⁴ For more details on the possible contribution of EOMs to the individual's right to political participation see Christina Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (2007) 13 European Public Law 133.

⁴⁰⁵ Florian Dunkel, 'International Election Observation' in Manfred Nowak, Karolina M Januszewski and Tina Hofstätter (eds), *All human rights for all: Vienna manual on human rights* (Intersentia, 2012) 535.

⁴⁰⁶ Judith Kelley, 'D-Minus Elections: The Politics and Norms of International Election Observation' (2009) 63 Int Org 765 766–67; Avery Davis-Roberts and David J Carroll, 'Using international law to assess elections' (2010) 17 Democratization 416 418.

⁴⁰⁷ Kelley conducted a detailed research on the factors, which influence election observers. The results show that even though observers act as independent experts, the final results are influenced by several factors such as expectations of the sending organisations or the context in which the elections are held. For details see: Judith

United Nations Electoral Assistance Division (Department of Political Affairs), started consultations on the harmonisation of standards. This culminated in the endorsement of a Declaration of Principles for International Election Observation and a Code of Conduct for International Election Observers celebrated at a high-level event held in October 2005 at the United Nations in New York.⁴⁰⁸ The documents were originally endorsed by 21 organisations but remained (and remain) open for other organisations willing to join.⁴⁰⁹ The Declaration provides a first common understanding of what an EOM is⁴¹⁰ and establishes principles concerning the format and conduct of missions, the personal prerequisites for participating in an EOM as organisation or individual observer (such as full independence also financially from the government of the host country, no political or economic conflict of interests), as well as conditions that must be given in the host country (e.g. unimpeded access to all stages of the electoral process and freedom of movement around the country). Finally, endorsing organisations also '*pledge to cooperate with each other*' in conducting EOMs.⁴¹¹

The Code of Conduct accompanying the Declaration sets out essential principles of professional conduct for individual observers, such as respect for the sovereignty and laws of the host country as well as international human rights, strict political impartiality, accuracy of observations and professionalism in drawing conclusions, as well as proper personal behaviour.

The European Commission was among the first endorsers of this inter-institutional commitment. At that time, the EU⁴¹² had already deployed EOMs to many countries in Europe, Africa, Asia and Latin America for more than ten years. Since the first deployment of an EU EOM to the parliamentary election in the Russian Federation in 1993, EOMs have constantly evolved to one of the EU's most visible foreign policy instruments in the areas of human rights, democracy and the rule of law. A general legal basis for EU

Kelley, 'D-Minus Elections: The Politics and Norms of International Election Observation' (2009) 63 Int Org 765; Judith Kelley, 'Election Observers and Their Biases' (2010) 21 Journal of Democracy 158.

⁴⁰⁸ The documents are available on the websites of signing organisations e.g.

<http://eeas.europa.eu/eueom/pdf/declaration-of-principles_en.pdf> accessed 18 December 2014.

⁴⁰⁹ Avery Davis-Roberts and David J Carroll, 'Using international law to assess elections' (2010) 17 Democratization 418. According to paragraph 24 of the Declaration endorsements shall be recorded with the United Nations Electoral Assistance Division. The division's website does not provide, however, information on the Declaration and the Code of conduct.

⁴¹⁰ Cf. the definition in para 4 of the Declaration: [...] the systematic, comprehensive and accurate gathering of information concerning the laws, processes and institutions related to the conduct of elections and other factors concerning the overall electoral environment; the impartial and professional analysis of such information; and the drawing of conclusions about the character of electoral processes based on the highest standards for accuracy of information and impartiality of analysis. International election observation should, when possible, offer recommendations for improving the integrity and effectiveness of electoral and related processes, while not interfering in and thus hindering such processes. [...].

⁴¹¹ See paragraph 8 of the Declaration.

⁴¹² Until the entry into force of the Treaty of Lisbon, EU EOMs were organised by and conducted under the responsibility of the European Commission. Since its establishment, the EEAS is responsible for the political preparation of and follow-up to EOMs, while the EC remains responsible for the budget and logistics.

action in this field can already be found in the Treaty on the European Union⁴¹³ and in 1998 the Council adopted first Guidelines on the EU Policy on EOMs.⁴¹⁴ They define EOMs as *'an important component of the EU's policy in promoting human rights and democratisation throughout the world'* and should be undertaken *'on the basis of partnership and with the objective of developing national capacity'*. An important indicator that the EU sees EOMs as part of longer-term democratic assistance and (possibly) political dialogue with the country concerned, is the provision that EOMs should only be deployed if the EU had already previously been monitoring political developments in that country for some time and has the political capacity to assess developments through the EU Heads of Mission (at that time only the HoMs of Member States, meanwhile also the heads of EU delegations).

As an integral part of these guidelines, a general code of conduct as well as *'General Guidelines for Observers when visiting Polling Stations'* are annexed to the text. They are still in use, even though the EU has meanwhile issued a detailed handbook outlining its principles of election observation, based on the inter-institutional Declaration of Principles, described above.⁴¹⁵ Two Council Regulations in 1999⁴¹⁶ and notably a Communication by the Commission in 2000⁴¹⁷ further established more specific principles and concretised the EU's views not only on EOMs but also on electoral assistance through financial and technical means.

In these documents the EU recognises the importance of elections as *'an essential step in the democratisation process and an important element in the full enjoyment of a wide range of human rights'* and commits to the principles of international human rights law in the assessment of elections.⁴¹⁸

⁴¹³ Now Article 21 consolidated version of the Treaty on European Union Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007: Lisbon Treaty (2007): *'[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'*.

⁴¹⁴ Council Decision 9262/98, published as Annex III to the European Commission, *'Communication from the Commission on EU Election Assistance and Observation'* (COM(2000) 191 final).

⁴¹⁵ European Commission, *Handbook for European Union election observation*. Second edition (2008) <http://eeas.europa.eu/eueom/pdf/handbook-eueom-en-2nd-edition_en.pdf> accessed 22 July 2014. (first issued in 2005).

⁴¹⁶ Council Regulation (EC) N° 975/1999 of 29 April 1999 laying down the requirements for the implementation of development co-operation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms; Council Regulation (EC) N° 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development co-operation, which, within the framework of Community co-operation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms.

⁴¹⁷ European Commission, *'Communication from the Commission on EU Election Assistance and Observation'* COM(2000) 191 final.

⁴¹⁸ *ibid* 22; European Commission (n 415Error! Bookmark not defined.) 14.

As these documents only provide very basic selection criteria, there remains a considerable leeway for the EEAS and the Council to decide on the concrete selection of countries. Neither the processes how these selections are employed nor the final list of selected countries is made transparent.⁴¹⁹ According to interview partners in the EEAS, the EEAS (Democracy and Election observation Division in consultation with the geographical desks) provides each autumn a list of election priorities of the following year, which is approved by the HR/VP before it is shared with the Member States and the Democracy Support and Election Coordination Group (DEG) of the European Parliament. After these consultations, the final decision is made by the HR/VP.⁴²⁰ Much depends of course also on the budget available each year. With the establishment of the European Instrument for Democracy and Human Rights (EIDHR), in 2006⁴²¹, EU EOMs were put into an institutionalised framework, which should guarantee their funding; the amount available per year depends on the annual budget allocation for and within EIDHR though. The new EIDHR-Regulation, which was adopted in March 2014 and replaced the 2006 Regulation, includes in its annex a Joint Declaration of the EP, the Council and the European Commission on EU EOMs whereas *'up to 25 % of the budget over the period 2014-2020 [...] should be devoted to the funding of EU EOMs, depending on annual election priorities'* in order to allow the financing of smaller-scale projects, in particular capacity building.⁴²² According to interview partners in the EEAS, the actual budget available for EOMs has constantly been less than 25% of the total EIDHR budget in recent years, making it necessary to look for funding opportunities by other foreign policy instruments or to reduce missions.⁴²³ By the end of September 2014, the EU had in total deployed 152 EOMs (three were ongoing), varying from 8-12 missions per year during the last five years.⁴²⁴

In the Strategic Framework and Action Plan on Human Rights and Democracy, adopted by the Council in 2012, the EU renewed its commitment to the promotion of democracy in the world, made, however, little reference to the instrument of EU EOMs. The only explicit reference is on the follow-up use of EOMs in Chapter III, point 6 (d) of the Action plan.⁴²⁵ In fact, it is precisely the follow-up to EU EOMs, which has not been systematically pursued in the past. Over the last few years though there has developed an institutional practice, which the EEAS now strives to systematise. Usually, after the

⁴¹⁹ Priorities for EOMs might be cited though in other publicly available documents such as those reporting about the EEAS' activities. Once an EOM is actually deployed, this is also made public on the EEAS website (<http://eeas.europa.eu/eueom/missions/index_en.htm>).

