A Thorny Path to the Spotlight

The Rule of Law Component in EU External Policies and EU-Ukraine Relations

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Abstract

The rule of law and its promotion abroad is currently at the core of EU external policies, specifically in the European neighbourhood. But has it always been the case? This article traces the rule of law component of EU external policies in general and EU–Ukraine relations as a case study, and reveals that in the last two decades the rule of law has followed a thorny path to the spotlight, emerging from a rather peripheral place in the 1990s to its currently central one. The article argues that this is a result of three processes: the legislative mainstreaming of the rule of law in the EU itself, the growing ambitiousness of EU–Ukraine relations, and the increased visibility of systemic shortcomings in rule of law application in Ukraine due to the trials of opposition politicians since 2010. The article concludes by suggesting that rule of law components of other EU bilateral relations in the European neighbourhood and beyond are subject to similar processes.

Keywords: rule of law, rule of law promotion, European Union, European Neighbourhood Policy, Ukraine.

A. Introduction

The rule of law and its promotion abroad is currently at the core of EU external policies, specifically in the European neighbourhood. Such centrality of the rule of law to EU engagement in third states seems usual today. But has it always been the case? To analyse the relevance of the rule of law for EU cooperation with third states and the reasons behind its potential change, this article traces the rule of law component of EU external policies in general and EU–Ukraine relations in particular. Ukraine is selected as a case study for this analysis for two main reasons. The first reason is the empirical affluence of EU–Ukraine cooperation as one of the most elaborate relationships under the European Neighbourhood Policy (ENP), which provides sufficient evidence to explore and analyse. The second reason is the presently explicit positioning of Ukraine's compliance with the rule of law as a crucial precondition for further EU–Ukraine integration, specifically for

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concluding the Association Agreement with a Deep and Comprehensive Free Trade Area (DC FTA).The empirical findings reveal that, in the last two decades, the rule of law component of respective policies followed a thorny path to the spotlight, emerging from a rather peripheral place in the 1990s to its currently central one. The article argues that the unprecedented attention currently devoted by the EU to the rule of law concerns in Ukraine is a result of three processes: the legislative mainstreaming of the rule of law in the EU itself, the growing ambitiousness of EU–Ukraine relations, and the increased visibility of systemic shortcomings in rule of law application in Ukraine due to the trials of opposition politicians since 2010. The article concludes with a suggestion that similar processes and principles are at work in EU bilateral relations with other countries in the European neighbourhood and beyond.

B. A Phenomenon of Many Faces: The Rule of Law in EU Internal and External Policies

The concept of the rule of law was rarely referred to in EU (then – EC) documents prior to 1992 and the Treaty of Maastricht; and it was not until 1997 and the Treaty of Amsterdam that the rule of law was given legal status next to a politico-philosophical one. Since then, the rule of law is increasingly apparent on EU internal and external policy agendas owing to legislative mainstreaming, or the process of gradual, progressive integration of the rule of law into various aspects of EU policies and actions.[1] The Lisbon Treaty documents the culmination of this legislative mainstreaming to date, and since 2009, the rule of law has occupied a solid place in the consolidated version of the Treaty on European Union (TEU). The TEU provides – at the highest legal and political level possible in the EU – a rather straightforward and complete codification of the variety of ways in which the rule of law forms part of EU internal and external policies. Thus, the Treaty repeals the task of demonstrating the relevance of the rule of law by finding it

1 L. Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', *CLEER Working Papers, 2012/3,* p. 13; and E.O. Wennerström, *The Rule of Law and the European Union.* Iustus Förlag, Uppsala, 2007, p. 227.

mentioned here and there throughout the multiplicity of EU documents, which researchers faced earlier.[2]

So what are the various ways in which the rule of law is referred to by the EU, according to the TEU? Ten capacities can be identified. First, the rule of law appears as a universal value[3] that sprang from the European heritage and inspired the creation of the EU:

> "Drawing inspiration from the cultural, religious and humanist inheritance of Europe, from which have developed the universal values of the inviolable and inalienable rights of the human person, freedom, democracy, equality and the rule of law (...)." (Paragraph 2, the Preamble)

Second, the rule of law features in the capacity of a principle to which the heads of EU Member States are continuously attached:

> "Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law (...)." (Paragraph 4, the Preamble)

Third, the rule of law is listed among the founding values of the Union, which are, furthermore, common to its Member States (fourth):

> "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, toler-

2 For resourceful examples of such historical tracing of the rule of law in EU founding documents and political discourse, either chronologically or by policy area (usually along both axes), *see* M. Cremona, Values in the EU Constitution: The External Dimension', *CDDRL Working Papers, 26,* 2004b, pp. 1-26; M. Cremona, 'Values in EU Foreign Policy'. *in* M. Evans & P. Koutrakos (Eds.), *Beyond the Established Orders: Policy Interconnections Between the EU and the Rest of the World,* Hart Publishing, Oxford, 2011, pp. 275-315; D. Kochenov, 'Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and The Rule of Law', *European Integration Online papers,* Vol. 8, No. 10, 2004, pp. 1-34, <http://eiop.or.at/eiop/texte/2004-010a.htm>; D. Kochenov, 'The EU Rule of Law: Cutting Paths Through Confusion,' *Erasmus Law Review,* Vol. 2, No. 1, 2009, pp. 5-24; L. Pech, 'The Rule of Law as a Constitutional Principle of the European Union. *Jean Monnet Working Paper, 04/09,* 2009, pp. 1-79; L. Pech, 'Rule of Law As a Guiding Principle of the European Union's External Action', *CLEER Working Papers, 2012/3,* 2012, pp. 1-56; E.O. Wennerström, 'The Rule of Law in the European Constitution', *Europarättslig Tidskrift, 2004/3,* pp. 2004, 351-371; and Wennerström, 2007, Chapter 3.

