2 Protecting the rule of law in post-Soviet states

The relevance of European and Eurasian integration

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Introduction

The year 2016 marked a quarter of a century since the fall of the Soviet Union. The independent states that emerged have varied progress to declare, including on the rule of law protection track. This chapter examines rule of law developments in twelve post-Soviet states (excluding the Baltics) with the aim of revealing the role of European and Eurasian integration processes therein. In what follows, we identify major *regional tendencies* in rule of law protection and analyse *paradigmatic effects* of respective regional integration processes.

For the purposes of this chapter, the rule of law is understood as a coherent directing idea that law should serve its social goals by coordinating social relations, minimising arbitrariness and providing order in society.[1] According to a conceptual baseline on the rule of law, relevant aspects include the separation of power, judicial independence and a transparent legislative process.[2] Adopting such a broad definition of the rule of law at the start grants conceptual and analytical openness necessary for examining the rule of law as an element of the countries' post-Soviet domestic development and processes of European and Eurasian integration.

The analysis reveals that the influence of European and Eurasian integration processes on the development of the rule of law protection mechanisms in post-Soviet states is principally different. With regard to the objectives of influence, the European Union (EU) draws on the broader understanding of the concept used by the Council of Europe (CoE) and seeks to promote this understanding in the region. The Eurasian Economic Union (EAEU), on the contrary, does not see the promotion of the rule of law among its priorities, even *vis-à-vis* its Member States that generally follow the rule *by* law paradigm (reducing law to the legal texts and applying those formalistically and instrumentally to assert power), and moreover serves to safeguard authoritarianism.[3]

With regard to mechanisms of influence, the EU does not offer membership prospects to any of the twelve post-Soviet states. The Association Agreements (AAs) between the EU and the three post-Soviet states aspiring to EU integration (Ukraine, Georgia and Moldova) offer a platform for the EU to advance its normative objectives, including respect for the rule of law. In all other cases, the

EU lacks the legal basis and political leverage to do so. Either way, post-Soviet states find themselves on the receiving end of the EU's normative agenda. The EAEU, in turn, draws on previous post-Soviet integration efforts, and all members are active co-shapers of its normative foundations. Uploading their own norms to the EAEU level gives additional legitimation to what has been previously established domestically and creates altogether different dynamics of norm transfer. Overall, while post-Soviet states all share Soviet legacies and struggle with the introduction and consolidation of the rule of law, it is increasingly difficult to speak of them as a coherent group: the diverse post-Soviet paths of each country are defined by peculiar domestic political and constitutional developments, as well as the relatively different relevance and weight of European and Eurasian integration processes.

A long path to the rule of law protection covered to date and remaining systemic deficiencies

After 70 years of Soviet rule, which for most post-Soviet states were preceded by centuries of colonization by tsarist Russia, states that emerged from the collapse of the USSR entered the era of independence with remnants of the Soviet legal system. The impact of communism on legal systems and cultures of post-Soviet countries is captured sharply by Michael Newcity:

> To the degree that a modern legal consciousness akin to the Western legal tradition might ever have developed [in these states], those prospects were dramatically short-circuited by the Bolshevik Revolution.[4]

Under the Soviet regime, the principles of Western democratic law were not abused or put in abeyance in practice; they were fundamentally challenged normatively and theoretically.[5] The official legal doctrine was directed against the bourgeois 'legalistic worldview'. The Soviet positivist legal doctrine transformed law into a superstructure of the state and judiciary, an attachment of the party system. And while the ends of Soviet communism were different from those of tsarist Russia, attitudes to an absolutist state and the coerciveness of law were rather similar.[6]

The Soviet legal heritage complicated the introduction of rule of law protection mechanisms in post-Soviet states. Nevertheless, the far-reaching changes implemented in the last twenty-five years must be acknowledged. The post-Soviet countries not only drafted an astonishing volume of laws, but also established a great number of new legal and judicial institutions, adopted a bulk of material and procedural codes regulating previously non-existent matters and designed constitutional frameworks from scratch in the absence of recent or historical experiences with constitutionalism.[7] Significantly, post-Soviet states declared their formal commitment to the rule of law through their newly adopted constitutions and numerous international treaties. With or without an explicit reference

to 'the rule of law', all of the respective constitutions contain clauses that pertain to the rule of law's conceptual baseline. Table 2.1 provides an overview of rule of law provisions in the constitutions of post-Soviet states, and Annex 1 at the end of this volume contains respective excerpts from the constitutions.

