

Hague Journal on the Rule of Law

<http://journals.cambridge.org/ROL>

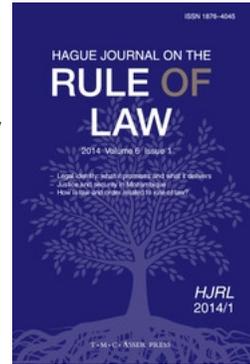
Additional services for *Hague Journal on the Rule of Law*:

Email alerts: [Click here](#)

Subscriptions: [Click here](#)

Commercial reprints: [Click here](#)

Terms of use : [Click here](#)



An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine)

Olga Burlyuk

Hague Journal on the Rule of Law / Volume 6 / Issue 01 / January 2014, pp 26 - 46
DOI: 10.1017/S1876404514001018, Published online: 06 March 2014

Link to this article: http://journals.cambridge.org/abstract_S1876404514001018

How to cite this article:

Olga Burlyuk (2014). An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine) . Hague Journal on the Rule of Law, 6, pp 26-46
doi:10.1017/S1876404514001018

Request Permissions : [Click here](#)

An Ambitious Failure: Conceptualising the EU Approach to Rule of Law Promotion (in Ukraine)

Olga Burlyuk*

This article conceptualises the EU approach to rule of law promotion outside of accession, taking Ukraine as a case study. Empirical evidence, collected through document analysis, expert interviews and participant observation, reveals that the rule of law as a legal and political category in EU external relations has little to do with the essentialist scholarly definitions of the concept. Instead, it constitutes an abstract ideal which frames bilateral cooperation at the political level and a banner under which the parties realise a variety of activities at the practical level. This EU approach is deliberate and meant to allow for defining the rule of law in harmony with the parties' integration ambitions, priorities and domestic institutional contexts. The article concludes with a discussion of the findings' implications for future policy and research.

INTRODUCTION

Over the past two decades, the EU matured as a rule of law promoter and is engaged most intensely in its neighbourhood. The Treaty on the European Union (TEU) formally assigns the rule of law with a guiding role in EU external policies.¹ However, the subject of EU rule of law promotion remains under-researched. The literature on rule of law promotion addresses EU efforts marginally, the EU being a latecomer in the field of global value promotion and 'European studies' being an insular discipline.² In turn, the European studies literature places rule of law

* Brussels School of International Studies, the University of Kent, ob68@kent.ac.uk.

¹ The Preamble and Arts. 2, 21, 49 of the consolidated version of the TEU.

² These are mostly studies comparing EU and US efforts. See Dinorah Azpuru et al., 'What Has the United States Been Doing?', in: 19(2) *Journal of Democracy* (2008), p. 150; Elena Baracani, 'EU Democratic Rule of Law Promotion', in Amichai Magen and Leonardo Morlino (eds.), *International Actors, Democratization and the Rule of Law: Anchoring Democracy?* 2008, p. 53; Elena Baracani, 'U.S. and EU Strategies for Promoting Democracy', in Federiga Bindi (ed.), *The Foreign Policy of the European Union: Assessing Europe's Role in the World*, 2010, p. 303; Thomas Carothers, 'Democracy Assistance: Political vs. Developmental?', in: 20(1) *Journal of Democracy*

promotion into an all-inclusive 'EU democracy promotion' basket and rarely approaches it as such. Although, important steps are made towards conceptualising the rule of law as a legal and political category particular for EU external relations.³ Focused on the EU approach to rule of law promotion, this article enriches our understanding of the EU as a rule of law promoter and contributes to both sets of scholarship.

The absence of a uniform rule of law conception upheld across EU external policies is reported unanimously in the few accounts to date. Relevant EU instruments rarely specify what the rule of law stands for, and if they do, these specifications are rather vague and inconsistent.⁴ Moreover, in EU external relations beyond enlargement, there is even less of a resemblance of a definition for the rule of law: there are no Treaty obligations and European Court of Justice (ECJ) judgements to rely on as in EU internal affairs and no *acquis communautaire* for the partner state to adopt as in accession contexts. Scholars conclude that the EU uses 'superficial, diverse and/or unconvincing definitions' of the rule of law,⁵ which is a failure and 'more an absence of a proper approach than a consciously vague approach'.⁶

Contrary to this, author's interviews with EU officials revealed that having no definition for the rule of law in external relations is actually *desirable* for the EU. Even more so, it is a *deliberate* decision, a *political* choice of the EU to leave this notion as open and vague as possible; *especially* in the domain of relations with third states.⁷ According to policy-makers, the EU never wanted, intended or sought

(2009), p. 5; Richard Youngs, 'What Has Europe Been Doing?', in: 19(2) *Journal of Democracy* (2008), p. 161; Jan Zielonka, 'Europe as a Global Actor: Empire by Example?', in: 84(3) *International Affairs* (2008), p. 471.