3 Two remarks should be made here. First, this section uses the words used by the EU itself for qualifying the capacities, roles and purposes that the rule of law serves for the Union. This is done without prejudice to the scholarly debates outside the scope of this study as to whether the rule of law is a principle or a value; whether as such a principle/value it is universal; whether it is indeed common for EU Member States, and so on. Second, this section follows the text of the TEU and, hence, does not suggest any assumption as to the order or hierarchy of the named rule of law capacities.

> ance, justice, solidarity and equality between women and men prevail." (Article 2)

The significance attached to the rule of law in external relations is of particular importance for this study. To this end, the rule of law is mentioned as a guiding principle for the EU action on the international scene (fifth), the rule of law being a principle that inspired not only the creation but also the development and enlargement of the EU (sixth) and that the Union seeks to advance in the wider world (seventh):

> "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." (Paragraph 1, Section 1, Article 21)

Remarkably, this clause constitutes the first instance when respective values are recognised as guiding for the EU external action overall. Earlier versions of the TEU (*i.e.* before the Lisbon Treaty) make reference to the rule of law only with respect to selected external policy areas, such as development cooperation policy, foreign and security policy and sometimes economic, financial and technical cooperation. The aim of consolidating and supporting the rule of law abroad is highlighted further as an objective in itself, a priority to be pursued through the definition and realisation of the Union's external policies and actions (eighth):

> "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: (a) safeguard its values, fundamental interests, security, independence and integrity; (b) consolidate and support democracy, the rule of law, human rights and the principles of international law; (...)." (Section 2, Article 21)

And the somewhat special status of third countries that share, among others, the rule of law principle with the EU is framed indirectly in the clause below (ninth):

> "The Union shall seek to develop relations and build partnerships with third countries, and international, regional or global organisations which share the principles referred to in the first subparagraph (...)." (Paragraph 2, Section 1, Article 21)

Effective commitment of a third country to the rule of law thus bears a two-fold significance: it can serve as a ground for a somewhat privileged relationship with the EU (if the account is on the positive), just as it can become a precondition or even an obstacle for advancing this country's integration with the EU (if the

record is on the negative). Finally, and tenth, the respect for the rule of law and the desire to promote it are restated in their status of conditions for membership in the EU:

> "Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union." (Article 49)

To conceptualise the many uses of the rule of law, this research adopts the approach of Neil Walker, who frames the uses of the rule of law in the EU along "five distinct but closely intertwined functional dimensions" of what he regards as the social and political "use-value" of the rule of law.[4] These dimensions of use-value include regulation, authorisation, instrumentalisation, identification and promotion. The first dimension, regulatory, stands for the understanding of the rule of law as a "meta-rule" about the principal significance of legal rules for a polity, thus, a good in itself.[5] The authorisation dimension of using the rule of law refers to the way in which the assertion of the rule of law, by authorising a certain power structure or modality, serves an ideological purpose.[6] The rule of law functions instrumentally when it is being understood as a means to other ends rather than an end in itself; whereas when the rule of law is "claimed and portrayed as a defining virtue" of a polity or a community, it serves an identification purpose.[7] Finally, the promotional dimension refers to instances and ways in which a polity may employ and benefit from the rule of law "as something to be disseminated and applied elsewhere", and it does so for either one – or any combination – of the four above-mentioned purposes.[8] Thus, the EU promotes the rule of law as capable of serving the purpose of regulation, authorisation, identification and a variety of instrumental purposes (or all of these at once). Even though the suggested division is purely analytical, this framework of use-values is a well-suited

4 N. Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', *in* G. Palombella and N. Walker (Eds.), *Relocating the Rule of Law*, Hart Publishing, Oxford and Portland, Oregon, 2009, p. 120.
5 *Ibid.*, p. 120.
6 *Ibid.*, p. 122.
7 *Ibid.*, pp. 123-124.
8 *Ibid.*, p. 124.

organising tool.[9] The application of this framework to the ten references to the rule of law in the TEU reveals that the rule of law – presently and increasingly so – figures in the EU within and across all five use-values.[10] Table 1 may serve as an illustration.

9 Similar but less elaborate frameworks are suggested elsewhere. Cremona (2004b) speaks of an "external dimension" of EU values such as human rights, the rule of law and democracy (which echoes Walker's promotional dimension) and distinguishes between constitutive and instrumentalist aspects thereof (which together could perhaps embrace the remaining four use-values). N. Wichmann, 'The EU as a Rule of Law Promoter in the ENP', *in* T. Balzacq (Ed.), *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security*, Palgrave Macmillan, Basingstoke, 2009, pp. 111-132; N. Wichmann, *Rule of Law Promotion in the European Neighbourhood Policy: Normative or Strategic Power Europe?* Nomos Verlagsgesellschaft, Baden-Baden, 2010, looks at the "rule of law promotion agenda" of the EU. Yet Wichmann engages in a power debate: she explores the intertwining of security and normative considerations of the EU to examine which type of power the EU is and concludes that the EU acts as both. Because they are far less detailed or take a different angle from the present research, these frameworks do not provide a fitting alternative to Walker's framework of use-values.

10 Walker, 2009, p. 125, himself arrives at the same conclusion, although utilising a set of various EU instruments in the absence of the Lisbon Treaty.