Accordingly, all twelve constitutions proclaim the supremacy of the constitution, six of them formally pledge allegiance to the rule *of* law principle and three to the rule *by* law, or the rule of the written law (Azerbaijan, Belarus and Russia). Two striking observations are due here: first, the list of 'rule of law' countries includes Georgia, Moldova and Ukraine, which traditionally have a better rule of law protection track-record; second, Belarus declares both the rule *of* law and the rule *by* law principles (see *infra*). Moreover, despite the inclusion of necessary provisions, post-Soviet constitutions differ considerably in stipulating the mechanisms necessary to safeguard the rule of law. Thus, while all constitutions without exception maintain the importance of an independent judiciary, some of them remain vague or ambiguous on the procedures that shall ensure this very independence, including the appointment, terms in office and dismissal of judges (e.g. constitution of Turkmenistan), and yet others basically grant major control powers over the judiciary to the President as head of the executive branch (e.g. constitutions of Armenia and Uzbekistan). All post-Soviet constitutions provide for a possibility of certain restrictions on human rights and fundamental freedoms in the case of martial law or a state of emergency, thus openly allowing concessions with respect to one of the key elements of the rule of law.

At the same time, however precise and conforming to the basic principles of the rule of law they might be, constitutional provisions do not guarantee effective application of laws in the post-Soviet countries. In fact, when it comes to actual practices, post-Soviet states score poorly on rule of law compliance regardless of how the evaluation scale is drawn. Table 2.2 below offers an overview of the respective countries' performance on major global indexes on the rule of law, democracy, corruption and governance. It also highlights the top and the bottom of the class in each category.

The usual package of rule of law deficiencies in these states includes problems with the functioning of the system of justice and concerns about the independence, impartiality, effectiveness and accountability of judiciary and law enforcement institutions; the functioning of administrative and regulatory institutions at national and local levels; deficiencies in material and procedural law, legislative gaps and the lack of consistency and coherence within and between laws; and the problems with the protection of human rights and fundamental freedoms. Either laws and institutions are lacking, or they exist but are of poor quality, or they are of sufficient quality but are not applied or enforced properly. Notably, those states that perform the worst generally score low on every index and every dimension of an index in Table 2. For example, Uzbekistan and Turkmenistan have very bad scores across the board. In turn, those states that perform comparatively well (for example, Georgia, Moldova and Ukraine) often score better on some indexes or dimensions of an index and worse on others. Like this, Ukraine scores better than

Table 2.1 Rule of law provisions in the constitutions of post-Soviet states[1]

Country	*Rule of law provision with direct mentioning of the term*	*Supremacy of the constitution*	*Separation of power*	*Independence of the judiciary*	*Respect for fundamental rights*	*Equal rights/ Equality before the law*
Armenia	x	x	x	x	x	x
Azerbaijan		x	x	x	x	x
Belarus	x	x	x	x	x	x
Georgia	x	x	x	x	x	x
Kazakhstan		x	x	x	x	x
Kyrgyzstan	x	x	x	x	x	x
Moldova	x	x	x	x	x	x
Russia		x	x	x	x	x
Tajikistan		x	x	x	x	x
Turkmenistan		x	x	x	x	x
Ukraine	x	x	x	x	x	x
Uzbekistan		x	x	x	x	x

Source: compiled by the authors (see also annex 1 and 2 to this volume). For this table, the latest versions of post-Soviet constitutions were reviewed, with all amendments currently in force. The authors analysed both English and Russian translations of respective constitutions. Varying combinations of keywords for each category listed have been used to identify the presence of the above rule of law elements in the examined documents.

Table 2.2 Countries' performance on global rule of law and governance indexes

Country	*WJP RoL Index 2016*[1] *(0 – lowest, 1 – highest)*	*FH Nations in Transit 2016*[2] *(1 – best, 7 – worst)*	*TI Corruption Perception Index 2015*[3] *(0 – highly corrupt, 100 – very clean)*	*Transformation Index BTI – The Status Index 2016*[4] *(# in the world, 1 – highly advanced democracy)*	*Worldwide Governance Indicators – Rule of Law 2015*[5] *(-2.5 – lowest, +2.5 – highest)*
Armenia	–	5.36	**35**	64	–0.34
Azerbaijan	–	**6.86**	29	95	–0.60
Belarus	**0.54**	6.64	32	99	–0.79
Georgia	**0.65**	**4.61**	**52**	**45**	**0.30**
Kazakhstan	0.50	6.61	28	85	–0.37
Kyrgyzstan	0.47	5.89	28	60	**–1.00**
Moldova	0.49	4.89	33	**47**	–0.40
Russia	**0.45**	6.50	29	81	–0.72
Tajikistan	–	6.54	26	109	**–1.01**
Turkmenistan	–	**6.93**	**18**	**116**	**–1.39**
Ukraine	0.49	**4.68**	27	**52**	–0.80
Uzbekistan	**0.45**	**6.93**	**19**	**115**	**–1.07**

Source: Compiled by the authors on the basis of data from respective indexes

[1]See http://data.worldjusticeproject.org/
[2]See https://freedomhouse.org/report/nations-transit/nations-transit-2016
[3]See www.transparency.org/cpi2015#map-container
[4]See www.bti-project.org/en/atlas/
[5]See http://info.worldbank.org/governance/wgi/#reports