⁴²⁰ Information provided by the EEAS through interviews in September 2014.

⁴²¹ Regulation (EC) No 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide: EIDHR Regulation (2006).

⁴²² Regulation (EU) No 235/2014 of the European Parliament and of the Council of 11 March 2014 establishing a financing instrument for democracy and human rights worldwide.

⁴²³ Information provided by the EEAS through interviews in September 2014. According to these interview partners, the EIDHR as such has been underfunded in recent years.

⁴²⁴ Calculation based on the information available on <http://eeas.europa.eu/eueom/missions/index_en.htm> accessed 7 October 2014.

⁴²⁵ Council of the European Union (n 378): *'Systematise follow-up use of EU Election Observation Missions and their reports in support of the whole electoral cycle, and ensure effective implementation of their recommendations, as well as the reports of other election observation bodies (e.g. OSCE/ODIHR).'*

conclusion of an EU EOM, the mission's final report is shared with the responsible geographical working group of the Council, COHOM and the DEG. In addition, the chief observer and members of the core team travel back to the country to present the report and to have interactions with key stakeholders, including civil society, usually two months after the election. This 'return visit' marks the official end of the mission.⁴²⁶ Frequently the geographical working group also asks the HoMs to deliver a report on the follow-up to the EOM's recommendations one or two years after the conclusion of the mission which is then discussed in the pertinent geographical working group – in some cases even HoMs reporting every six months has been established. Recently, the EEAS has also started to organise follow-up missions in the mid-elections cycle (approximately two years after the EOM) whose findings serve both to evaluate the follow-up process to that date and to assess whether an EU EOM to the following election would be useful. This is, however, not established as standard procedure yet.⁴²⁷ In any case, any following EOM should also take into consideration the findings and recommendations of previous missions. According to interview partners in the EEAS and DG DEVCO, recommendations of EOMs are also increasingly used in the (internal) human rights country strategies, as well as in the country programming, particularly concerning democracy support programmes.⁴²⁸

In a resolution in 2008, the European Parliament underlined the need for a follow-up to the recommendations made by EU EOMs both in the political process (e.g. political dialogues, action plans for European Neighbourhood Policy countries) and in development cooperation (in particular with activities of the European Development fund and EIDHR) and confirmed its intention to reinforce its involvement in this regard.⁴²⁹ Contrary to this commitment though, the parliamentary resolution remained the only one by the plenary of the EP since 2008 and the EP's involvement in the follow-up process has often been limited to a follow-up report by the chief observer (who is usually an MEP) some two years after the EOM. According to interview partners in the EEAS, the follow-up reports by HoMs are shared with the DEG,⁴³⁰ which might open new follow-up opportunities for the EP once such regular reporting is established as standard procedure.

A proper follow-up procedure by all EU actors involved in EOMs (EEAS, EP, Council, EC, HoMs) in their respective fields of competences would be important not only to ensure the 'sustainability' of the EU's engagement through EOMs but also to have a clearer picture on a country's progress. This might help to assess whether to deploy an EOM at the following election and provide useful information for the country programming.

⁴²⁶ Information provided by interview partners in the EEAS during interviews in September 2014.

⁴²⁷ According to interview partners in the EEAS, there have been two follow-up missions in early 2014: to Nigeria (EOM 2011) and to the Democratic Republic of Congo (EOM 2011).

⁴²⁸ Information provided by interview partners in the EEAS and DG DEVCO during interviews in September 2014. To which extent recommendations by EOMs are effectively considered in the country programme could not be analysed in this report, as both for Egypt and Pakistan new country programmes were about to be developed at the time of writing.

⁴²⁹ Cf. paragraphs 1, 29, 32, 33, 37, 45 European Parliament resolution of 8 May 2008 on EU election observation missions: objectives, practices and future challenges (2007/2217(INI)) (2008).

⁴³⁰ Information provided by the EEAS through interviews in September 2014.

C. Case studies

1. Egypt

a) Context of EU-Egypt relations

The bilateral relations between the EU and Egypt are mainly governed by the Association Agreement concluded in the context of the European Neighbourhood Policy (ENP) with the Southern Mediterranean States. It entered into force in 2004 and is the basis for all further agreements and programmes under the heading of the ENP. While human rights are mentioned in the considerations of the agreement and Article 2 stipulates that the relations between the parties and all provisions of the agreement shall be guided by '*democratic principles and fundamental human rights*' (so called 'human rights clause'),⁴³¹ there is, interestingly, no further mention of common aims for the promotion of human rights in the 92 articles of the text, its annexes and protocols. In individual action plans concluded with all ENP partners the EU's and its partner's commitments should be concretised and translated into concrete goals, supported by the EU through e.g. financial or technical and policy support. The action plan concluded with Egypt in March 2007 has been extended several times and is now still valid until March 2015.⁴³² Two of the 'priorities for action' agreed in this action plan are the promotion of human rights 'in all its aspects' as well as enhancing the effectiveness of institutions entrusted with strengthening democracy and the rule of law and consolidating the independent and effective administration of justice.⁴³³ In the action plan the partners also agreed on establishing a formal and regular dialogue on human rights and democracy in the framework of the Association Agreement. To assess the progress made towards the objectives of the Action Plans and the Association Agendas, the EEAS and the European Commission annually publish progress reports for each partner country.⁴³⁴

Political relations between the EU and Egypt have been difficult in recent years because of the political instability following the overthrow of the Mubarak regime in early 2011. In numerous statements, the representatives of the EU welcomed the democratic developments in Egypt and promised the Union's support in this process but also called – sometimes cautiously – for the full respect of human rights.⁴³⁵

⁴³¹ Cf. Article 2: '*Relations between the Parties, as well as all the provisions of the Agreement itself, shall be based on respect of democratic principles and fundamental human rights as set out in the Universal Declaration on Human Rights, which guides their internal and international policy and constitutes an essential element of this Agreement.*' For more details on 'human rights clauses' see the report of FRAME Deliverable 9.1.

⁴³² Information provided by DG DEVCO during interviews held in Brussels in September 2014.

⁴³³ European Neighbourhood Policy - EU-Egypt Action Plan (2007) 3–4. Among the actions under this heading are e.g. strengthening participation in political life and promoting freedom of association and expression, fostering the role of civil society and capacity building, aligning national laws with international human rights standards, improving prison conditions, as well as promoting specific rights of women and children.

⁴³⁴ These reports are available on <http://eeas.europa.eu/enp/documents/progress-reports/index_en.htm> accessed 7 October 2014.