Table 1 *References to the Rule of Law in the TEU*

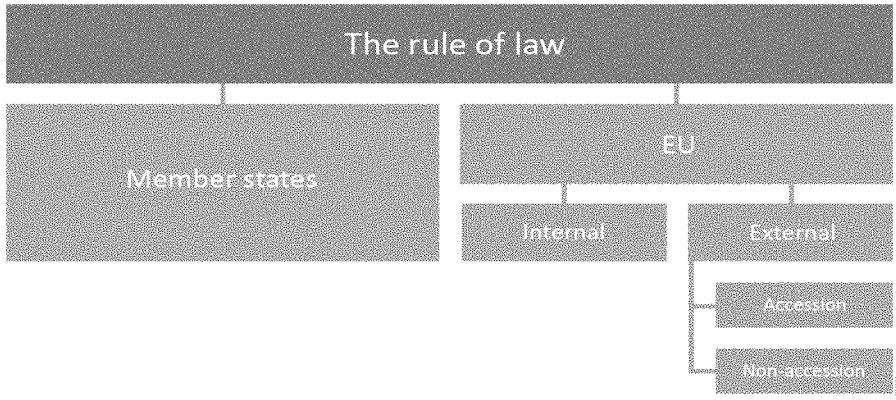
Rule of law reference in the TEU	Rule of law use-value
1. Universal value	Reg., auth., ident.
2. Guiding principle for (heads of) Member States	Reg.
3. Founding value for the EU	Reg., auth., ident.
4. Common value among Member States	Reg., auth., ident.
5. Guiding principle for EU external action	Prom. (reg., auth., instr. & ident.)
6. Guiding principle for EU development and enlargement	Reg., auth.
7. Principle to promote world wide	Prom. (reg., auth., instr. & ident.)
8. Value/principle to safeguard in EU external action	Ident., prom.
9. Principle condition for further cooperation	Instr., ident.
10. Principle condition for EU membership	Instr., ident.

Historically, the rule of law evolved in EU internal policy, performing mostly functions of identification and authorisation (but also regulation and instrumentalisation). However, with time, the rule of law became an ever more prominent component of EU external policy and relations; a development the Treaty documents well. It is here, in the promotional dimension, that the rule of law "figures in most explicit and active discursive terms".[11] Being a polity that refers to the rule of law in influencing both internal and external affairs (and so influences individuals and states), the EU is unique and differs substantially from any other international organisation.[12] In turn, the rule of law in the EU context differs

11 Walker, 2009, p. 130.

12 F. Amtenbrink, 'Introduction: Observing the Rule of Law in the European Union – Selected Issues', *Erasmus Law Review*, Vol. 2, No. 1, 2009, p. 1; and Wennerström, 2007, p. 21.

Figure 1 The rule of law in the EU



from the rule of law as found at the national and international levels.[13] Moreover, the rule of law as part of EU external policies differs from the rule of law in EU internal policies.[14] In internal policies, the rule of law has been legalised significantly and has become a legal issue next to being a political issue; whereas in external policies, the rule of law remains to be primarily, if not exclusively, a political issue.[15] Finally, a distinction is drawn between the rule of law category as applied in EU external relations *inside* and *outside* accession contexts.[16] Figure 1 visualises the three levels of distinction. This article examines the rule of law as a

13 This first distinction (by actors: EU – Member States) is maintained presently by all scholars working on the subject. For the early contributions on the rule of law in EU Community law, *see* G. Bebr, *Rule of Law Within the European Communities*, Institut d'Etudes Europeennes de l'Universite Libre de Bruxelles, Bruxelles, 1965; and A. Lord Mackenzie Stuart, *The European Communities and the Rule of Law*, The Easter Press Ltd, London and Reading, 1977. The more recent works include K.J. Alter, *Establishing the Supremacy of European law: The Making of An International Rule of Law in Europe*, Oxford University Press, Oxford, 2003;Arnull, A. (2002). 'The Rule of Law in the European Union', *in* A. Arnull and D. Wincott (Eds.), *Accountability and Legitimacy in the European Union*. Oxford University Press, Oxford, 2002, pp. 240-258;and M.L. Fernandez Esteban, *The Rule of Law in the European Constitution*, Kluwer, The Hague, 1999.

14 The need to make this distinction (by EU policy/competence area: internal – external) is emphasised in all academic works that touch upon the rule of law in EU external relations, although often implicitly so (*see* M. Cremona, 'The European Neighbourhood Policy: Legal and Institutional Issues'. *CDDRL Working Papers, 25,* 2004a, 1-27; D. Kochenov, 'Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', *European Integration Online Papers,* Vol. 8, No. 10, 2004, pp. 1-34, <http://eiop.or.at/eiop/texte/2004-010a.htm>; D. Kochenov *EU Enlargement and the Failure of Conditionality: Pre-accession Conditionality in the Fields of Democracy and the Rule of Law,* Kluwer Law International, Alphen aan den Rijn, 2008, Chapter 3;D. Kochenov, 'The EU Rule of Law: Cutting Paths Through Confusion', *Erasmus Law Review,* Vol. 2 No. 1, 2009, pp. 5-24; D. Mineshima, 'The Rule of Law and EU Expansion', *Liverpool Law Review*, Vol. 24, 2002, pp. 73-87; Pech, 2009, 2012; Walker, 2009; Wennerström, 2004, 2007; Wichmann, 2007, 2009, 2010).

15 Wennerström, 2007, p. 17.

16 The third distinction (by political context in external relations: accession – non-accession) is highlighted only in a few works to date (Wennerström, 2007; Wichmann, 2009).

legal and political category in EU external relations in the non-accession political context.