Moldova on the Freedom House Nations in Transit Index, and Moldova scores better than Ukraine on the Transparency International Corruption Perceptions Index and BTI Transformation Index. And while they have identical scores on the World Justice Project Rule of Law Index (WJP RoL Index), Ukraine performs better on the Fundamental Rights dimension, and Moldova on Order and Security.[8] Georgia currently performs best among post-Soviet states, and Russia sank into the club of the worst, with the same WJP RoL Index score as Uzbekistan (and other scores similar to those of Belarus and Central Asian states). Paradoxically, Belarus scores remarkably well on the WJP RoL Index (second after Georgia), its dramatic scores on all others indexes notwithstanding. The high score on WJP RoL Index is due to indicators of Order and Security, Criminal and Civil Justice – and, despite its poor results on Constraints on Government Powers, Open Government and Fundamental Rights.[9] The aggregate scores often give a more optimistic impression than the real picture in specific sectors.

Moreover, while Table 2 gives a *snapshot* of the situation as of 2015–2016, we also engaged in a *longitudinal* analysis beyond Table 2, comparing countries' results on respective indexes across time. It demonstrated that 'the worst-performing' states in the group (Belarus, Turkmenistan, Uzbekistan) are steadily the worst, while the 'best-performing' states (Georgia, Moldova, Ukraine) swing as pendulums between better and worse, and occasionally switch roles of 'the best pupil in the class'. Georgia is in the lead at present, but that can change quickly again. This stability or swinging could be linked to the effects of European and Eurasian integration processes at different points in time (see *infra*). Importantly, Russia's standing in various indexes has been worsening, reflecting the consolidation of Putin's regime.

Overall, due to resilient authoritarian power structures and corruption, post-Soviet states have problems not only with rule *of* law compliance, but even with rule *by* law compliance. Two paradoxes coined by Olga Burlyuk elsewhere capture systemic shortcomings in post-Soviet states and can be labelled as the 'façade arrangement paradox' and 'Brownian motion paradox'.[10] The *façade arrangement paradox* implies that, despite the existence of rule of law clauses at the fundamental constitutional level, the implementation of these clauses fails drastically in reality. Although some post-Soviet states have generally more liberal legal frameworks than others and their rule of law protection mechanisms satisfy a higher standard, as illustrated in Table 2, the difference between what is proclaimed and what is implemented in reality is evident in all post-Soviet states. The *Brownian motion paradox*, in turn, refers to an empirical observation that, in the field of rule of law reform, there is a lot of movement with doubtful progress or change to declare. This paradox is more relevant for those post-Soviet states that experience frequent changes of ruling elites, political instability and subsequent reform efforts (e.g. Ukraine, Georgia, Moldova) and is less or not at all relevant for those states that have consolidated authoritarian regimes (e.g. Azerbaijan, Belarus, Kazakhstan, Russia, Turkmenistan, Uzbekistan). While in the former group of states the problem rests with the lack of political will for continuous,

long-term and durable change, in the latter it rests with the lack of political will for change as such.

Rudenko and Harutyunyan, among other scholars, examine the sources of challenges to the rule of law in the latter group of post-Soviet states, led by Russia, and identify the reasons behind what one calls "pseudo-rule-of-law" and the other calls "deformed constitutionalism".[11] Four main explanations can be synthesised here. First, there is an anti-Western sentiment and relativistic approach to human rights and democracy, with voices against the export of Western liberal values and arguments for an own "democracy model" (observed e.g. in Azerbaijan, Kazakhstan, Russia).[12] Second, the identification of the rule *of* law with the rule *by* law results in a "dictatorship of law".[13] Indeed, the concept "the rule of law" is relatively new and there was even no term for it in the Soviet Union. While the rule of law as an essentially contested concept is bound to have varied meanings and understandings,[14] the debate in post-Soviet states challenged its very utility, necessity and relevance.[15] In Russian, there are two different words for law and the written law as a legal act: *pravo* and *zakon*. This distinction is familiar to other languages and legal systems: the Roman *jus* and *lex*, the German *Recht* and *Gesetz*, the French *droit* and *loi*, and others. The Soviet ideology insisted – as a matter of legal theory – that *zakon* is *pravo* and that there is no *pravo* outside *zakon*. Consequently, the introduction of the rule of law into legal doctrines and systems of post-Soviet states translated into an opposition between the principles of the rule *of* law (*verkhovenstvo prava*) and the rule *by* law (*vekhovenstvo zakona*), the latter sitting firmly at the top. Importantly, the Council of Europe[16] and the Venice Commission[17] emphasised that the concept of *verkhovenstvo zakona* found in post-Soviet states is not a proper equivalent for the rule of law, that treating it as such runs contrary to the essence of the rule of law, and that *verkhovenstvo prava* is the only proper equivalent for the rule of law.