³Dimitry Kochenov, 'Behind the Copenhagen Facade: The Meaning and Structure of the Copenhagen Political Criterion of Democracy and the Rule of Law', in: 8(10) *European Integration online Papers* (2004), p. 1; Dimitry Kochenov, *EU Enlargement and the Failure of Conditionality: Pre-Accession Conditionality in the Fields of Democracy and the Rule of Law* 2008; Dimitry Kochenov, 'The EU Rule of Law: Cutting Paths through Confusion', in: 2(1) *Erasmus Law Review* (2009), p. 5; Dale Mineshima, 'The Rule of Law and EU Expansion', in: 24 *Liverpool Law Review* (2002), p. 73; Laurent Pech, 'Rule of Law as a Guiding Principle of the European Union's External Action', *CLEER Working Papers* 2012; Neil Walker, 'The Rule of Law and the EU: Necessity's Mixed Virtue', in Gianluigi Palombella and Neil Walker (eds.), *Relocating the Rule of Law* 2009, p. 119; Erik Wennerström, *The Rule of Law and the European Union* 2007; Nicole Wichmann, 'Promoting the Rule of Law in the European Neighbourhood Policy: Strategic or Normative Power?', in: 2 *Politique européenne* (2007), p. 81; Nicole Wichmann, 'The EU as a Rule of Law Promoter in the ENP', in Thierry Balzacq (ed.), *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security*, 2009, p. 111; Nicole Wichmann, *Rule of Law Promotion in the European Neighbourhood Policy: Normative or Strategic Power Europe?* 2010.

⁴Pech, 'Rule of Law as a Guiding Principle', at pp. 22-28.

⁵Pech, 'Rule of Law as a Guiding Principle', at p. 8.

⁶Wennerström, *The Rule of Law*, p. 293.

⁷Interviewees 14, 27, 33, 38, 39, 45, 46, 47, 48, 51 and 55. Here and in the rest of the article the words emphasised by Interviewees are in italics.

to have a definition for the rule of law, so it is of little use to speak of a failure on its part. A senior EU official even called such arguments ‘a myth made up by academics’.⁸ Such unwillingness of the EU to define the rule of law is rooted in an assurance that finding a uniform definition is either impossible or even more problematic than having none.⁹ A senior EU official expressed a particularly strong sentiment on the matter, having said that ‘defining the rule of law is almost ridiculous’.¹⁰ Like this, consciously or unconsciously, EU officials refer to what legal scholarship knows as the essentially contested nature of the rule of law concept and, moreover, admit the highly contested nature of the rule of law category in this particular instance of its application – EU external relations outside of accession.

While the absence of a formal rule of law definition might be regrettable, the EU pursues rule of law promotion policies in multiple countries regardless, and a large number of activities take place under this label. So how does the EU itself approach and frame the subject? This article conceptualises the EU approach to the rule of law as a legal and political category in EU external relations, specifically in the non-accession context. The analysis draws on a particular instance of the phenomenon: EU rule of law promotion in Ukraine. Empirical evidence reveals that the rule of law as used by the EU in relations with third states outside of accession has little to do with the essentialist legal-philosophical definitions of the concept. Instead, it constitutes an abstract ideal which frames the cooperation of the parties at the political level and a banner under which the parties realise a variety of activities at the practical level. This EU approach is deliberate and meant to allow for defining the rule of law in harmony with the parties’ integration ambitions, priorities and domestic institutional contexts.

The article proceeds as follows. After a note on method, the EU approach to rule of law promotion at the political and practical levels of cooperation are analysed in turns. The article concludes with a discussion of the implications of the findings for future research and policy.

⁸ Conference ‘On narrow paths and shallow waters? Discussing the substance of EU democracy promotion’, 25 January 2012, Brussels.