Document analysis reveals that all ten capacities of the rule of law mentioned in the TEU are pertinent in the ENP and Eastern Partnership context, including the rule of law as a component of membership conditionality.[17] Scholars argue that "the rule of law is not just an aspect of the ENP, but is its foundation or basis".[18] The rule of law features in ENP policy documents with varying frequency and focus since the very inception of the policy in the Wider Europe Communication (2003). The policy is framed as a privileged relationship based on "mutual commitment" to "common values" because EU neighbours pledged adherence to those values by joining international treaties and through bilateral political dialogue with the EU itself. Effective commitment to these common values is, therefore, essential for moving forward with the privileged relationship.[19]

To conclude, the rule of law is an important legal and political category for the EU and permeates gradually, and increasingly so, various instruments of the Union's internal and external policies. The latest advances of such legislative mainstreaming of the rule of law in the EU are fastened by the Lisbon Treaty. The TEU vests the rule of law with serving the purposes of regulation, authorisation, instrumentalisation, identification and promotion. Remarkably, the promotional dimension of the rule of law has come to the forefront in recent decades, and it is here, in external relations, that the rule of law is invoked by the EU in most explicit and active terms. Finally, the regional external policy of the EU relevant for this case study, the ENP, has the rule of law at its very basis. The following section explores whether and how this EU-wide process of legislative mainstreaming of the rule of law is reflected at the level of EU–Ukraine bilateral relations.

17 This claim is based on the analysis of major ENP and Eastern Partnership policy documents, including: Wider Europe – New Neighbourhood – Proposals from the Swedish delegation (31 March 2003), Wider Europe – Neighbourhood: A New Framework for Relations with our Eastern and Southern Neighbourhs, Commission Communication (11 March 2003), European Neighbourhood Policy Strategy Paper, Commission Communication (12 May 2004), On Strengthening the European Neighbourhood Policy, Commission Communication (4 December 2006), A Strong European Neighbourhood Policy, Commission Communication (5 December 2007), Taking Stock in the European Neighbourhood Policy, Commission Communication (12 May 2010), A New Response to the Changing Neighbourhood, Joint Communication (25 May 2011), Delivering on a new European Neighbourhood Policy, Joint Communication (15 May 2012); Eastern Partnership – A Polish-Swedish Proposal (June 2008), Eastern Partnership, Commission Communication (3 December 2008), Joint Declaration of the Prague Eastern Partnership Summit, the Council of the European Union (7 May 2009), and Eastern Partnership Roadmaps to autumn 2013 Summit, the bilateral dimension and the multilateral dimension (15 May 2013).

18 Cremona, 2004a, p. 17.

19 European Neighbourhood Policy Strategy Paper, Commission Communication, 2004, pp. 3, 12, 13.

C. A Thorny Path to the Spotlight: Tracing the Rule of Law Component of EU–Ukraine Relations

Unlike the rule of law component of EU policies in general, the rule of law component of EU–Ukraine bilateral relations has been neither codified by the parties themselves nor studied systematically by scholars. This section undertakes the task of tracing the rule of law component of EU–Ukraine relations, or the relevance of the rule of law and the significance assigned to it by the parties, through a methodical historical analysis of cooperation documents and political dialogue.

I. EU–Ukraine Cooperation Documents and Political Dialogue

The Partnership and Cooperation Agreement between the European Communities and their Member States and Ukraine (PCA) is the first and currently the only legally binding framework agreement between the EU and Ukraine.[20] The common values and principles are mentioned thrice – and the rule of law only once – in the entire document. For the first time, common values are mentioned in the Preamble of the PCA and include the rule of law, human rights, multiparty system with democratic elections and economic liberalisation towards a market economy. A reference in the Preamble is also made to a set of documents of the Conference on Security and Co-operation in Europe (CSCE) recognised as important by both parties.[21] The analysis of the relevant CSCE documents reveals that the language of the formulations was extremely careful in the 1970s and 1980s. There was little talk of "values" other than human rights and no mention of the rule of law. The language becomes more straightforward after the dissolution of the USSR. "The rule of law" together with "the equal protection under the law for all" is mentioned for the first time in the Bonn Conference Document of 1990; and the relevant formulation is copied into the PCA. Once it enters the political discourse in 1990, the rule of law – together with human rights, democracy, economic liberty and social justice – maintains a firm position among "the shared values" of the participating states in the later CSCE/OSCE documents. Returning to the PCA, for the second and third time, values and principles are mentioned in Articles 2 and 6, which establish the general principles of co-operation and political dialogue. Here, however, the rule of law is omitted from the list: it is only the principles of democracy, market economy and respect for human rights that should underpin and constitute an essential element of the parties' partnership and political dialogue. The remaining 107 articles and 28 pages of the Agreement are concerned primarily, if not exclusively, with economic and trade-related issues.

Clearly, the rule of law was not of primary concern for the EU and Ukraine when negotiating and concluding the PCA (1993-1994): the transformation of a formerly authoritarian, planned-economy Ukraine into a democratic, market-

20 The other agreements in force include agreements on cooperation in the field of nuclear energy, Ukraine's participation in EU police and crisis management missions, on trade in textile and steel, and most recently on readmission and visa facilitation.

21 These include the following: Final Act, 1975; Madrid Concluding Document, 1980; Vienna Concluding Document, 1989; Bonn Conference Document, 1990; Charter of Paris for a New Europe, 1990; Challenges of Change, 1992.

economy state was. Therefore, the rule of law is mentioned only once in the Preamble and is not mentioned at all in the text of the PCA. If one chooses to be ultra-formalistic, one could argue even that the rule of law is not currently among the principles to be observed by the parties to EU–Ukraine cooperation, since the PCA is the only binding framework agreement in force – and the rule of law is not to be found in its text. Overall, the Agreement does not come across as organised around values and around the EU as a value-promoter. Instead, the CSCE/OSCE is brought in as a standard-setting organisation and a point of reference for the parties.[22]