A third challenge to consolidating the rule of law in post-Soviet states is the instrumentalist approach to law. This means that law is frequently used as a tool to achieve political objectives, for instance through constitutional amendments.[18] This was the case, for example, when the constitutions of Kazakhstan and Belarus were revised through referenda, and reinterpreted by constitutional courts, so as to enable the re-election of the countries' sitting presidents for longer (Kazakhstan) or indefinite (Belarus) terms. In violation of the spirit of the rule of law, these decisions had been passed in seeming conformity with the constitutions and the law. While such practices are strongest in Belarus and Central Asia, they are not uncommon in other post-Soviet states too. An instrumentalist approach to law is a Soviet legacy that proves difficult to transform.

Finally, para-constitutional practices are a menace in the region: the ruling elites have mastered the skill of redesigning institutional structures "within" the limits of the constitutions, so as to by-pass them and reinforce the authority of certain branches of power as needed (typically, the president).[19] This way, the appearances are kept, and the domestic and foreign audiences are appeased. Deficiencies in popular and elite demand for law, or 'the bundle of attitudes and behaviour toward law as affected by historical experience, both personal and

societal', appear to be of crucial importance.[20] Attitudes, perceptions and value patterns of the elites and wider population mediate the impact of legal texts and institutions and so constitute a major constraint on any meaningful rule of law reform. A deficit of legal culture at all levels is a general characteristic of post-Soviet societies, states and legal systems.[21]

A few words should also be said to explain the diverse standing of post-Soviet states in the rule of law and governance indexes (reviewed in Table 2.2) despite the commonality of Soviet legacies. It is becoming increasingly more difficult to treat post-Soviet states as a homogeneous group: while the shared Soviet legacies do account for a large number of similarities between the states, it is the distinct *post*-Soviet experiences of these states, combined with the rediscovery of their *pre*-Soviet legacies, that account for the current diversity among them. Many obstacles to reform in the region today are inheritances from the most recent past, or 'post-communism gone astray'.[22] Additionally, some post-Soviet states embarked on recovering their pre-Soviet past. For example, Georgia, Moldova and Ukraine repeatedly appeal to their historical links and in fact belongingness to the European legal tradition. Post-Soviet states further east – especially in Central Asia – cannot boast direct historical ties to European legal tradition and instead try to artificially create such links (e.g. by modelling their constitutions on Western prototypes), albeit with their own interpretations of law, which at times revives pre-Soviet legal practices and values rooted in Islam.[23] Therefore, while important similarities can be observed, each country provides a distinct context for scholars to analyse and for external actors to engage in.

To conclude, systemic shortcomings in the protection of the rule of law in post-Soviet states stem from deficiencies in the supply of law and problems connected to the shape of laws and legal institutions, as well as from deficiencies in the demand for law and its rule among local elites and the wider population. The willingness of the ruling political and business elites to sustain existing power structures and the tendency of the elites (including legal scholars and practitioners) to equate the rule *of* law with the rule *by* law pose significant obstacles to the protection of the rule of law in these states. It is in this domestic rule of law context that post-Soviet states embark on European and/or Eurasian integration.

The rule of law and adaptation to European integration processes

European integration processes are profoundly conducive to rule of law protection in the states involved. The rule of law as a pan-European principle is an inevitable element of a country's integration with the European Union and membership in the Council of Europe.[24] In fact, the rule of law has been visibly mainstreamed within both the EU[25] and the CoE[26] in the last twenty years. On the European continent and beyond, these two organisations promote the triptych of 'shared European values' – democracy, human rights and the rule of law – and pursue principally the same 'civilising mission', notwithstanding important differences in their established objectives.[27]

As for the concept of the rule of law, the EU and the CoE (as well as the Venice Commission and the United Nations) advocate for the existence of a consensus on the core meaning of the rule of law and a shared pre-understanding of its essential, unquantifiable elements.[28] As mentioned in the previous section, the Venice Commission has explicitly stated that a consensual understanding of the essence of the rule of law is to be distinguished from a distorted, purely formalistic understanding as "rule by law", "rule by the law" or even "law by rules" found in some former socialist states.[29] Within the EU legal order, the rule of law is defined as one of the EU's foundational values (Article 2 TEU). Moreover, it serves as a central variable in the context of EU external action (Article 21(2) b TEU) and specifically in its relations with neighbouring countries (Article 8 TEU). The European Commission identified six key principles constituting the core of the rule of law in the EU legal order: legality and legal certainty, the prohibition of arbitrariness of the executive powers, the existence of independent and impartial courts, guarantees of effective judicial review (inclusive of respect for fundamental rights) and equality before the law.[30] Despite the existing differences in the definition and interpretation of the rule of law, 'we can be certain of at least one thing: an oppressive legal order cannot satisfy the EU's understanding of the rule of law'.[31]