⁹ Similar arguments are made regarding the Organization for Security and Co-operation in Europe (OSCE) (Frank Evers, ‘OSCE Efforts to Promote the Rule of Law: History, Structures, Survey’, in: *CORE Working Papers* 2010, p. 1) and European jurisprudence (Martin Loughlin, ‘The Rule of Law in European Jurisprudence’, in *Studies of the European Commission for Democracy through Law (Venice Commission)*, 2009, p. 1).

¹⁰ Interviewee 38.

A NOTE ON METHOD

How does this study understand EU rule of law promotion? For the purpose of attributing rule of law promotion, the EU is conceived as an actor, and independent efforts of EU Member States outside of EU framework policies are excluded from analysis. As for the rule of law, this study admits the essentially contested nature of the concept and examines its continued use by a given actor in a particular instance.¹¹ Accordingly, this article examines the rule of law as a distinct legal and political category featuring in EU external relations in the non-accession context. Thereby, it upholds and reinforces three analytical distinctions made in the literature. First, 'the rule of law' as an EU legal and political construct shall be distinguished from widely diverging concepts found in the national legal systems of EU Member States. Second, 'the rule of law' as used in EU external policies shall be distinguished from a theoretical concept internal to the EU Community law. Third, as for 'the rule of law' category applied in EU external relations, meaningful differences exist between the accession and non-accession contexts.¹² 'Promotion' refers to EU policies and practices aimed at improving the state of rule of law application in a third country. It comprises not only traditional financial and technical assistance, but also diplomatic efforts and socialisation through membership in international organisations and people-to-people contacts.¹³ The objects of rule of law promotion are grouped into four categories: laws, institutions, power structure and social norms.¹⁴ Importantly, any object of promotion can be targeted by the EU through any method of promotion, in either combination and simultaneously. Finally, rule of law promotion evolves at the intersection of traditionally separate spheres of diplomatic action (to influence governmental actors) and development efforts (to augment institutional infrastructure and capacity), and it is important to distinguish and at the same time integrate the two.¹⁵ This study maintains a distinction between two levels of analysis, which correspond to two levels of bilateral cooperation: political and practical.¹⁶

¹¹ Walter Gallie, 'Essentially Contested Concepts', in: 56 *Proceedings of the Aristotelian Society* (1956), p. 167; Walter Gallie, *Philosophy and the Historical Understanding* 1968; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?', in: 21(2) *Law & Philosophy* (2002), p. 137.

¹² For the latest review of the relevant literature, see Laurent Pech, 'The Rule of Law as a Constitutional Principle of the European Union', *Jean Monnet Working Paper* 2009, p. 1; Pech, 'Rule of Law as a Guiding Principle'; Erik Wennerström, 'The Rule of Law in the European Constitution', in: 3 *Europarättslig Tidskrift* (2004), p. 351; Wennerström, *The Rule of Law*, p. 15.

¹³ Rachel Kleinfeld, *Advancing the Rule of Law Abroad: Next Generation Reform* 2012, Chapter 5.

¹⁴ Kleinfeld, *Advancing the Rule of Law*, Chapter 4.

¹⁵ Kleinfeld, *Advancing the Rule of Law*, p. 29.

¹⁶ The literature on EU engagement in third states emphasizes the fundamental differences between the two levels of cooperation. See Giselle Bosse, 'A Partnership with Dictatorship: Explaining the Paradigm Shift in European Union Policy Towards Belarus', in: 50(3) *Journal of Common*

This study investigates EU rule of law promotion outside of accession, more specifically – under the framework of the European Neighbourhood Policy (ENP). To focus the inquiry and reach the necessary level of detail, EU rule of law promotion in Ukraine is selected as a case study. The first reason for this choice is that EU–Ukraine relations unfold in the non-accession context, although Ukraine’s European aspirations require an increased level of commitment from both parties. The second reason is the empirical affluence of EU–Ukraine cooperation as one of the most elaborate relationships under the ENP, which provides sufficient evidence to explore and analyse. The third reason is the explicit positioning of Ukraine’s compliance with the rule of law as a crucial precondition for further EU–Ukraine integration, specifically for concluding the Association Agreement. Notably, case study is used instrumentally so as to learn something about the EU and its approach to rule of law promotion, not to learn something about EU rule of law promotion in Ukraine as such. The findings are thus relevant for EU rule of law promotion outside of accession in countries other than Ukraine and, to a lesser extent, for EU policies to promote values other than the rule of law.