The next important document – the Common Strategy on Ukraine adopted by the European Council in 1999 (five years after the signature of the PCA and one year after its entry into force) – gives the rule of law visibly more consideration compared with the one and only mention of it in the PCA. "[A] stable, open and pluralistic democracy in Ukraine, governed by the rule of law and underpinning a stable functioning market economy" is among the strategic goals of the EU with regard to Ukraine; and consolidation of democracy, the rule of law and public institutions in Ukraine is a principal objective that shall be subject to special initiatives of the EU. The Strategy is based on the assumption of a strong linkage between democracy, economic transition and the rule of law. Although it is regarded as a largely declaratory document,[23] the Strategy does demonstrate a stronger value (and particularly rule of law) underpinning of the EU "vision" for its partnership with Ukraine and provides a guideline for programming EU technical assistance until the launch of the ENP.[24] The rule of law occupies a firm position in all subsequent Ukraine Country Strategy Papers and National Indicative Programmes.[25]

Once concluded, the EU–Ukraine Association Agreement will replace the PCA and mark a new phase in the relationship. According to the Resolution on Ukraine by the European Parliament (25 February 2010), the future Association Agreement "heralds a new generation of association agreements under Article 217 TFEU and involves an unprecedented level of integration between the EU and a third country". As common values, including the rule of law, are preconditions for closer integration, the Agreement will significantly enhance the value

22 There is no mention of the Council of Europe and its treaties in the PCA, because Ukraine had not joined the organisation when the Agreement was signed (1994).

23 G. Sasse, 'The EU Common Strategy on Ukraine: A Response to Ukraine's "Pro-European Choice"?' *in:* A. Lewis (Ed.), *The EU and Ukraine. Neighbours, Friends, Partnerse?* Federal Trust for Education and Research, London, (2002).

24 The Common Strategy features in TACIS programming documents until the launch of the ENP and the adoption of EU–Ukraine Action Plan (*i.e.* National Indicative Programme 2000-2003 and Annual Action Programmes 2000-2003).

25 Country Strategy Papers 2002-2006 and 2007-2013, National Indicative Programmes 2007-2010 and 2011-2013 (under ENPI). These programming documents identify "the rule of law and judiciary" and "good governance and the rule of law" as separate sub-priority areas. In turn, NIPs 2002-2003 and 2004-2006 (under TACIS) do not mention the rule of law. These NIPs mention only democracy and market economy as end-goals of bilateral cooperation and EU assistance, supporting the argument made above that democracy and market economy had been primary concerns in the early years of EU–Ukraine cooperation.

foundations of the relationship. Unfortunately for this analysis, the text of the Agreement will not be disclosed until the Agreement is concluded, notwithstanding its initialling in March 2012.[26] The four annual Joint Progress Reports on Association Agreement negotiations are, thus, the only publicly available source of information on the content of the future Agreement and on the framing and extent of value commitments of the parties. The rule of law can be expected to feature among the aims of political dialogue in the chapter Political Dialogue and Reform, Political Association, and Cooperation and Convergence in the Field of Foreign and Security Policy, and will be covered further in the Justice, Freedom and Security (JFS) chapter. It must be mentioned that a draft of the Association Agreement was made available on the Internet in December 2012. Judging from this text, the rule of law component is reinforced significantly by the Agreement as compared with the PCA and even with Action Plans and Association Agendas discussed further in this sub-section. Accordingly, the rule of law is mentioned 9 times (in the Preamble and 6 different Articles of the Agreement), which is more frequent than references to common values and democratic principles and just as frequent as mentions of human rights and market economy. It does come up in chapters on Political Dialogue and Justice, Freedom and Security, as stipulated in the Joint Progress Reports. Next to the Preamble of the Agreement, the rule of law is firmly among the objectives and general principles of cooperation, aims of political dialogue and key concerns for cooperation in the JFS area. In fact, Article 14 is devoted to the rule of law entirely and is titled so. Overall, there is an undeniable advancement in the importance assigned to the rule of law, especially as compared with the PCA.

Acknowledging that the PCA was outdated and that concluding an Association Agreement would require time, a set of working documents was developed over the years. These included the more general, framework documents, such as EU-Ukraine Action Plan (2005), Association Agenda (2009, updated in 2011) and accompanying it List of Priorities (2010 and 2011-2012); and sectoral documents such as Justice and Home Affairs Action Plan (2001), Revised Freedom, Security and Justice Action Plan (2007) and Visa Liberalisation Action Plan (2010). Technically, these are all unilateral EU documents programming its cooperation with Ukraine, although drafted in consultation with the recipient country. Thus, they could be viewed as binding on Ukraine politically, but not legally. Still, these documents are more recent and more detailed with regard to values and reforms than the PCA and the Common Strategy. They better reflect the maturing of the EU as an actor in its neighbourhood and as a promoter of values and constitute an important source of information on the evolution of the rule of law component of EU–Ukraine relations.

The rule of law features in all the above-mentioned documents (with a few exceptions addressed below) and becomes a permanent element of cooperation from 2000 onwards. The process of legislative mainstreaming of the rule of law in EU internal and external policies is mirrored by the (political rather than legisla-

26 An EU official clarified in an interview with the author that the text of the Association Agreement is kept undisclosed upon firm insistence of the EU.

tive) mainstreaming of the rule of law in EU–Ukraine cooperation. At the same time, it reflects the overall intensification of cooperation between the two parties over the years. The rule of law is referred to as a value and principle the effective application of which in Ukraine is at the same time a challenge and a strategic aim of the parties. 'Strengthening', 'consolidating' or otherwise improving Ukraine's rule of law institutional capacity is a priority area of EU–Ukraine cooperation. Remarkably, Visa Liberalisation and Readmission Agreements and subsequent Visa Liberalisation Action Plan contain no mention of the rule of law at all. Clearly, these sectors of cooperation relate to the rule of law compliance in Ukraine. Likewise, the rule of law is usually not mentioned in the Annual Action Programmes in favour of Ukraine, which programme EU technical and financial assistance, although this assistance is meant to foster the rule of law in Ukraine. The absence of a reference to the rule of law in these cases could be explained by the fact that 'the rule of law' is simply not in the bureaucratic vocabulary of the respective level and sector of cooperation. Another observation is that across the analysed working documents, just as in the ENP framework documents, the rule of law is paired inevitably with democracy, good governance, human rights and fundamental freedoms.[27] With respect to the significance the EU assigns to the rule of law as a component of EU–Ukraine cooperation, this implies that, at that time, the rule of law was included in a package of values rather than a concern of its own.