Given the above, it is especially unfortunate for the introduction and consolidation of the rule of law in post-Soviet states that throughout the 1990s and early 2000s "European integration" of the region was of low intensity, to say the least. Armenia, Azerbaijan, Georgia, Moldova, Russia and Ukraine have become members of the CoE in the mid-1990s. In the uncertain political context of the early 1990s, accession to the CoE was dominated by presumptions that 'compliance could be achieved within a reasonable time-frame with the good will of governments' and that 'admission would result in a continuing and indeed much stronger influence of the CoE than would be the case if the country were not a member'.[32] As a result, the said states became CoE members despite their poor compliance record at the time.[33] Norm acceptance, however, has not been followed by norm compliance, as the analysis in the previous section illustrates. As for Belarus and Central Asian states, they are not even members of the CoE.

The EU, in turn, 'neither played nor endeavoured to play a role in domestic change in the Soviet successor states' until its eastward enlargements in 2004 and 2007.[34] Throughout the 1990s, EU relations with former Soviet states in Eastern Europe and South Caucasus were overshadowed by the EU accession process of the Central and East European countries. Central Asia was almost completely missing from the EU radar at the time. Bilateral relations between the EU and post-Soviet states did not go beyond the conclusion of Partnership and Cooperation Agreements (PCAs) and minimal cooperation within the TACIS programme. With regard to the former, the PCAs with nine out of twelve states entered into force only towards the end of the 1990s. The signature of the agreement with Tajikistan was postponed until 2004 due to the civil war in the country (1992–1997), resulting in a belated ratification in 2005. The ratification of the PCAs with Belarus and Turkmenistan has even been postponed indefinitely.

All ratified PCAs contain a provision emphasising respect for the principles of democracy, human rights and international law, in accordance with the UN Charter, the Helsinki Final Act and the Charter of Paris for a New Europe. This clause could, in principle, serve as a tool for the EU to push for adherence to the above principles, as well as the rule of law. The EU could even go as far as suspending the PCAs in case of a breach of these principles by the partner countries. However, in practice, this has happened only once – in the case of Uzbekistan, in response to severe human rights violations and massacre of civilians in the city of Andijan in 2005; and even in this case the PCA suspension was only partial and quickly reversed.[35]

With regard to the TACIS programme, post-Soviet states received tiny amounts compared to the assistance provided to acceding states in Central and Eastern Europe or Western Balkans. The total budget of the TACIS programme at 7,567.8 million Euro (supporting 13 states, among them such large states as Russia and Ukraine) is *two-and-a-half times smaller* than the total budget of the PHARE programme at 18,673.1 million Euro (supporting 12 states, including such small states as Malta and Cyprus) and is *less* than the combined assistance budget for just two countries, Bulgaria and Romania (7,665.7 million Euro). Likewise, financial assistance to Ukraine (998.3 million Euro) in the period 1991–2006 was lower than to the Czech Republic (1062.2 million Euro) and slightly higher than to Lithuania (808.5 million Euro) and Slovakia (805.2 million Euro); while Kazakhstan (166.2 million Euro) received less than three times the assistance to Malta (57 million Euro).[36] Besides, within the entire period of the programme's implementation (1991–2006), South Caucasus post-Soviet countries received relatively less than East European ones, and Central Asian states received least of all: while Russia and Ukraine received 2,060.6 and 998.3 million Euro respectively, the five Central Asian states combined received as little as 536 million Euro (or 1/2 of Ukraine's and 1/4 of Russia's total).[37] What is more, the larger part of TACIS funds were used to promote economic liberalisation, ensure nuclear safety and modernise public administration, rather than to foster political and legal reforms that could lead to a true advancement of democracy and the rule of law.[38] The EU support in these areas was thus missing exactly in the period when it was most needed and when it could have been most effective, considering that post-Soviet states were at that time going through major political transformations and were more open to external normative influences.

Starting with the mid-2000s, the EU has topped up its engagement in the region and has become a key centre of gravity. The European Neighbourhood Policy (ENP) launched in 2004 and the Eastern Partnership (EaP) launched in 2008 gave new impetus, structure and funding to EU cooperation with East European and South Caucasus states. These policies are based on the principles of shared values, conditionality, joint ownership and differentiation.[39] Despite the initial intention to bring all states under one umbrella, the EU's relations with the respective states are subject to progressively more political and legal differentiation, also in what concerns the rule of law. It has been argued elsewhere that such

variation in EU rule of law promotion approaches is not a problem in itself, as long as there is a shared understanding of the core meaning and essential components of the concept.[40] The EU relies on a variety of instruments and mechanisms to promote the rule of law abroad, including soft law (Action Plans and Association Agendas) and hard law instruments ("essential elements clauses" in bilateral agreements); unilateral (technical and financial assistance), bilateral (framework and sectoral agreements) and multilateral (regional platforms) instruments; as well as what scholars call "value diffusion strategy" (e.g. diplomatic measures and discursive practices).[41]