The analysis draws on original empirical data collected through archival and field research, with elements of document analysis, in-depth qualitative interviewing and participant observation. In particular, I conducted 55 expert interviews and participated in 33 policy-oriented events in three locations (Brussels, Strasbourg and Kyiv) in the period September 2009–March 2013. The main category of respondents were officials at various EU institutions working on EU relations with third parties (ENP states) generally, including the European External Action Service (strategic planning, ENP sectoral and geographic coordination, multilateral cooperation, ENP/Ukraine desk officers); the European Commission (ENP/international relations officers at DGs for Development, Enlargement & Neighbourhood, Trade, Home and Justice); the Council of the EU (Secretariat, non-EU Europe); the European Parliament (parliamentarians from the Foreign Affairs Committee and foreign policy advisers to political groups); and officers from the EU Delegation to Ukraine. Additionally, I interviewed officials from the Council of Europe (CoE) (DG Human Rights and Rule of Law, the Venice Commission and the European Court of Human Rights); officers working on rule of law assistance projects implemented in Ukraine by the EU, the CoE, the OSCE, USAID

Market Studies (2012), p. 367; Tom Casier, ‘To Adopt or Not to Adopt: Explaining Selective Rule Transfer under the European Neighbourhood Policy’, in: 33(1) *Journal of European Integration* (2011), p. 37; Tina Freyburg, ‘Planting the Seeds of Change Inside? Functional Cooperation with Authoritarian Regimes and Socialization into Democratic Governance’, in: 8(1) *World Political Science Review* (2012), p. 1; Sandra Lavenex, Dirk Lehmkuhl, and Nicole Wichmann, ‘Modes of External Governance: A Cross-National and Cross-Sectoral Comparison’, in: 16(6) *Journal of European Public Policy* (2009), p. 813.

and private donors; and, finally, Ukrainian diplomats, officials and policy analysts as representatives of the receiving side.

A MYSTERIOUS SENSATION: APPEALING TO A SHARED UNDERSTANDING OF THE RULE OF LAW AT THE POLITICAL LEVEL

An understanding vs. a definition

In EU external relations, the rule of law is invoked for the purpose of cooperation, not confrontation, with third states. Cooperation in the non-accession context analysed here is essentially voluntary and beneficiary-driven.¹⁷ The EU is not in a position to impose anything, including a rule of law definition, on its partners and is not inclined to do so.¹⁸ In the context of cooperation with third states, the rule of law for the EU is effectively not about a definition and a uniform set of components (or any set of components, for that matter), but about the reliability of the partner and its readiness to advance in political and economic integration with the EU.¹⁹ As an European External Action Service (EEAS) official put it, ‘there must be trust in the system’.²⁰ Therefore, the EU conceives the rule of law in terms of an atmosphere in a state, an impression from the system’s outputs, a state of mind which one either shares or not.

In interviews, EU officials appealed to the existence of a common understanding, pre-conception of the essential, necessarily *un*-quantifiable, elements of the rule of law, with regard to which there is an overlapping consensus across various doctrinal conceptualisations.²¹ For example, an EEAS official commented that, ‘The rule of law starts up here [points at the temples]. It concerns the whole of the society... It is the *unquantifiable* thing. You just know it.’²² Another EEAS official said, ‘What is the rule of law, actually? What is it?! Nobody says! But surely you can imagine the essential elements’.²³ Knowingly or intuitively, EU officials appeal to the conceptual baseline on the rule of law. Whatever their nuances, conceptions of the rule of law all share one coherent directing idea: law should serve its social goals and coordinate social relations, minimise arbitrariness and provide order in a society. Although it remains unclear exactly which institutional configurations

¹⁷This is a common argument in the scholarship on EU external relations under the ENP.

¹⁸The above reasoning was emphasised by EU officials – Interviewees 31, 32, 33, 39, 40, 42, 44, 45, 46, 54.

¹⁹This argument transpires from the ENP and EU–Ukraine policy documents and was, moreover, made by both EU officials and Ukrainian diplomats (explicitly – by Interviewees 31, 39, 40 and 49).

²⁰Interviewee 31.

²¹Similarly, Wennerström, *The Rule of Law*, p. 15, speaks of *Vorverständnis* of the rule of law.