The annual EU–Ukraine Summits are a valuable source of evidence on the role played by the rule of law as well, because they reflect the political dialogue at the highest level, which, moreover, is regular. The analysis of final (joint or press) statements of the summits reveals the same situation as the analysis of documents. The rule of law was not a subject of bilateral dialogue at the highest level of political cooperation at all in the 1990s: only occasional references to Ukraine's 'democratic development' and 'economic stability' can be found. The rule of law is mentioned for the first time in a Joint Statement at the 4th Summit in 2000. For the rest, the rule of law enjoys unsystematic reference, in terms of the degree of political prioritisation or being mentioned at all. For instance, the rule of law is highlighted forcefully at the 5th Summit in 2001, but it is not mentioned at all in the joint statement of the 8th and 10th Summits (in 2004 and 2006, respectively).[28] The fact that, occasionally, the rule of law is forgotten and omitted from the joint statements altogether suggests that, at the level of political dialogue, the rule of law at that time was included 'in package' alongside other values and was not rendered a bone of contention by the parties.

27 Market economy, which seemed to be central in the group of values in the early and mid-1990s, is mentioned more rarely in the last decade. This could be explained by Ukraine's WTO accession in February 2008 and formal recognition of its status as a country with market economy.

28 Outcome documents of EU–Ukraine annual summits since 1998 onwards, available at: <http://www.ukraine-eu.mfa.gov.ua>.

II. Ukrainian Legislation on European Integration

It is also interesting to assess whether the increasing inclusion of references to the rule of law in EU–Ukraine (bilateral) and EU (unilateral) cooperation documents discussed above is reflected in the legislation on European integration adopted by Ukraine in relation or response to those texts. The relevant Ukrainian legislative framework consists of the foundational Strategy and Programme of Ukraine's integration and State programme of Ukraine's legislative adaptation to the EU (approved by the President of Ukraine in 1998, 2000 and 2004), as well as the working action plans listing priority actions for integration and legislative adaptation of Ukraine to the EU (approved by the Cabinet of Ministers on a yearly basis). In the Strategy and the Programme of Ukraine's integration into the EU, references to the rule of law appear in general political clauses where EU membership criteria – and the rule of law among them – are addressed as targets to be met by Ukraine. In turn, the accompanying annual Plans of actions for integration mention the rule of law only in the titles of sections, thereby matching the titles of sections in respective EU action plans/association agendas for Ukraine.[29] Also here the rule of law appears together with democracy, human rights and fundamental freedoms as a general capture of the area in which certain measures shall be undertaken by Ukraine; nothing more and nothing less. And when the named area is not among the priorities for Ukraine in the coming year, as in 2010 and 2012, the rule of law is not mentioned at all. Similarly, documents addressing the adaptation of the legislation of Ukraine to that of the EU – the State programme of 2004 and regular annual action plans since – do not contain any references to the rule of law. Admittedly, the purpose, content and language of these documents are very technical: what is at issue is *acquis communautaire* and concrete EU Directives, without 'lyrical digression' to common values and principles. So, Ukrainian legislation on European integration refers to the rule of law only when a document addresses EU membership criteria and in so far as it follows the structure and the language of respective EU documents. These references are neither numerous, nor systematic, nor deep. And still, through such instances of "the domestification of an EU-defined reform agenda"[30] the rule of law does permeate Ukrainian domestic legislation, which in itself is an important positive trend.

III. The Tymoshenko Trial as a Critical Juncture

Today, the rule of law and concerns about its application in Ukraine are clearly in the spotlight. It was the prosecution, trial and eventual conviction of Yulia Tymoshenko and other politicians in Ukraine that offered a critical juncture and

29 Action plan on implementation of priority points of the Programme of integration of Ukraine with the European Union, Actions for the implementation of the Ukraine–EU Action Plan, and later Plan of the priority actions for the integration of Ukraine with the European Union were adopted in 2001, 2005-2008 and 2010-2012.

30 K. Wolczuk, 'Implementation Without Coordination: The Impact of EU Conditionality on Ukraine Under the European Neighbourhood Policy', *Europe-Asia Studies*, Vol. 61, No. 2, 2009, p. 200.

turned the application of the rule of law in Ukraine into a bone of contention.[31] The developments in and around these cases had an eye-opening effect in European countries, clearly demonstrated the systemic shortcomings in the exercise of justice and the application of the rule of law in Ukraine, and brought the rule of law concerns to the centre of EU attention. The timing of such increased visibility of drawbacks in the application of the rule of law in Ukraine is peculiar: the EU and Ukraine stand on the verge of concluding an Association Agreement, which should lead to a significantly deeper level of political and economic integration between them. Therefore, the EU, its institutions and especially Member States are all the more concerned about the readiness and reliability of Ukraine as a partner and the risks for the EU, its businesses and citizens from such closer integration. Concerns about the rule of law situation in Ukraine eventually put the EU–Ukraine Association Agreement on hold for an indefinite period. The negotiations were finalised on 22 December 2011, the text of the Association Agreement was initialled on 30 March 2012 and the text of the DC FTA on 19 July 2012. However, in the Joint Statement from the 16th EU–Ukraine Summit that took place in Brussels on 25 February 2013, the parties (or rather the EU) stressed that "the rule of law with an independent judiciary is a critical element underpinning the Association Agreement" (p. 2).