Ukraine, Moldova and Georgia have repeatedly voiced their European aspirations and have concluded far-reaching Association Agreements with the EU.[42] This implies that the Union has more leverage to influence rule of law developments in these states. In turn, EU rule of law promotion is more difficult and less developed with regard to non-associated EaP countries (Belarus, Armenia, Azerbaijan).[43] In both groups, however, the actual commitment to European values – whether rhetorical or legal – is not accompanied by practical compliance, as analysed in the previous section and the EaP European Integration Index.[44]

The EU's influence remains very limited in relation to the Central Asian states. With the exception of Kazakhstan that signed an Enhanced Partnership and Cooperation Agreement with the EU in May 2016, the EU's relations with Central Asian states are still regulated by the initial PCAs.[45] Neither are these states covered by EU neighbourhood policies. Without a strong leverage at hand, the EU has to rely primarily on dialogue with Central Asian governments when promoting the rule of law in the region. This dialogue has been considerably boosted since the launch of the EU-Central Asia Strategy for a New Partnership in 2007. This document suggested establishing two new dialogue formats: a multilateral Rule of Law Initiative involving all Central Asian states and bilateral annual Human Rights Dialogues between individual governments and EU officials, including discussions on the adherence to the rule of law. Both formats, however, have demonstrated mixed results to date. The Rule of Law Initiative, which was supposed to rely on the joint ownership of Central Asian governments and be driven by selected EU Member States, did not have an easy start. The interest in the dialogue process on both sides was modest at best, whereas Uzbekistan and Turkmenistan basically refused to endorse the rule of law agenda.[46] The Human Rights Dialogues offered an opening for the EU to discuss sensitive political issues with the Central Asian governments. Yet the dialogue process was not backed up by any mechanisms to ensure that the governments followed through with their commitments.[47] In addition to the dialogue instruments, the EU provides bilateral financial and technical assistance, for instance to support judicial reforms in Central Asian states. Yet this assistance is limited and has hardly any impact.[48]

Two additional remarks are due here. First, the EU and the CoE are *existing* organisations with elaborate value and legislative packages. This leaves post-Soviet states on the receiving end of the European normative agenda: they can accept, adapt or reject respective value systems. Second, the mounting problems with

rule of law compliance among EU Member States (especially but not only Central and East European countries with a communist past) constitute an important recent development.[49] For one thing, this sends a negative signal to post-Soviet states and puts in question the EU's image as a rock-solid rule of law authority for the region. At the same time, it strengthens (semi-)authoritarian ruling elites of post-Soviet states in their arguments against European integration as a civilisational choice and European values as a value basis to strive for. Just like 'the rotten capitalism' in the Soviet ideology, the narrative of a 'decaying Europe' is taking shape in Russia and other states in the region.

By way of a general observation, it is progressively more difficult to speak of the relevance of European integration for rule of law protection in post-Soviet states as a homogeneous region or even to identify sub-regions/sub-sets of states therein: Belarus is an outlier in the 'Eastern Europe' block; Georgia is a front-runner in the "South Caucasus"; and the variation in the strength and nature of EU's engagement with states in "Central Asia" is striking despite the initially chosen "regional" approach.

The rule of law and adaptation to Eurasian integration processes

Ever since the dissolution of the Soviet Union, post-Soviet states have been involved in various regional (re-)integration projects, most of them under Russia's leadership and domination. The Commonwealth of Independent States (CIS), the Collective Security Treaty Organisation (CSTO), the CIS Free Trade Area, the Eurasian Economic Community (EurAsEc) are but a few examples of Russia's failed political and economic attempts at Eurasian integration.[50] Respective integration frameworks are generally characterised by path dependence, recurrent sovereignty sensitivities and frequent changes in design.[51] Importantly, also in the post-Soviet period, Russia's legal system (in particular, its material and procedural codes of law) has served as a model for other states in the region with less constitutional and legislative experience.[52]

The Eurasian Economic Union (EAEU), launched on 1 January 2015, consolidated the twenty-five years of post-Soviet integration and is much more solid than its predecessors.[53] Instead of consistently promoting rule-based integration, however, the EAEU increasingly turns into a foreign policy instrument serving Russia's objectives.[54] Despite the EAEU's declared objective to bring long-term economic benefits to its Member States, it is unlikely to do so: its members are neither wealthy, nor are their economies complementary. As a cherry on the cake, Armenia is the only customs union member in the world without a shared border with either of the other participants. This has made scholars argue that the EAEU is at least as much a political organisation as it is economic, if not more.[55] The institutional structure of the EAEU is more pyramidal and less horizontal, and its Member State compositions are less balanced compared to the EU. In terms of the type of competences granted, the degree of independence of the organisation's internal bodies, the development of a body of common law, and

the availability of disciplinary and enforcement mechanisms, the EAEU is less of a supranational framework than its predecessors. It offers weak formal constraints to state sovereignty and reasserts intergovernmental modes of operation under Russia's domination.[56] Moreover, Russia has been using bilateral trade, security and migration ties with post-Soviet states – economic, political and military pressure – to complicate their European integration and conduce them towards Eurasian integration, putting in question both the EAEU's economic and voluntary nature.