⁴³⁵ Cf. e.g. Joint statement by President of the European Council Herman Van Rompuy, President of the European Commission Jose Manuel Barroso, and EU High Representative Catherine Ashton on recent developments in Egypt of 11 February 2011; Statement by EU High Representative Catherine Ashton on the one-year anniversary of the

At the invitation by the Egyptian Government and Presidential Election Committee, the EU deployed for the first time ever⁴³⁶ an EOM to the presidential elections in Egypt in spring 2014. This decision was not uncontested, as the political climate in the country and the repression against representatives of the Muslim Brotherhood in the previous months casted doubts on the fairness of the electoral process. In a parliamentary debate about the situation in Egypt in July 2014, the Dutch MEP Judith Sargentini (Greens / EFA) heavily criticised the deployment of an EOM as having legitimised a political situation in which activists, journalists and ordinary citizens demonstrating for their rights were imprisoned.⁴³⁷ It has to be noted, however, that it was the (majority of the) EP which invited the Egyptian Government to request the deployment of an EU EOM to the presidential elections in a resolution in February 2014.⁴³⁸

b) Interplay between EU EOM and parliamentary debates

The European Parliament has frequently dealt with the situation in Egypt during the last years and mostly these debates also addressed the situation of human rights, democracy and rule of law in the country. Interestingly though, before the outbreak of the 'Arab spring' in early 2011, the EP dealt with the human rights situation in Egypt only once and this in a very specific context – a resolution on attacks on Christian communities in a number of countries.⁴³⁹ As the first plenary debate on the situation in the Mediterranean, in particular in Tunisia and Egypt, in early February 2011, reveals, the mass protests for democracy and fundamental rights worked as 'wake-up calls' for the MEPs. In the partly emotional debate,⁴⁴⁰ MEPs heavily criticised the EU representatives – mainly HR/VP Ashton – for having reacted late and 'too softly' to the developments in North Africa and the Middle East, thereby having shown too little support to the activists on the streets. The MEPs exercised, however, also self-criticism for not having paid enough attention to the legitimate concerns of the people of these countries during the previous years and also for having silently accepted stable dictatorial regimes in fear of instability or religious extremism in the European Neighbourhood.⁴⁴¹

Egyptian uprising on 25 January of 25 January 2012; Declaration by the High Representative Catherine Ashton, on behalf of the European Union, on the situation in Egypt of 14 July 2013.

⁴³⁶ Neither the EU nor any other international organisation was invited to observe the presidential elections in spring 2012. In January 2014 the EU sent a small Electoral Expert Mission to observe the constitutional referendum in Egypt, however its report was not made public (as it is the usual practice with Electoral Expert Missions).

⁴³⁷ In the original: '[...] Wij zien activisten, wij zien gewone burgers, wij zien journalisten grootschalig in de gevangenis verdwijnen; zij worden met showprocessen decennialang opgesloten. Wij zien schietpartijen op mensen die aan het demonstreren zijn. [...] Wij hebben gewoon een Europese waarnemingsmissie gestuurd naar de presidentsverkiezingen in Egypte en wij hebben die zaak gelegitimeerd.' At the time of writing there was no translation available yet at the EP website.

⁴³⁸ European Parliament resolution of 6 February 2014 on the situation in Egypt (2014/2532(RSP)) (2014); In the debate preceding the adoption of this resolution, the possible deployment of an EU EOM was apparently not raised (as there was no translation of the minutes available yet at the time of writing, not all of the contributions could be taken into account), cf. Egypt: recent developments (debate), 5 February 2014 – Strasbourg.

⁴³⁹ European Parliament resolution of 21 January 2010 on recent attacks on Christian communities (2010).

⁴⁴⁰ Situation in the Mediterranean, in particular in Tunisia and Egypt (debate), 2 February 2011.

⁴⁴¹ *ibid.*

The resolution on Egypt, finally adopted on 17 February 2011⁴⁴² stressed the importance of democratic development in line with the respect for human rights: demanding e.g. the release of all peaceful protesters, prisoners of conscience, human rights defenders, journalists and lawyers; the revision of the Constitution and the electoral law; free and fair elections; and a democratically elected civilian government. It also stressed in particular the importance of freedom of expression, association and assembly and the freedom of religion or belief. Additionally it called for the EU instruments (notably ENPI and EIDHR) to be adapted to prioritise human rights, rule of law and political reform.⁴⁴³ Even though not using the term ‘deep democracy’ this resolution already stresses the ‘core ingredients’ of what it sees as indispensable for a sustainable democratic development of the country.

Most of these calls on a government of a country in transition remained the same over the following years. In a series of resolutions between 2011 and 2014, the EP repeatedly called for free and fair elections and democratic reforms, including the hand-over of power to a civilian – and elected – government.⁴⁴⁴ The EP also expressed concern about restrictions of the freedom of expression, association and assembly as well the situation of journalists, bloggers and civil society activists.⁴⁴⁵ On these issues the EP even adopted specific resolutions in November 2011, February 2012 and July 2014.⁴⁴⁶ Two other human rights concerns repeatedly raised by the MEPs are freedom of religion and belief, in particular violence against Coptic Christians and discrimination of non-Abrahamic beliefs, as well as women’s rights, especially their participation in political life and widespread sexual and gender-based violence.⁴⁴⁷ Equally, the EP called in several resolutions for the investigation into alleged abuses, including killings, by security forces, the independence of the judiciary, the release of all political prisoners and the abolishment of military jurisdiction for civilians, often combined with the call for

⁴⁴² In-between the date of the debate and the date of the adoption of the resolution, President Mubarak resigned and the Supreme Council of the Armed Forces resumed power.

⁴⁴³ European Parliament resolution of 17 February 2011 on the situation in Egypt (2011).

⁴⁴⁴ Cf. European Parliament resolution of 27 October 2011 on the situation in Egypt and Syria, in particular of Christian communities (2011) –; European Parliament resolution of 16 February 2012 on Egypt: recent developments (2012/2541(RSP)) (2012); European Parliament resolution of 14 March 2013 on the situation in Egypt (2013/2542(RSP)) (2013); European Parliament resolution of 12 September 2013 on the situation in Egypt (2013/2820(RSP)) (2013); European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter 55.; European Parliament resolution of 6 February 2014 on the situation in Egypt.

⁴⁴⁵ European Parliament resolution of 14 March 2013 on the situation in Egypt; European Parliament resolution of 12 September 2013 on the situation in Egypt; European Parliament resolution of 6 February 2014 on the situation in Egypt.

⁴⁴⁶ European Parliament resolution of 17 November 2011 on Egypt, in particular the case of blogger Alaa Abd El-Fattah; European Parliament resolution of 16 February 2012 on Egypt: recent developments [concerning NGOs]; European Parliament resolution of 17 July 2014 on freedom of expression and assembly in Egypt.

⁴⁴⁷ European Parliament resolution of 27 October 2011 on the situation in Egypt and Syria, in particular of Christian communities; European Parliament resolution of 16 February 2012 on Egypt: recent developments; European Parliament resolution of 14 March 2013 on the situation in Egypt; European Parliament resolution of 12 September 2013 on the situation in Egypt; European Parliament resolution of 11 December 2013 on the Annual Report on Human Rights and Democracy in the World 2012 and the European Union's policy on the matter (2013/2152(INI)) (2013) para. 55–56; European Parliament resolution of 6 February 2014 on the situation in Egypt.

releases in individual cases.⁴⁴⁸ In one specific resolution, the EP addressed the situation of refugees and other victims of human trafficking on the Sinai and followed up on this issue in two general resolutions on Egypt.⁴⁴⁹ It included a call on the HR/VP to put this topic on the agenda of the political dialogue with Egypt as a matter of high priority. Finally the EP called on the Council and the European Commission to make financial aid to Egypt conditional to progress on human rights, democratic governance and rule of law, in line with the 'more for more' approach.⁴⁵⁰