The last two years have been rich with reactions to developments in Ukraine. The response of the international community started off with initial scepticism as to the political motives of the current President and Government of Ukraine, because "prosecution against so many members of a former government [is] so seldomly seen, even in that part of the world".[32] The reactions related primarily

31 The list of the opposition members prosecuted since Viktor Yanukovych and his team came to power in February 2010 is quite extensive. It includes Yulia Tymoshenko, former Prime Minister of Ukraine; Yuri Lutsenko, former Minister of Interior; Valeri Ivashchenko, former acting Minister of Defence; Yevhen Korniychuk, former First Deputy Minister of Justice; Georgy Filipchuk, former Minister for Environment; Bohdan Danylyshyn, former Minister of Economy (fled to Czech Republic and got asylum); Anatoli Grytsenko, former speaker of the Crimean Parliament; Arsen Avakov, former Head of Kharkiv regional state administration, and tens of others. These criminal lawsuits were all (re-)opened around the same time, and roughly similar crimes are being incriminated. Furthermore, they are all similar in terms of violations in the process of execution of justice observed by the local and international community (Danish Helsinki Committee. *Legal monitoring in Ukraine I: Preliminary Report on the trials against former Minister of Interior Yurij Lutsenko and former First Deputy Minister of Justice Yevhen Korniychuk,* The Danish Helsinki Committee for Human Rights, Copenhagen, 2011a, pp. 1-13; Danish Helsinki Committee, *Legal monitoring in Ukraine II: Second Preliminary Report based on the investigations and trials against former Prime Minister Yulia Tymoshenko, former acting Minister of Defence Valeriy Ivashchenko, former Minister of Interior Yurij Lutsenko and former First Deputy Minister of Justice Yevhen Korniychuk,* The Danish Helsinki Committee for Human Rights, Copenhagen, 2011b, pp. 1-31; Danish Helsinki Committee, *Legal monitoring in Ukraine III: Preliminary Report on the investigations against Yulia Tymoshenko in November 2011,* The Danish Helsinki Committee for Human Rights, Copenhagen, 2011c, pp. 1-15; Danish Helsinki Committee, *Legal monitoring in Ukraine IV: Does Ukraine try to improve the Rule of Law? Ukrainian reactions to the Council of Europe's Parliamentary Assembly Resolution 1862.* The Danish Helsinki Committee for Human Rights, Copenhagen, 2012, pp. 1-32). For this reason, these cases are addressed commonly in a group as 'the case of Tymoshenko and others', as in this article.

32 Danish Helsinki Committee, 2011a, p. 2.

to political acceptance or non-acceptance of (mass) criminal prosecution of opposition leaders for what are political decisions taken while in office. Eventually, the realisation of the systemic nature and prevalence of violations, even when approached in purely legal terms and analysed in relative detachment from the political context, settled and focused the emphasis increasingly on the rule of law.[33] Consequently, the rule of law moved to the centre of attention, while 'selective justice' became a keyword for describing the current situation in Ukraine.[34]

The EU reacted to the situation in Ukraine formally and publicly, at all levels: statements were made by Catherine Ashton as the EU High Representative, José Manuel Barroso as the Commission President, Stefan Füle as the Commissioner for Enlargement and Neighbourhood, Jerzy Buzek as the President of the European Parliament, and the Parliament itself – through a number of Resolutions on Ukraine, the EU Delegation in Ukraine and its Head, Ambassador José Manuel Pinto Teixeira, and even by Androulla Vassiliou as the Commissioner for Sport – with regard to boycotting the European Football Championship 2012, co-hosted by Ukraine.[35] The incandescence of the language used and the gradual crystallisation of the rule of law as a centrepiece can be clearly observed. With each new statement, the rule of law is stressed more directly, clearly, frequently and forcefully. At the moment, the strengthening of (respect for) the rule of law in Ukraine is qualified and emphasised repeatedly as an essential prerequisite for advancing in EU–Ukraine relations (first and foremost, for concluding the Association Agreement); whereas failure to respect the rule of law is promised to cause profound implications for the bilateral relationship. It has had implications already: the 15th EU–Ukraine Summit in December 2011 was on the verge of being cancelled, the Association Agreement was not signed during this Summit as intended originally, the conclusion of the Agreement and the DC FTA was put on hold indefinitely, and the 16th Summit was postponed until 25 February 2013. The EP Resolution on Ukraine of 24 May 2012 and the Speech by Commissioner Füle at the EU–Ukraine PCC (12 June 2012) contain a reference to the rule of law in practically each sentence or paragraph. Most recently, the Council conclusions on

33 An example of such legal analysis of the trials, produced in Europe and in English, are the four consecutive reports "Legal Monitoring in Ukraine" by the Danish Helsinki Committee for Human Rights (2011a, 2011b, 2011c, 2012). They provide legal analysis of the evidence in the light of Ukraine's obligations as a member of the CoE and a state-party to the ECHR, without prejudice to the persons under investigation being (found) guilty or innocent. The reports list numerous violations of the ECHR that are not only common across all cases studied, but also have systemic character in Ukraine's legal system. The reports enjoy high standing among European politicians and experts: one of the reports even served as a basis for the PACE Monitoring Committee's own report on Ukraine (of 9 January 2012) and subsequent PACE Resolution (of 26 January 2012).

34 Selective justice is defined as instances when "the purpose of the investigation is to promote a political aim not protected by the law by prosecuting somebody for acts for which others are not being prosecuted, and thus not treat everybody equally according to the law" (Danish Helsinki Committee, 2011a, pp. 9-10).