The Treaty on the EAEU says *nothing* about the rule of law. Instead, it refers to a 'rule of constitutional rights and freedoms of man and national', as well as universal principles of international law.[57] Moreover, the Treaty stipulates, in a number of clauses, that a Member State may deny compliance with a Union's decision if 'its execution may prejudice the sovereignty, security and public order of the Member State or is contrary to its legislation'.[58] This way, the EAEU is designed to reinforce domestic public orders of its Member States, taking into account their security and sovereignty concerns. These preoccupations are not new. An analysis of the post-Soviet states' constitutions reveals that territorial integrity and national sovereignty are emphasised more strongly and frequently than adherence to the rule of law.[59] Moreover, the language of the constitutions is rather defensive, with direct references to defence and protection (e.g. Armenia, Article 8; Azerbaijan, Article 9; Ukraine, Article 17), 'defensive war' (Georgia, Article 98), 'external threat' and 'aggression' (Kazakhstan, Article 44; Kyrgyzstan, Article 14). Moldova declared 'permanent neutrality' (Article 142), which reads as a preemptive appeasement-of-the-aggressor strategy. In turn, Ukraine's constitution speaks of the 'indivisibility and inviolability' of its territory (Article 17), rather than more common 'integrity', addressing the centuries-long attempts to divide the country along various lines and foreseeing the violation of its territorial integrity two decades later. Overall, sovereignty clauses of post-Soviet constitutions read as shields against classical threats to the state authority and territory (originating from Russia and/or state-internal secessionist tendencies). They do not provide for a soft and gradual delegation of sovereignty through functional integration with international organisations.[60] These concerns with state sovereignty and territorial integrity were reignited by Russia's annexation of Crimea and led to insistence for additional requirements to constrain Russia's domination in the EAEU by the presidents of Kazakhstan and Belarus.[61]

The value system underlying Eurasian integration is based on adherence to the rule *by* law principle, if at all, and as such is not conducive to rule of law protection and notions such as separation of power, judicial independence, a transparent legislative process and respect for human rights. There was initial optimism that further legalisation and institutionalisation under the auspices of the EAEU may eventually strengthen the rule of law or, at least the rule by law, in the region.[62] However, the EAEU as it took shape in the Astana Treaty – and the Astana Treaty itself – is considered 'weak from an international, legal and constitutional point of view'.[63] Moreover, the Union's competences have been progressively reduced in the course of negotiations and drafting of the Treaty and are now 'down to

zero'.[64] Consequently, the concept of 'the law of the Union' has but an organising and symbolic role, with little legal effect.[65]

Nevertheless, the Eurasian integration process bears a strong impact on domestic political developments in the post-Soviet space. All countries in the region are affected by it to different degrees and for different reasons.[66] Moreover, the process of Eurasian integration challenges the very idea that the EU is the sole actor able to promote 'conceptions of normal'[67] to the post-Soviet space. The universal applicability and acceptance of European norms is questioned, as the EAEU is ready to offer a viable alternative to those not interested in implementing democratic and rule of law reforms. This alternative, rooted in the constantly emphasised principle of respect for the sovereignty, culture and traditions of the Member States,[68] resonates better with the visions and expectations of the countries' authoritarian leaders, even if the price to pay is the increased influence of Russia as the key member of the Union.

Just as Russia did not take European integration processes seriously until the colour revolutions in early 2000s and the launch of the ENP and the EaP, the EU did not take the regional re-integration processes in the post-Soviet region seriously until the establishment of the EAEU. The EU's initial reaction has been cautious and hardened after Armenia's departure from the AA with the EU in favour of EAEU membership in September 2013[69] and Russia's annexation of Crimea in March 2014. There is no 'bloc to bloc' dialogue between the EU and the EAEU, as high-level engagement could only follow serious shifts in Russian policy towards Ukraine and other states in the region. Nevertheless, there are contacts between EU and EAEU officials 'at technical level'. These are believed to help inform future strategies and offer pragmatic short-term gains, at least in defining substance for future discussions.[70]

Geopolitically, the EAEU is an integration framework meant to sustain post-Soviet states' links to Russia and stop the advance of the EU into Eastern Europe and the Southern Caucasus as well as the advance of China to Central Asia.[71] However, 'the dream of a geopolitical Eurasia died in Ukraine', that is, with Russia's annexation of Crimea and the outbreak of violence in Ukraine's eastern provinces.[72] Russia's pressure has already served as an important driver of Ukraine's, Moldova's and Georgia's European integration: all three hurried to conclude the Association Agreements with the EU. Similarly, it may drive Central Asian states into the arms of China, which has greater economic clout in the region.[73] In the coming decades or even years, the definition of 'Eurasian integration' as a Russia-led process may be challenged, making the balancing act for Central Asian states ever more difficult.