As the EP resolutions are mainly based on media coverage and reports by international governmental and non-governmental organisations, it is interesting to compare their main issues with the findings of the first EU mission to Egypt, the EOM deployed in spring 2014. Following the invitation to observe the 26/27 May presidential election in Egypt, Memoranda of Understanding between the Presidential Election Committee, the Ministry of Foreign Affairs and the EU were signed in mid-April 2014. Starting still in April, the EU deployed a fully-fledged EOM with a core team, long-term observers and short-term observers, led by Chief Observer Mario David, a Portuguese MEP (European People's Party). In brief, the EOM characterised the electoral process in its final report as overall in line with the law but it also noted restrictions to the freedom of association, assembly and speech in the pre-election period, as well as some structural problems e.g. concerning the voter registration (the voter register was extracted from the national ID documents database, which excluded many women not having IDs) or an insufficient campaign financing legislation.⁴⁵¹

Hence, the EOM's recommendations do not only cover issues directly related to the electoral process (e.g. voter registration, franchise, election observation, campaign regulation) but also the general human rights situation preceding and during the election. They can be grouped along the following lines:

1. Right to peaceful assembly: Review the content and application of the protest law, particularly relating to the use of force as well as to notice requirements.
2. Freedom of association, right to a fair trial: Review the Penal Code in order to limit unreasonable impacts on political participation.
3. Freedom of expression, including freedom to impart information on the media: implement constitutional provisions to ensure full respect for fundamental freedoms and curtail harassment of

⁴⁴⁸ European Parliament resolution of 17 November 2011 on Egypt, in particular the case of blogger Alaa Abd El-Fattah; European Parliament resolution of 14 March 2013 on the situation in Egypt; European Parliament resolution of 12 September 2013 on the situation in Egypt; European Parliament resolution of 6 February 2014 on the situation in Egypt.

⁴⁴⁹ European Parliament resolution of 15 March 2012 on human trafficking in Sinai, in particular the case of Solomon W.; European Parliament resolution of 14 March 2013 on the situation in Egypt; European Parliament resolution of 6 February 2014 on the situation in Egypt.

⁴⁵⁰ European Parliament resolution of 14 March 2013 on the situation in Egypt; European Parliament resolution of 6 February 2014 on the situation in Egypt. On the 'more for more'-principle in the ENP see the information provided on the EEAS website: <http://eeas.europa.eu/enp/index_en.htm> last accessed on 17 October 2014.

⁴⁵¹ European Union Election Observation Mission, 'Arab Republic of Egypt - Final Report: Presidential Election, 26/27 May 2014' <http://www.eueom.eu/files/pressreleases/english/eueom-egypt2014-final-report_en.pdf> accessed 31 July 2014.

journalists; ease restrictions on media outlets to enable a more open political debate during the electoral process; set basic rules for paid advertising; develop an independent and efficient media monitoring body.

4. Rights to participate in political affairs/right to vote: right to vote for all naturalised citizens; increase participation of minority groups in public life; voting opportunities for detained persons, persons turning 18 up to the polling day; establishment of a transparent electoral dispute resolution mechanism.

5. Equal participation of women in public life: require that political parties include women in party structures and select them as candidates; reduce candidate nomination deposits for female candidates;

6. Genuine elections/rule of law: review candidate financing rules; reduce administrative burden for domestic election observers (civil society organisations); publish detailed information on the updating process of the voter register; inform voters adequately about voting procedures.

7. Independence of judiciary/right to a fair trial: accord jurisdiction in all criminal cases to the ordinary criminal courts (exclude military jurisdiction for non-military citizens).

While bearing in mind the caveat noted in the introduction that EU EOMs are independent and focus on the electoral processes, some general conclusions can be drawn from the analysis of the content of parliamentary resolutions and the EOM's final report. First, both EP resolutions and the EOM address restrictions on the freedom of speech, association and assembly, which do not only violate the rights of Egyptian citizens to exercise these freedoms but also negatively influence democratic participation. Equally, an independent judiciary, fair trials and investigation of abuses by security forces are not only requirements of international human rights law but also important indicators for the status of the rule of law in the country. Thus, both parliamentary debates and the final report of the EOM underline the importance of the rule of law and 'deep democracy' while only scarcely using the latter term itself.⁴⁵² Among the core elements characterising 'deep democracies', EU actors seem to pay less attention to the fight against corruption and to the reform of the security sector in Egypt, which are only occasionally and in general terms addressed in parliamentary resolutions.⁴⁵³ By contrast, in recent years EU actors have frequently addressed two other central reference points of the EU's conceptualisation of human rights, the strengthening of women's rights and the protection of vulnerable groups or minorities. The EOM's final report confirmed the severe underrepresentation of women in the political life in Egypt described in EP resolutions and linked it also to the discrimination of women in society as such (e.g. women often have no ID cards which hampers their participation in elections). On the other hand, the EOM did not notice acts of violence against women in the context of the electoral process. Concerning religious minorities, the EOM noted an underrepresentation of Christians but no specific difficulties faced by them during the electoral process.⁴⁵⁴ The fact that the EOM neither noted acts of violence against women nor discrimination of Christians or other religious minorities does of course not mean that they do not occur outside the electoral setting and can thus be legitimate human rights concerns.

⁴⁵² Only two EP resolutions expressly refer to the term: European Parliament resolution of 16 February 2012 on Egypt: recent developments; European Parliament resolution of 12 September 2013 on the situation in Egypt.

⁴⁵³ Cf. e.g. European Parliament resolution of 12 September 2013 on the situation in Egypt; European Parliament resolution of 6 February 2014 on the situation in Egypt.

⁴⁵⁴ European Union Election Observation Mission (n 451) 30.

Concerning the role of civil society, the EP has frequently addressed the situation of NGOs and other civil society actors in Egypt in its resolutions⁴⁵⁵ and also the EOM's final report noted restrictions on civil society organisations.

The analysis also shows that economic, social and cultural rights in Egypt have been addressed only in very general terms by EU actors in recent years (e.g. referring to the 'need for economic reform' or the importance of a 'higher standard of living' and 'improved opportunities for social inclusion'). In none of the texts though these general demands are linked to individual rights. This is surprising as political analysts largely agree that one of the central factors that triggered the outbreak of the 'Arab spring' was the economic and social situation in the countries concerned, in particular high (youth) unemployment rates, poverty, few economic opportunities (if not through nepotism) and inefficient forms of intervention and redistribution.⁴⁵⁶ Protesters on the streets did not only demand freedom of speech or political reforms but also individual job opportunities and a fight against corruption.

2. Pakistan

a) Context of EU-Pakistan relations

The main basis for cooperation between the EU and Pakistan is the Cooperation Agreement concluded in 2004, which followed a cooperation agreement already signed in 1976.⁴⁵⁷ Even though the agreement starts with a 'human rights clause', making human rights and democratic principles an essential element of the agreement, the body thereof mostly deals with economic cooperation in various sectors, as well as development and environmental cooperation. The EU-Pakistan 5-year Engagement Plan, adopted in 2012, transposes this framework into more concrete actions, among them in the areas of democracy, governance, human rights and socio-economic development.⁴⁵⁸ The proposed actions under this heading include support for capacity building of public national or provincial institutions such as for those dealing with judicial, electoral, police, human rights and socioeconomic development but the Engagement Plan does not go further into detail.⁴⁵⁹ With regard to development cooperation, the EU has been one of the biggest donors in Pakistan for many years, the focus was, however, more on rural development, natural resources management and education than on programmes expressly promoting human rights, democracy and the rule of law (even though poverty reduction and access to education

⁴⁵⁵ In particular, see European Parliament resolution of 16 February 2012 on Egypt: recent developments.

⁴⁵⁶ Cf e.g. Richard Javad Heydarian, 'The Economics of the Arab Spring. Economic grievances are galvanizing the Arab street to attempt to redraw the political landscape' Foreign Policy In Focus (21 April 2011) <http://fpif.org/the_economics_of_the_arab_spring/> accessed 19 August 2014; Adeel Malik and Bassem Awadallah, 'The economics of the Arab Spring' CSAE Working Paper WPS/2011-23 (2011) <<http://www.csae.ox.ac.uk/workingpapers/pdfs/csae-wps-2011-23.pdf>> accessed 19 August 2014.