35 For a compilation of reactions to Tymoshenko's arrest, *see* G. Fomenchenko, *International Reaction to Tymoshenko's Arrest (5 August 2011)*, Brussels, EPP Headquarters, 2011; and V. Lavrov, 'Reaction Swift to Tymoshenko's Arrest (Updated)', *KyivPost*, 2011, <http://www.kyivpost.com/content/ukraine/reaction-swift-to-tymoshenkos-arrest-updated.html> (last visited 5 August 2011).

Ukraine (10 December 2012), the Speech by Commissioner Füle at the European Parliament (12 December 2012) and the EP Resolution on the situation in Ukraine (13 December 2012) stated clearly and unanimously that "Ukraine's performance will determine the pace of engagement," "the ball is clearly in Ukraine's court," the signature of the Association Agreement is suspended at least until the Eastern Partnership Summit in November 2013 and "there will be no signature if progress on the benchmarks is insufficient". The Joint Statement and remarks by Herman Van Rompuy and Jose Manuel Barroso following the 16th EU–Ukraine Summit (25 February 2013) have all reaffirmed the above points and placed progress on the rule of law in Ukraine at the core.

To conclude, the findings of this section reveal that the rule of law component of EU–Ukraine relations followed a thorny path from initial obscurity to becoming an indispensable and, most recently, a pressing issue. The rule of law was a rather inconspicuous element of EU–Ukraine relations throughout the 1990s, enjoyed only unsystematic references in the cooperation documents and political dialogue and was in a way inferior to democracy, market economy and human rights concerns. In the 2000s, the rule of law has become a permanent and independent element of dialogue and cooperation and, although still mentioned in conjunction with other "values" and "principles" and not rendered a bone of contention by the parties, is indispensable. This is a reflection at the bilateral level of the legislative mainstreaming of the rule of law at the EU level. At the same time, it is a product of ever closer cooperation between the two. However, the rule of law had not grown into a focal point of EU attention and a bone of contention between the parties until the trials of Yulia Tymoshenko and other Ukrainian politicians brought the systemic deficiencies in the application of the rule of law in Ukraine to the surface and to the centre of EU attention. Coming at a time when the parties were most eager to conclude an Association Agreement that would lead to a significantly closer political and economic integration between the EU and Ukraine, these events gave the rule of law concerns a central place on the EU agenda. At the moment, the rule of law is truly in the spotlight and is reaffirmed as a precondition for further cooperation. It remains to be seen whether this change in the political rhetoric (observed at the level of political dialogue and statements of the relevant actors) will lead to structural changes in the relationship (reflected in the cooperation documents).

D. Conclusion

This article examined the rule of law component of EU external policies in general and EU–Ukraine relations as a selected case, in order to analyse the relevance of the rule of law for EU cooperation with third states and to identify the reasons for changes thereof. The empirical findings reveal that, although marginalised throughout the 1990s, the rule of law component is currently assigned a guiding role in both. They also reveal that such a central role of the rule of law at present is due to three processes: the legislative mainstreaming of the rule of law in the EU itself, the growing ambitiousness of the EU–Ukraine relations, and the

increased visibility of systemic shortcomings in rule of law application in Ukraine through the trials of opposition politicians. The findings of this article enrich not only our understanding of the rule of law component of EU–Ukraine relations, but also our understanding of the rule of law as a legal and political category in EU external relations outside accession in general. A number of implications for future research and policy should be addressed here.

First, the process of legislative mainstreaming of the rule of law in the EU and the principle of alignment between EU internal and external policies imply that, just as in the studied case, the rule of law component of EU policies towards other states was most likely missing prior to 1990, gradually gained prominence throughout the 1990s, and have become a stable element of cooperation since the 2000s. EU bilateral policies reflect changes at the general EU level; therefore, once the rule of law was firmly established at the EU external policy agendas, it began to penetrate EU agendas for particular countries. This observation could, in fact, be of global relevance.

The finding on the linkage between the attention devoted by the EU to rule of law application in a partner state and the integration ambitions of the parties is also of broad significance. The closer the parties aim to integrate politically and economically, the higher the risks for European businesses and citizens from non-compliance with the rule of law in a partner state and, hence, the higher the attention devoted to the subject by the EU. The EU emphasis on Ukraine's adherence to the rule of law grew in the last few years, because the EU and Ukraine stand on the verge of concluding an Association Agreement that provides for integration, outside of accession, of unprecedented depth. The degree of integration would explain the lower attention of the EU to rule of law application in the countries of Southern Caucasus and Central Asia or the even higher attention to rule of law compliance in the countries of Western Balkans, which are going through the accession process.

Finally, the finding on the linkage between the attention devoted by the EU to the rule of law application in a partner state and the perceived severity of the domestic situation in that state is also of general relevance. The worse the situation with rule of law compliance is considered to be, the more concerned the EU becomes and the more prominently the rule of law component features on the cooperation agenda. The words "perceived" and "considered to be" are not accidental in the previous sentences. Owing to the limited expertise of the EU about its partner states and rule of law realities therein, the visibility of violations and the assessment of these violations by other international actors gain importance. Political prosecutions often catch media attention, and thus the attention of the EU and its Member States. In the case of Ukraine, it was the trials of Yulia Tymoshenko and others; in Russia, it was the trials of Mikhail Khodorkovsky and Alexei Navalny; in Belarus, it is the mass prosecution of opposition activists. With the emergence of these cases, the state of rule of law application in these countries has not instantly worsened; but the deep systemic problems have instantly become more visible.

Future research should proceed with similar within-case analyses with respect to other countries and eventually engage in comparative research, in

order to verify the general relevance of the above findings and identify their scope conditions.

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