Conclusions

The influence of European and Eurasian integration processes on the development of the rule of law protection mechanisms in post-Soviet states varies in several regards. First, when looking at the EU and the EAEU as poles of attraction and actors in their own right, they pursue very different objectives with regard to

the promotion of the rule of law. The EU draws on the broader understanding of the concept used by the CoE, which incorporates the principle of an independent judiciary and respect for human rights, and seeks to promote this understanding both within and beyond its borders. The EAEU, on the contrary, does not see the promotion of the rule of law among its priorities, even *vis-à-vis* its Member States that generally follow the rule *by* law paradigm, if at all. Moreover, it is designed to have no effect on domestic political orders of participant states so that it safeguards authoritarianism.

Second, the mechanisms of influence of both entities are quite different. The EU does not offer membership prospects to any of the twelve post-Soviet states, including those aspiring for accession. Instead, its relations with the states are regulated by framework treaties, varying from Association Agreements with Georgia, Ukraine and Moldova, which stipulate normative approximation of the partner countries with the EU, to less ambitious Partnership and Cooperation Agreements with the rest. In the former case, the asymmetric partnership between the EU and the three associated states offers a platform for the EU to advance its normative objectives, including the rule of law. In the latter case, the EU lacks a strong legal basis and political leverage to do so. In any event, post-Soviet states find themselves on the receiving end of the EU's normative agenda, as they can react to the principles advanced by the EU only by either accepting, adapting or rejecting them. Thus, in the process of European integration, in which only a few post-Soviet states participate and only to a limited extent, these states become either compliant or non-compliant with the EU norms. The EAEU is quite different in this sense, as it draws on previous post-Soviet integration efforts. The five current members of the Union were all part of the USSR before, and now they are active co-shapers of norms represented by the EAEU. In fact, as the process of Eurasian integration has a comparatively short history, the normative foundations of its Member States have been formed before the EAEU was established. And now these norms can be uploaded to the EAEU level and shared by its members, producing an additional legitimation effect to what has been previously established domestically. This creates very different dynamics of norm transfer than in the case of the EU, which acts as an external norm promoter *vis-à-vis* post-Soviet countries. At the same time, the limits of the EAEU's influence are quite obvious. Former Soviet states not participating in the EAEU are excluded from both shaping and receiving common norms of this Union.

A general observation stemming from the analysis in this chapter and worth reiterating here is that, at the time of writing and with regard to the subject addressed, speaking of post-Soviet states as a group is justified and unjustified at the same time. It is justified to the extent that all states involved share Soviet legacies, have been exposed to European and Eurasian integration efforts and generally struggle with the introduction and consolidation of the rule of law. It is unjustified, however, as far as the diverse post-Soviet and post-post-Soviet paths in each country are defined by peculiar domestic

political and constitutional developments and varying links with European and Eurasian integration processes.

Notes

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2 For a conceptual baseline on the rule of law, see Hill, *Rule of Law Inventory Report*, *op. cit.*, p. 12.
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5 J. J. Linz and A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-communist Europe*, Baltimore and London: The Johns Hopkins University Press, 1996, p. 249.
6 The details are familiar and well documented. For Western accounts of the Soviet law see volumes by Barry, *Toward the 'Rule of Law' in Russia? Political and Legal Reform in the Transition Period*, Armonk, NY: M. E. Sharpe, 1992; W. Butler, *Soviet Law*, London: Butterworth, 1988; J. Burbank, 'Lenin and the Law', *Slavic Review*, 54(1), 1995, 23–44; H. Collins, *Marxism and Law*, Oxford: Oxford University Press, 1982.
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8 See full country profiles available at: http://data.worldjusticeproject.org/#/groups/MDA (Moldova) and http://data.worldjusticeproject.org/#/groups/UKR (Ukraine).
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13 Rudenko, 'Demokraticheskoie verkhovenstvo prava', 63–64. See also Harutyunyan, 'Deformatsii konstitutsionalisma', 6; M. Koziubra, 'Dykhotomiia bukvy i dukhu prava: vynyknennia problemy, yii aspekty ta napriamy vyrishennia', *Naukovi Zapysky NaUKMA*, 77(3), 2008, 3–8.
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18 Rudenko, 'Demokraticheskoie verkhovenstvo prava', 64–66. See also M. Koziubra, 'Pravo, polityka, pravosuddia: zarubizhnyi ta vitchyznianyi dosvid vzaiemovidnosyn', *Naukovi Zapysky NaUKMA*, 38, 2005, 3–8.

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