⁴⁵⁷ Cooperation Agreement between the European Community and the Islamic Republic of Pakistan, relating to the partnership and to development (2004).

⁴⁵⁸ EU-Pakistan 5-year Engagement Plan (2012).

⁴⁵⁹ EU-Pakistan 5-year Engagement Plan (2012).

are of course important human rights goals).⁴⁶⁰ The EU has also been a major donor of humanitarian aid in Pakistan, particularly after the recurrent floods since 2010 and in assisting the refugee and internally displaced population in the northwest of the country. Furthermore, Pakistan can access other thematic or Asia-wide programmes and Pakistani civil society organisations are eligible for funds under the EIDHR.

The EU holds regular human rights dialogues with Pakistan as part of the cooperation agreement (sub-group to the joint commission) and has observed elections in the country in 1997, 2002, 2008 and 2013. According to a report by the EU Delegation to Pakistan, over 70 recommendations made by the EU EOM in 2008 have been followed-up between 2008 and 2013;⁴⁶¹ according to interview partners in the EEAS not all of these recommendations were successfully implemented though during this period. To promote the implementation of the recommendations issued by the 2013 EU EOM, the Chief Observer and his core team went on a return mission across the country to present the EOM's final report and its recommendations also to provincial and local governments.⁴⁶²

b) Interplay between EU EOM and parliamentary debates

The European Parliament has frequently dealt with Pakistan in recent years. Often tragic events in the country triggered multi-party motions for resolutions, addressing either the situation in Pakistan in general or specific aspects of human rights violations. In these debates and resolutions, MEPs have not only denounced the failure of the Pakistani government to guarantee human rights for its citizens. They have also called on the European Commission and Council to demand more emphatically the effective respect of human rights and democratic standards from their Pakistani counterparts as well as to provide more assistance to human rights defenders⁴⁶³ and projects promoting women's rights⁴⁶⁴ in Pakistan. More specifically, the EP has called in two resolutions on the EEAS to present a report on the implementation of the Cooperation Agreement with Pakistan and in particular its human rights and democracy clause.⁴⁶⁵

Human rights concerns in Pakistan recurrently addressed by the EP include the situation of religious minorities, in particular Christians,⁴⁶⁶ the 'blasphemy laws' and their application by the Pakistani

⁴⁶⁰ Cf. Pakistan-European Community Country Cooperation Strategy (2007-2013). Democratisation and Human Rights is listed therein as a 'Non-focal area'.

⁴⁶¹ European Union Delegation to Pakistan, 'EU-Pakistan: Partnering for Democracy and Prosperity' (2014) 9.

⁴⁶² Information provided the EEAS through interviews in Brussels in September 2014.

⁴⁶³ European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan (2011); European Parliament resolution of 10 March 2011 on Pakistan, in particular the murder of Shahbaz Bhatti (2011).

⁴⁶⁴ European Parliament resolution of 20 January 2011 on Pakistan, in particular the murder of Governor Salmaan Taseer (2011); European Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai (2012/2843(RSP)) (2012).

⁴⁶⁵ European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan, para. 32; European Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai, para. 21. Already in resolutions in 2010 and in March 2011 the EP has called on the Council to uphold this clause of the cooperation agreement.

⁴⁶⁶ European Parliament resolution of 20 May 2010 on religious freedom in Pakistan; European Parliament resolution of 20 January 2011 on Pakistan, in particular the murder of Governor Salmaan Taseer; European

judiciary (including two resolutions adopted after the murder of two politicians advocating for the abolition of these laws),⁴⁶⁷ the situation of women and girls (including discriminatory laws, violence against women and girls' access to education),⁴⁶⁸ the independence of judiciary and the respect for the rule of law,⁴⁶⁹ as well as the reform of the education system, including the establishment of a basic elementary curriculum and regular inspections of religious schools (*madrassas*) to prevent that violent extremism is taught to children.⁴⁷⁰ The minutes of the parliamentary debates show that there were particularly numerous interventions concerning the blasphemy laws and the protection of religious minorities, as well as on women's rights, where MEPs often expressed their outrage about severe human rights violations and vocally called for the respect of human rights.⁴⁷¹

During the parliamentary term 2009-2014 the EP also acknowledged progress in certain areas of human rights protection in Pakistan. Thus, it recognised Pakistan's ratification of the ICCPR and of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which it had previously called for in a resolution in May 2010.⁴⁷² Ratification of the ICCPR was also one of the recommendations of the EU EOM 2008 and therefore one the EEAS could record on the 'successful follow-up' side.⁴⁷³ Equally, the EP welcomed legislation on child protection and the protection of

Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai; European Parliament resolution of 10 October 2013 on recent cases of violence and persecution against Christians, notably in Maaloula (Syria) and Peshawar (Pakistan) and the case of Pastor Saeed Abedini (Iran); European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution.

⁴⁶⁷ European Parliament resolution of 20 May 2010 on religious freedom in Pakistan; European Parliament resolution of 20 January 2011 on Pakistan, in particular the murder of Governor Salmaan Taseer; European Parliament resolution of 10 March 2011 on Pakistan, in particular the murder of Shahbaz Bhatti; European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan; European Parliament resolution of 10 October 2013 on recent cases of violence and persecution against Christians, notably in Maaloula (Syria) and Peshawar (Pakistan) and the case of Pastor Saeed Abedini (Iran); European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution.

⁴⁶⁸ European Parliament resolution of 20 May 2010 on religious freedom in Pakistan; European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan; European Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai; European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution.

⁴⁶⁹ European Parliament resolution of 20 January 2011 on Pakistan, in particular the murder of Governor Salmaan Taseer; European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan; European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution.

⁴⁷⁰ European Parliament resolution of 20 January 2011 on Pakistan, in particular the murder of Governor Salmaan Taseer; European Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai; European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution.

⁴⁷¹ Cf. e.g. debate on Discrimination against girls in Pakistan, in particular the case of Malala Yousafzai, Strasbourg 26 October 2012 (CRE 26/10/2012 - 4.2); debate on Pakistan - murder of Shahbaz Bhatti, Minister for Minorities, Strasbourg 10 March 2011; debate on Situation of women in Afghanistan and Pakistan, Strasbourg 15 December 2011.

⁴⁷² European Parliament resolution of 20 May 2010 on religious freedom in Pakistan.

⁴⁷³ European Union Election Observation Mission, Islamic Republic of Pakistan - Final Report: National and Provincial Assembly Elections, 18 February 2008 66; Interview partners in the EEAS explicitly referred to these ratifications as an example for a successful follow-up dialogue with the Pakistani authorities.

women from violence,⁴⁷⁴ as well as laws promoting minority rights.⁴⁷⁵ In these cases, however, the acknowledgment was combined with calls for further efforts and in particular, an effective implementation of the laws. According to press releases issued by the European Commission, respectively the EEAS, women's rights in Pakistan were also raised by the HR/VP at the EU-Pakistan Strategic Dialogues (of which the human rights dialogue is a part) held in 2012 and 2014, along with an 'encouragement' to fulfil international commitments in national laws.⁴⁷⁶

Some of the concerns regarding the discrimination of women and (religious) minorities were equally noted by the latest EU EOM deployed to the General Elections in Pakistan in May 2013. It was the third time in a row that the EU deployed an EOM to general elections in Pakistan. Following an invitation by the Pakistani Ministry of Foreign Affairs, the EU deployed 11 core team members, 52 LTOs and 46 STOs from 3 April to 4 June 2013.⁴⁷⁷ The EOM was headed by Michael Gahler, a MEP from Germany (Group of the European People's Party) who had already been Chief Observer of the EU EOM in Pakistan 2008.⁴⁷⁸ In addition, a delegation of the European Parliament, led by the British MEP Richard Howitt (Group of the Progressive Alliance of Socialists and Democrats) joined the EU EOM for the election day.⁴⁷⁹ Due to the poor security conditions in parts of the country, EU observers were mostly accompanied by police escorts and no observers could be sent to Balochistan and the Federally Administered Tribal Areas. In the generally tense situation also incidents of election violence occurred, causing the death of more than 150 people during the last four weeks of the campaign (most of the attacks were directed against candidates and supporters of parties identified as secular). On election day alone, 64 persons were killed and more than 200 injured, despite large-scale security measures.⁴⁸⁰

⁴⁷⁴ European Parliament resolution of 15 December 2011 on the situation of women in Afghanistan and Pakistan, para. 23-24; European Parliament resolution of 26 October 2012 on the discrimination against girls in Pakistan, in particular the case of Malala Yousafzai, para. 11-13.