²²Interviewee 38.

²³Interviewee 33.

enhance the rule of law without fail, experience proves with a degree of certainty that the separation of power, judicial independence and a transparent legislative process are minimal essential elements.²⁴ Arguments on the existence of a consensus on the core meaning of the rule of law are advanced by the United Nations, the Council of Europe and the Venice Commission itself.²⁵ And a shared understanding of the meaning and value of the rule of law is said to exist among EU Member States.²⁶

The EU frames the rule of law around a certain overall impression and atmosphere in a state, a feeling of justice and law serving its social purpose. With the concerns over partners' reliability in mind, the rule of law is about a sensation stemming from the system and its outputs. The rule of law is a matter of a societal choice, as Commissioner for Enlargement and Neighbourhood Füle commented in Ukrainian context: 'If we have to have long arguments over every single possible reform law, and if we have differences of opinion about what an independent judiciary means, then it means that that choice hasn't been made.'²⁷ When the understanding of the rule of law is indeed common, agreeing on its precise components and steps that would move a country towards the ideal is a technical matter, not a sensitive political one.

A direction vs. a model

The EU does not propose a model of the rule of law to its partners, but indicates a direction in which the situation should be evolving. This is because of the reasons discussed above and because there is no such model to begin with. The EU exists at the intersection of different legal cultures of its twenty-seven Member States, who each have their own, equally valid, legal system and model to offer for the 'contest' on the EU rule of law conception.²⁸ Leaving aside a search for direct legal equivalents, even a uniform translation of the very term 'rule of law' into the relevant languages is barely possible.²⁹ An EU official commented plainly on this:

²⁴ For a pragmatic guide to the basic aspects of the rule of law, see Hague Institute for the Internationalisation of Law (ed.), *Rule of Law Inventory Report: Academic Part* 2007, p. 12; Brian Z. Tamana, 'A Concise Guide to the Rule of Law', in: 82 *Legal Studies Research Paper Series* (2007), p. 1.

²⁵ Paragraph 10 of the UN GA Resolution A/Res/67/1 (2012) on the Declaration of the High-level meeting on the rule of law at the national and international levels; PACE Resolution 1594 (2007) *The Principle of the Rule of Law*; Venice Commission Report on the Rule of Law (Study No. 512/2009) adopted on 4 April 2011.

²⁶ Interviewee 55, an EEAS official tasked with coordinating national pledges of EU Member States on the meaning of the rule of law for the purpose of drafting a joint EU pledge for a high-level meeting at the UN General Assembly in September 2012.

²⁷ Conference 'Ukrainian identity 20 years after independence', 12 December 2011, Brussels.

²⁸ For analysis of the legal cultures of EU Member States, see Volkmar Gessner et al. (eds.), *European Legal Cultures* 1996.

²⁹ Kochenov, 'The EU Rule of Law', at p. 14.

‘We consist of 27 Member States, and all of them have their own unique, perfectly credible, functioning rule of law model. It is not our intention to be comparing and concluding which one is *the* one.’³⁰ If it would ever become the intention, the task would be virtually impossible to accomplish politically: there are too many centres of gravity and veto players involved.³¹ This exercise would succeed merely in taking up time and resources and, as another EU official remarked: ‘honestly, on a subject like this, I would not even open a discussion’.³²

EU policy documents bring out the ultimate condition of a state system, without necessarily going into particularities and especially without insisting on those. For the EU, it is important that law reigns in a society, and which particular institutional configurations would enhance the rule of law remains to be seen in line with partner’s domestic institutional context. The partner state is welcome to choose an EU Member State as a point of reference for its reforms. However, *which* model a country follows is not really a question of principle, provided one arrives at an output of designated quality. As a Ukrainian official commented: ‘The technical details... they are put in the most general way, in order simply to indicate a direction, “Guys, your system... let’s say, your judicial system... should create a *sensation* like this. We can give you a tip on how it works with us, but you might as well do it in any other way; provided that on the *output* you arrive at *this*”’.³³

The task (to be pursued at the practical level) is to assist a country in conducting reforms towards an improved rule of law application. Practitioners from both sides are more focused on the content. As a Ukrainian expert with 10 years of experience in external rule of law assistance commented:

‘Our task here is not to take a particular definition and follow it. Our task is to help carry out legal reforms which in the end should lead to the implementation of this principle in the relevant spheres: constitutional, administrative, criminal law and so on. Therefore, don’t pull the wool over your eyes with questions like “how do you understand the rule of law?” An international organisation never bothers with legal definitions, even if it is about its programming activity. The focus is always on the operationalisation.’³⁴

Whether a partner state copies any of the 27 models of EU Member States is even less a matter of principle in the non-accession context, which this study explores. Here, the partner is not obliged to implement the whole of the EU *acquis*: ensuring minimal compatibility, interoperability and guarantees to European citizens and businesses suffices. Therefore, the EU operates widely with international stand-

³⁰ Interviewee 48.

³¹ Interviewees 27, 38, 39, 46, 47, 48 and 55.

³² Interviewee 46.

³³ Interviewee 49.

³⁴ Interviewee 11.

ards. Throughout EU instruments, references to ‘international standards’, ‘universal’ or ‘common European’ values, as well as the Council of Europe and the OSCE are much more frequent than references to any sort of ‘EU values’.³⁵ The rule of law itself is often presented in universalistic and not community terms.³⁶

Negative vs. positive reasoning

An important quality of the rule of law is that not only its presence has the potential to make a positive difference, but also its absence can make a negative difference. This premise manifests itself in the EU approach in two ways: a noticeable inclination of politicians and practitioners to make arguments using a counterpoint and the qualification of partner’s effective commitment to the rule of law as a precondition for advancing its relationship with the EU.

EU officials often used a counterpoint when making an argument on the rule of law record of a country. Their claims can be reduced to the following: we know when the rule of law is *not* there better than we know when it *is*. This feeds back into the conceptualisation of the rule of law: we might not be able to say what the exact attributes of the rule of law are, but we know how things should not be if the rule of law is in place. Clarifying what the rule of law is not can be a good starting point for determining the minimum requirements common to different understandings of the rule of law and, eventually, specifying what the rule of law would be in a concrete context. The 2011 *Report on the Rule of Law* by the Venice Commission does precisely this: it highlights that a consensual understanding of the essence of the rule of law is to be distinguished from a distorted, purely formalistic, understanding of the rule of law as ‘rule by law’, ‘rule by the law’ or even ‘law by rules’.³⁷ The latter variations are found in some former socialist countries, including Ukraine. In the EU context, ‘we can be certain of at least one thing: an oppressive legal order cannot satisfy the EU’s understanding of the rule of law’.³⁸

The problem with negative reasoning is that, in practice, a lot of instances fall in between. Until the Tymoshenko trials brought to the surface systemic shortcomings in the application of the rule of law in Ukraine, one could argue that Ukraine was such an instance. As a senior EEAS official commented:

³⁵ The above argument is based on the analysis of the ENP and Eastern Partnership policy documents, as well as EU documents for Ukraine (Action Plans, Association Agendas, Lists of Priorities for cooperation and others).

³⁶ Walker, ‘The Rule of Law and the EU’, at p. 136.

³⁷ Pieter van Dijk et al., ‘Report on the Rule of Law’, in *Studies of the European Commission for Democracy through Law (Venice Commission)*, 2011, at pp. 4-5. PACE Resolution 1594 *On the Principle of the Rule of Law* suggested the same point already in 2007.

³⁸ Pech, ‘Rule of Law as a Guiding Principle’, at p. 27.

‘Because of course in reality ... a lot of instances fall in between, when you are wondering: so is it the rule of law or is it not?! And this is what we have to deal with in Ukraine a lot, and we disagree with the Ukrainian government often... The rule of law – well, it is not respected in countries like Burma and North Korea; but what about the countries in between? “It is *largely* working fine”. Yes, “largely” it is working. But it is still not working!’³⁹

Here the second manifestation comes into play. The EU positions the rule of law as a fundamental, key principle for the EU and its Member States, and the effective commitment of the partner state to common values is what allows a partnership to become a ‘privileged’ one.⁴⁰ A convincing positive rule of law record is a precondition for a closer integration with the EU, because the level of rule of law compliance is viewed as an indicator of partner’s (un-)reliability and (un-)readiness to advance on the integration path. This was emphasised also in interviews. An EEAS official commented that, ‘if we get signals that certain – for us *key* – principles, like the rule of law, are not respected, then we become worried about what we can expect from Ukraine as a partner’.⁴¹ She continued saying that:

‘We need to see more proof that values are taken seriously. And I think with the rule of law it is a good example... It is a precondition. I mean, which European companies are going to want to invest in Ukraine, where on paper, OK, some approximation has been done, but at the same time there is so much uncertainty about the rules of the game, and they can change, and challenging government decisions in court is... you know, may not lead to you getting a sort of fair trial or recourse... The rule of law is *so* fundamental, you can’t, you cannot go forward economically if you don’t have these issues under control.’⁴²

The rule of law is put to the forefront in EU reactions to recent political developments in Ukraine. The European Parliament’s Resolutions on Ukraine of 27 October 2011 and 1 December 2011 stress that the current state of rule of law application in Ukraine is ‘at odds’ with the rule of law principle and remedying the current situation is a precondition and a prerequisite for moving forward with Ukraine’s European integration. More strongly, Council Conclusions on Ukraine of 10 December 2012 state that ‘Ukraine’s performance’ (to be assessed on the basis of progress regarding selective justice) ‘will determine the pace of engagement’ and there will be no signature of the Association Agreement if the progress is insufficient.

³⁹ Interviewee 38.

⁴⁰ Arts. 2, 21 of the TEU; ENP Strategy paper 2004, p. 13; Eastern Partnership Communication 2008, p. 5.

⁴¹ Interviewee 39.

⁴² Interviewee 39.

The rule of law usually becomes an issue in the EU-third party relations when it is not (sufficiently) applied in the partner state. If the rule of law record of a country is positive, the issue does not need to be emphasised additionally; while if it is negative, things quickly become problematic. Moreover, as a senior EU official emphasised, ‘the more interaction there is, the more seriously these issues are taken into account’.⁴³ The degree of concern with the rule of law depends on the level of integration ambitions of the parties. The recent acute concern of the EU with the state of rule of law application in Ukraine is understandable in the light of the parties’ intention to conclude an Association Agreement. Overall, resting on a common pre-understanding of what the rule of law essentially is and on the ability to discern instances in which the rule of law is clearly missing, the EU approach has to rely on the rule-of-law instinct of individuals driving the policy; an interesting direction for further investigation beyond the scope of this article.

ALL ROADS LEAD TO ROME: SUBSTANTIATING THE RULE OF LAW AT THE PRACTICAL LEVEL

Deliberate variation by country and by policy area

The EU substantiates the abstract rule of law ideal that frames bilateral cooperation at the political level by defining its relevant components for each particular country and policy area for the purposes of practical cooperation. An EU official referred to this practice as ‘taking a differentiated, consensual approach to the definition’.⁴⁴ Given the show-direction approach of the EU, exactly which practical steps would lead a country in the direction of the ideal is to be decided on a case-by-case basis. Moreover, even such substantiation of the rule of law at the practical level is an intermediate step. An EU official was rather straightforward on this, having said, ‘Well, the ENPI and all respective documents are *indicative*. “National Indicative Programme”. The name says it all.’⁴⁵ In the EU policy-making mechanism, one needs to set at present priorities for cooperation in the medium- or long-term future. Since it is impossible to oversee how things will evolve, these priorities, objectives, indicators can be neither sufficiently concrete nor set in stone. EU officials stressed this mediating factor, as the following: ‘But to be very honest with you... you can’t sit in 2009 and make very detailed indicators. It is just not realistic. I mean, it is an *indicative* program and for a country [Ukraine] where things

⁴³ Interviewee 46.

⁴⁴ Interviewee 48.

⁴⁵ Interviewee 44.

change *a lot*... So, if you look at the objectives, the expected results, you get the feeling for the *direction* that we from here are pointing out.⁴⁶

Importantly, the exercise of defining the rule of law by its institutional attributes and facilitating the establishment of a particular set of institutions through development cooperation is viewed by the EU instrumentally – as means to achieve the political ideal of the rule of law, defined by the values, goals, purposes it is to serve in a society. In other words, an institutions-based approach to the rule of law at the practical level is an integral element and a necessary practical step in the essentially ends-based approach of the EU to rule of law reform overall.