⁴⁷⁵ E.g. a 5% quota for minorities in the federal job sector, the recognition of non-Muslim public holidays, the declaration of a National Minorities Day. European Parliament resolution of 10 October 2013 on recent cases of violence and persecution against Christians, notably in Maaloula (Syria) and Peshawar (Pakistan) and the case of Pastor Saeed Abedini (Iran), para. 18; European Parliament resolution of 17 April 2014 on Pakistan: recent cases of persecution, para. 10.

⁴⁷⁶ European Commission, Press Release 'EU-Pakistan Strategic Dialogue', Islamabad 5 June 2012 <http://europa.eu/rapid/press-release_IP-12-566_en.htm accessed 05 December 2014>; EEAS, Joint Press Release '2nd EU-Pakistan Strategic Dialogue, Brussels, 25 March 2014', Brussels, 27 March 2014, 140327/01, <http://www.eeas.europa.eu/statements/docs/2014/140327_01_en.pdf> accessed 05 December 2014.

⁴⁷⁷ European Union Election Observation Mission, 'Islamic Republic of Pakistan - Final Report: General Elections, 11 May 2013' 7 and information on <http://eeas.europa.eu/eueom/missions/2013/pakistan/mission_en.htm> accessed on 12 August 2014

⁴⁷⁸ Information on <http://eeas.europa.eu/eueom/missions/2013/pakistan/index_en.htm> accessed on 12 August 2014.

⁴⁷⁹ In a resolution in February 2012 the EP had reaffirmed the EU's readiness to provide assistance for the elections in Pakistan which it considered crucial for the country's democratic future and for stability in the region (cf. European Parliament resolution of 7 February 2013 on recent attacks on medical aid workers in Pakistan, para. 16)

⁴⁸⁰ European Union Election Observation Mission (n 477) 4.

The EU EOM hence acknowledged the strong commitment by parties, candidates and voters who participated in unprecedented numbers, despite the threats and attacks, which disturbed the electoral process.⁴⁸¹ On the positive side the EU EOM also noted the improved legal framework for elections in comparison to the previous EOM in 2008⁴⁸² and an increased competitiveness with more parties participating and more than twice as many candidacies for National Assembly seats.⁴⁸³ Nevertheless, the EOM noted a number of shortcomings in both the electoral legislation and administration and issued a total of 50 specific recommendations in its final report. Most of these recommendations address the vague 'moral' requirements for candidacy, unclear mechanisms for electoral dispute resolution, a lack of election administration transparency, an inadequate legislation on editorial independence and an inequitable media coverage of the various parties and candidates in practice, as well as restrictions on the freedom of expression in parts of the country.⁴⁸⁴ Concerning the participation of women, the EU EOM noted that while there was a significant increase of women registered, there were still more than 11 million fewer female voters registered than male voters and the EOM received credible reports about women being hindered to cast their vote in some parts of the country. Equally, the number of female candidates increased but the number of women elected to the National Assembly dropped to only six (since there are 60 reserved seats for women there are nevertheless 66 female members of the National Assembly, amounting to 19.3% of the seats).⁴⁸⁵ In its final report the EU EOM thus included a series of recommendations to increase the number of women both as voters and as MPs, e.g. registration campaigns targeting especially women in rural and conservative areas and younger women, accessible polling stations with suitable facilities for women (in some areas there exist separate polling stations for men and women), measures to encourage the nomination of female candidates for general seats, as well as to increase the visibility of female candidate in state media.⁴⁸⁶ Regarding the number of women in the national assembly, the EU's credibility is arguably weakened though by the fact that six of the 28 EU Member States have an even lower percentage of female MPs in their lower or single house, according to data of the Inter-Parliamentary Union.⁴⁸⁷

The EU EOM also noted discrimination against (religious) minorities in the electoral process, e.g. Ahmadis were registered on a separate electoral roll, very few non-Muslim candidates ran on general seats, especially on party tickets (similar to the quota for women there are, however, 10 reserved seats for Non-Muslims) and there were no programmes aimed at promoting the participation of

⁴⁸¹ European Union Election Observation Mission, 'Islamic Republic of Pakistan - Preliminary Statement: A competitive and improved election process in Pakistan despite militant violence and procedural shortcomings' (Islamabad 2013) 1.

⁴⁸² European Union Election Observation Mission (n 473) 3.

⁴⁸³ European Union Election Observation Mission (n 481) 1.

⁴⁸⁴ European Union Election Observation Mission (n 477) 6; 54-71.

⁴⁸⁵ *ibid* 45. According to the website of the National Assembly of Pakistan, last consulted on 9 October 2014, there are currently only 60 female members (<<http://www.na.gov.pk/en/composition.php>>).

⁴⁸⁶ *ibid*: cf. recommendations 37-43.

⁴⁸⁷ Cf. <<http://www.ipu.org/wmn-e/classif.htm>> accessed 12 August 2014. The Member States concerned are: Estonia (19%), Slovakia (18.7%), Ireland (15.7%), Malta (14.3%), Romania (13.5%), Cyprus (12.5%) and Hungary (10.1%).

minority members in the election. According to the final report also few persons with disabilities participated in the election due to a lack of awareness, accessibility, identity documents as well as societal attitudes. Accordingly, the EOM proposed the establishment of a unified electoral roll, measures to increase the visibility of candidates from minority groups and the participation of persons with disabilities, as well as a review of the system for allocating reserved seats, as minority communities complain about a lack of representativeness of the current system (representatives are not directly elected but nominated on the reserved seats).⁴⁸⁸

The analysis of the EU's human rights engagement with Pakistan reveals a strong focus on the civil and political rights of women, (mostly religious) minorities and vulnerable groups. Promotion of these rights was often linked to the necessity for legislative amendments and calls for the independence of the judicial system and the respect for fair trial provisions – other key issues of the EU's engagement with Pakistan. Strengthening the rule of law is thus mainly understood in a very broad way as establishing the legislative framework for the protection and promotion of individual rights as well as ensuring the well-functioning of a fair and independent judicial system (using elements of the 'thick definition'). Apart from the right to education the EU, however, hardly addressed economic, social and cultural rights in its engagement with Pakistan. While information on the content of HRDs, where also these rights might be discussed, are not publicly available, this gap could be an indication that the EU's human rights and development cooperation policies are not well linked yet. As the EU has been a major donor of development aid in Pakistan for many years, focusing particularly on rural development, natural resources management and education, discussing the promotion of economic and social rights would seem like a rather easy starting point for a HRD. Remarkably also, EP resolutions hardly addressed question of democratic development in Pakistan, even though both the 2008 and 2013 EU EOM issued a high number of recommendations concerning not only the electoral system but also political participation, transparency and (access to) independent media. However, as a follow-up to the recommendations by the EU EOM in 2008, the EU has provided (financial) assistance to the electoral reform process in Pakistan in the past years and supported the preparations for the 2013 general elections through various programmes, including a cooperation with the NGO Democracy Reporting International.⁴⁸⁹ According to interview partners in the EEAS, it is intended to continue this assistance during the next years.

D. Conclusions

The brief analysis of the EU's operationalisation of the concepts of human rights, democracy and the rule of law through selected external actions, conducted in this chapter, offers a number of conclusions,

⁴⁸⁸ European Union Election Observation Mission (n 477) 46–49 and recommendations 44–47.

⁴⁸⁹ European Union Delegation to Pakistan (n 461) 9 and information provided by the EEAS during interviews in Brussels in September 2014.

which can help to better understand the challenges for the EU's implementation of these concepts in general.

First, the promotion of economic, social and cultural rights is only partly integrated into EU foreign policy actions. The EU Guidelines on human rights dialogues with third countries neither explicitly list economic, social and cultural rights among the issues to be included on every dialogue's agenda ('standing items') nor is their promotion mentioned as a goal of HRDs elsewhere in the document. While the Strategic Framework and Action Plan on Human Rights filled this gap by including a commitment to '*address specific questions related to economic, social and cultural rights in dialogues with third countries*'⁴⁹⁰ it remains unclear to which extent these issues are in fact raised in HRDs as the latter's content is confidential. The analysis of EP debates and resolutions shows a mixed picture: The EP has highlighted the importance of economic, social and cultural rights (including social standards in trade relations) in general terms in several occasions in recent years, such as the resolutions on the Annual Report on Human Rights in the World and the European Union's policy on the matter or in the resolution on the review of the EU Human Rights Policy.⁴⁹¹ On the other hand, it has made little reference to this group of rights in the concrete country contexts of Egypt and Pakistan (where it has instead sometimes referred in great detail to certain civil and political rights such as freedom of speech or freedom of religion and belief). This is particularly surprising in the case of Egypt, as several MEPs have named social injustice, exclusion and economic reform as issues that needed to be tackled urgently in response to the outbreak of the 'Arab Spring'.⁴⁹² In the case of the EU EOMs' final reports, a focus on civil and political rights is understandable though, as they assess the guarantee of human rights specifically in the electoral context.

Regarding the broader picture, the EU's priorities in the external promotion of human rights could be critically evaluated as to whether they really reflect the indivisibility of all human rights, stated by the Treaties and the Strategic Framework. While a detailed analysis of this issue would go beyond the scope of this report, it should be noted here that already the Action Plan's specific priorities include mainly civil and political rights (e.g. eradication of torture, freedom of religion or belief, freedom of expression online and offline, administration of justice etc.), while economic, social and cultural rights are only included *en bloc* and not as separate rights. This prioritisation/neglect becomes even more obvious when examining the issues for which EU Guidelines have been developed and which could thus be seen as priorities for action defined by the Council: while some of the currently eleven Guidelines include also aspects of economic, social and cultural rights (e.g. the Guidelines on the Promotion and Protection of the Rights of the Child or the Guidelines to promote and protect the enjoyment of all Human Rights by

⁴⁹⁰ Council of the European Union (n 378) 15.

⁴⁹¹ European Parliament resolution of 13 December 2012 on the review of the EU's human rights strategy (2012/2062(INI)) (2012).

⁴⁹² Situation in the Mediterranean, in particular in Tunisia and Egypt (debate), 2 February 2011.

lesbian, gay, bisexual, transgender and intersex (LGBTI) persons), there have been no Guidelines developed yet on any specific economic, social or cultural right.⁴⁹³

Second, the analysis shows that the rule of law is not only a concept the EU has inserted in many strategies and principles for external action (even if not in a prominent position) in recent years – including in the Strategic Framework and Action Plan,⁴⁹⁴ the EU Guidelines for Human Rights Dialogues with third countries, programmatic EP resolutions⁴⁹⁵ and documents outlining the principles for EU EOMs – it is also a concept which is commonly used in the practice of the EU's external actions. The parliamentary resolutions and debates as well as the final reports of EU EOMs analysed in this report, frequently refer to (the necessity to strengthen) the rule of law and the Guidelines on HRDs with third countries also mention the promotion of the rule of law as an issue to be addressed in each dialogue. The EU's understanding of 'rule of law' in these contexts focuses broadly on the well-functioning of the justice system, including the guarantee of judicial rights, and (to a lesser extent) the fight against corruption. Some documents (including the Guidelines on HRDs) use the term 'rule of law' without explaining how it is understood in these contexts, while many times the aforementioned elements are also used separately in concrete contexts and only the headings make clear that they are understood as forming one principle. In the case of depicting structural deficits, as this happened in the final reports of the EU EOMs to Egypt and Pakistan or in parliamentary resolutions on these countries, unpacking the elements of the rule of law might be helpful as they make it easier for the addressees to understand the concrete concerns than a somewhat vague recommendation to 'improve the rule of law'. Nevertheless, there remains the impression that as long as there is no common conceptual understanding of what rule of law means in the EU's external actions and how it should be promoted, its operationalisation remains somewhat piecemeal.

Third, the EU has developed many avenues of cooperation with civil society organisations on human rights, democratisation and the rule of law in recent years: NGOs and individual human rights defenders are e.g. consulted to assess the human rights situation in third countries, they are de-briefed of the results of HRDs and are involved in the follow-up to EOMs and human rights country strategies on the local level, to mention just a few encountered during this research. Both interview partners from the EU institutions and a NGO representative have confirmed that the cooperation works generally well and that the EU profits from the – often local – expertise of civil society partners. Most of this cooperation is of an informal nature though, which means that the form and extent of the cooperation depends both on the commitment of the persons directly responsible (e.g. EEAS officers, local HoMs) and on the

⁴⁹³ The current list is available on <http://eeas.europa.eu/human_rights/guidelines/index_en.htm>, last accessed 15 October 2014.

⁴⁹⁴ It could be questioned though if the fact that 'rule of law' was not included in the title of the Strategic Framework and Action Plan had a deeper meaning. The simple explanation provided by actors involved in the drafting process of the documents ('*we thought it would be too much*'), could for example be an indicator that rule of law seems less strongly connected to the other two concepts – in the sense of something that is better to be dealt with separately.

⁴⁹⁵ Such as the aforementioned resolutions on the Annual Report on Human Rights in the World and the European Union's policy on the matter or the Strategic Framework and Action Plan.

circumstances of the case, which can make it (politically) easier or more difficult for the EU to engage strongly with civil society organisations. HRDs are a case in point, where a strong commitment to involve civil society in the process is only partly lived up. In practice, the EU has reduced the direct involvement of civil society organisations (e.g. through seminars held in parallel to the official dialogue or experts being invited to the talks) to a merely consultative role because of the resistance by partner countries in the past. In combination with strict confidentiality policies,⁴⁹⁶ this limited direct involvement makes it difficult for NGOs and human rights defenders to follow the EU's external human rights actions and provide meaningful input to it.

While it is understandable that the EU wants to keep a degree of confidentiality of its human rights diplomacy, in particular when discussing sensitive questions with third countries, it could thus be advisable to critically reflect whether more transparency and openness to civil society could be useful for both sides in some cases. For the sake of transparency and reliability, it would also be important to establish concrete modalities for the cooperation with civil society in external action whenever possible. This would provide clear guidelines of engagement for EU officials and give NGOs and human rights defenders a genuine role as partners in the processes established. A visibly strong involvement of civil society on the EU's side would also enhance the latter's credibility when claiming a stronger role for civil society in third countries and could even illustrate to partner countries that such a cooperation is possible and fruitful.

Fourth, the rights of women, minorities and vulnerable groups are a visible priority in the EP's deliberations and EU EOMs' reports analysed – in the sense that these documents frequently raised them. It depends, however, strongly on the concrete context whether 'empowerment of women', 'promotion of minority rights' or 'protection of vulnerable groups' are used as mere 'slogans' or concretised with detailed claims or recommendations. The events of the 'Arab Spring' in Egypt have highlighted, for example, the question of the political participation of women in the country but also the (sexual) harassment against them, which triggered a number of concrete references in parliamentary resolutions and debates.⁴⁹⁷ Women's rights and also combating all forms of discrimination (which could also mean discrimination against minorities and vulnerable groups) are also listed as 'standing items' to be included on the agenda of each HRD in the EU Guidelines on Human Rights Defenders. As always in the case of HRDs it is, however, not possible to verify to which extent the EU effectively raises these topics by, respectively with which countries. A separate issue, which goes beyond the scope of this report but will be dealt with in more detail by other FRAME reports, is, how the EU understands 'vulnerable groups' and to a certain extent also 'minorities'.⁴⁹⁸ Having no clear definition at hand on who

⁴⁹⁶ Civil society organisations have e.g. neither access to local human rights country strategies, even if they might have been consulted in the drafting process, nor to information about HRDs beyond the de-briefing sessions organised.

⁴⁹⁷ Similarly, the attack on Malala Yousafzai prompted an EP resolution on the discrimination against girls in Pakistan (see note 468).

⁴⁹⁸ Interview partners both in the EEAS and the EC confirmed that there are still on-going debates EU-internally on the use of the term 'vulnerable groups' in a human rights context (or whether to use it at all or rather list groups

is to be counted as ‘vulnerable group’, makes it difficult to evaluate the prioritisation of this topic by EU external actions beyond the use of the term ‘vulnerable group’ in documents.

Fifth, the EU follows at least partly the concept of ‘deep democracy’ in its Neighbourhood Policy in recent years but it does – mostly – so without labelling it so. The analysis of the resolutions on Egypt passed by the EP since 2011 show a constant and strong insistence on genuine elections, freedom of assembly and expression in all its forms (particularly also online), judicial rights, an independent judiciary and to some extent also on the fight against corruption and security sector reform. Interestingly all of these issues (apart from the security sector reform) are also raised by the final report of the EU EOM to Egypt in 2014. This illustrates not only that democracy means more than elections but that elections also need a well-functioning (‘deep’?) democracy to be conducted freely and fairly. Therefore, the question why the concept of ‘deep democracy’ was hardly used in external action since 2011 remains unanswered. Maybe it got lost in the multitude of new concepts and strategies the EU has developed particularly in relation to its Neighbourhood Policy in recent years or it turned out not to be a practical concept for implementation, as its definition leaves too much room for interpretation.⁴⁹⁹ As it is also a concept which is strongly linked to the former HR/VP and EC, it will also be interesting to see how the EU frames its democracy agenda in external action in the coming years.

Sixth, while the EP insists in many resolutions on the necessity of proper follow-up to the EU’s external actions, there is little information available on how the EP itself follows-up to its actions. This question is particularly pertinent in relations to the many resolutions it adopts, which often contain concrete ‘calls for action’ on the EC, the HR/VP or the EEAS. During this research it was difficult to find out e.g. whether certain reports requested by the EP were actually presented or if the HR/VP took topics proposed by the EP into account in her contact with third countries (respectively if the EP follow-up to questions in case it was not informed by the HR/VP accordingly). In the spirit of transparency vis-à-vis the European constituency but also the efficiency of the EP’s own work, a regular follow-up process to previous resolutions would thus be advisable.

Seventh, as a concrete overarching conclusion, the analysis of the way how the EU understands human rights dialogues has shown that the EU Guidelines on human rights dialogues would need to be updated. Apart from some procedural provisions that need to be adapted in the light of the Treaty of Lisbon, the Guidelines also have to reflect the EU’s priorities and aims as defined by the Strategic Framework and Action Plan. Maybe drafting a new Action Plan could go hand in hand with analysing how the EU’s new human rights profile could be translated into all existing Guidelines and actions.

instead). An example for the difficult use of the concept of ‘minority’ would be situation of Coptic Christians in Egypt. In a statistical sense they can be qualified as minority as the majority of Egyptians is Muslim and the EP also referred to Coptic Christians as ‘religious minority’ when insisting in resolutions on their freedom of religion and effective protection from violence. The final report of the EU EOM has, however, pointed to the fact that Coptic Christians do not understand themselves as minority but as ‘Egyptian’ (European Union Election Observation Mission (n 451) 30.)

⁴⁹⁹ Interview partners in the EEAS and the EC have stated that they either do not use the concept as such in their work (but maybe elements of it) or only for programming purposes.

V. Conclusions

The task of this report was to provide a ‘critical analysis of the EU’s conceptualisation and operationalisation of the concepts of human rights, democracy and rule of law’. This report has understood the term ‘concepts’ to refer to the *content* of the notions of human rights, democracy, and rule of law. Accordingly, the objective of this report was to analyse what content the EU assigns to human rights, democracy, and rule of law. Chapter II uncovered this content by examining how the EU refers to these terms in its legal materials (both hard and soft law) and, additionally, by studying the legal literature. This desk research was supplemented by interviewing EU officials.

As human constructs, concepts are dynamic and they have no clear boundaries (see *supra* Chapter I.B.1). The concepts of human rights, democracy and rule of law – which have been developed over many centuries and have been crucial in formulating ideas about what is the good life – are famously elusive (see in that sense also Deliverable 3.1). The ways in which the EU applies these concepts are no less elusive, which is not surprising considering that the EU has many roles and operates on many different levels.

One trend that is clearly discernible is that the EU has moved from more ‘thin’/formal to more thick/substantive conceptions of these three ideals. The thin/thick terminology is derived from rule of law literature, but might be applied to human rights and democracy as well. The point is that, over the years, the EU has come to interpret these concepts in a fairly broad and holistic manner, which is conceptually underpinned by a respect for human dignity (see *supra* Chapter II.B). In external action, the EU’s approach to these concepts is even broader (see *supra* Chapter III parts C.6/D.6/and E.4).

This report shows that the content of each concept consists of several components. To summarize:

- *Human rights* are the rights humans universally enjoy, and that entail a universal legal obligation on the part of states to uphold them. Human rights are indivisible, in the sense that the EU recognises civil, political, social, economic and cultural rights. In the EU’s conceptualisation, human rights are primarily individual but they can also have collective dimensions (e.g. when it comes to environmental protection; see *supra* Chapter II.C.5).
- The *rule of law* is the proper method of governance, which includes both formal and substantive elements. Within the EU, the rule of law includes legality; legal certainty; prohibition of arbitrariness of the executive powers; independent judiciary; effective judicial review including respect for fundamental rights; and equality before the law.
- The concept of *democracy* denotes who governs. There are several principles underlying the EU’s vision of democracy: democratic equality; representative democracy; participatory democracy; transparency and deliberation.

Chapters III and IV turned to the question how the EU actually operationalizes these concepts. On the internal scene (Chapter III), the report provides a case study of Hungary. In spite of the fact that Hungary is an EU member state, it diverges from the values enshrined in Article 2 of TEU and the concept of democratic rule of law with human rights. Criticism by international and European organizations has not been followed by changes affecting the fundamental characteristics of the newly setup constitutional system.

Chapter IV analysed the ways in which the EU operationalizes human rights, democracy and rule of law in its external action through its human rights dialogues (HRDs), election observations missions (EOMs) and resolutions by the European Parliament (EP). It focused thereby on the case studies of Egypt and Pakistan. The key question of this analysis was whether the EU's external policy actors in practice follow the conceptual principles which have been developed. The conclusion is that this mixed. Especially as regards social and economic rights and the protection of 'vulnerable' groups, conceptualisation and operationalisation seem to lie apart.

This brings us back to the two cross-cutting themes that were identified at the beginning of this report: the interaction between universalism and cultural relativism, and the question of how to ensure that human rights, democracy and rule of law are conceptualised in inclusive ways. The success of the EU's mission to foster human rights, democracy and the rule of law within the Union as well as the outside world will to a large extent depend on the ways in which it navigates these two issues. The next Deliverable in this FRAME Work Package will provide an analysis of the ways in which these concepts are interpreted in selected third countries, in order to identify the differences and similarities with the EU-held convictions.

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C. Case law and legislation

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