The EU approach to assessing rule of law compliance is similar. An institutions-based rule of law conception, developed for a particular country and policy area, provides benchmarks for interim, technical progress evaluation. However, an ends-based rule of law conception remains an ultimate point of reference for assessing partner's compliance and, eventually, its readiness for closer political and economic integration with the EU. Given the limitedness of its own resources and expertise, the EU relies on the assessment products of other inter- and non-governmental organisations. Reports by the Council of Europe and the OSCE, Freedom House (political and media freedom, civil rights), World Bank Worldwide Governance Indicators (the rule of law), Transparency International (corruption), World Justice Project Rule of Law Index, Bertelsmann Transformation Index, to name a few, are used as proxies for partner's performance on the basic rule of law elements.⁴⁷ In any case, under the current Treaty provisions, EU Member States are free to take a political decision on more or less integration with a partner state, and even a uniform rule of law conception would not change that.

Such a reality – the absence of uniform rule of law conception and an abstract political ideal substantiated on a case-by-case basis – has been problematised in the earlier studies. It is generally considered to hamper EU rule of law promotion, and the absence of a clear reference point for compliance assessment is of major concern. On the one hand, the situation is viewed as beneficial and even empowering for the EU, for it reinforces the scope for a final political decision on rule of law compliance. On the other hand, the situation is viewed as detrimental for the EU, for it exposes the EU to accusations of double-standards and challenges the legitimacy, credibility and effectiveness of its rule of law promotion.⁴⁸ Some

⁴⁶ Interviewee 39. Also Interviewees 44, 46, 47 and 54.

⁴⁷ For the analysis of different rule of law indices, see Wolfgang Merkel, 'Measuring the Quality of Rule of Law: Virtues, Perils, Results', in Michael Zurn et al. (eds.), *Rule of Law Dynamics: In an Era of International and Transnational Governance*, 2012, p. 21.

⁴⁸ Marise Cremona, 'The European Neighbourhood Policy: Legal and Institutional Issues', *CDDRL Working Papers* (2004), p. 1; Kochenov, 'Behind the Copenhagen Facade', at p. 23; Paivi Leino and Roman Petrov, 'Between "Common Values" and Competing Universals: The Promotion of the EU's Common Values through the European Neighbourhood Policy', in: 15 *European Law*

scholars even argue that the EU approach is a violation of the rule of law principle itself.⁴⁹ At the same time, such an EU approach has also its advantages, especially outside of accession. It suits the essentially contested nature of the rule of law concept in principle and in the studied political context. It allows the EU to inform the rule of law in harmony with the domestic institutional context of its partners and in line with the parties' ambitions and priorities. Eventually, it allows the EU to be more flexible, responsive and targeted in its (development) cooperation with third states through determining the institutional attributes of the rule of law in function of the rule of law end-goals in relation to the institutional context at hand. EU rule of law conceptions across cases are *meant* to have different emphases, components and strengths. Thus, it is practically by definition that researchers find different issues mentioned under the rule of law in EU cooperation with different countries or even with the same country at different points in time.⁵⁰

The many faces of the rule of law

Various EU instruments give individual meaning to the rule of law concept and bring its different components or institutional attributes to the forefront. In the promotional dimension, the rule of law is something to be disseminated for either or any combination of the four purposes: regulation, authorisation, identification and instrumental purpose.⁵¹ This sub-section analyses the variations of rule of law conceptions in ENP/Eastern Partnership policies generally and EU-Ukraine relations specifically in order to identify the purposes the rule of law ideal is put to serve.

The rule of law serves an identification purpose when it is 'claimed and portrayed as a defining virtue' of a polity or a community.⁵² The rule of law in the capacity of a founding value of the EU, a common value to be shared by partner states, a precondition for a closer relationship with the EU and ultimately membership in the Union serves an identification purpose. This use-value of the rule of law is highlighted forcefully in the TEU and ENP documents, as well as in every document on EU-Ukraine bilateral relations. Although there is a lot of scepticism about the emphasis the EU places on its identity and the role of values in defining it, the identification use-value of the rule of law was raised frequently by representatives of both the EU and Ukraine.⁵³ Failure on the Ukrainian side to acknowledge the

Journal (2009), p. 654, at p. 670; Mineshima, 'The Rule of Law and EU Expansion', at p. 85; Pech, 'Rule of Law as a Guiding Principle', at p. 12; Wennerström, *The Rule of Law*, p. 292.

⁴⁹ Wennerström, *The Rule of Law*, pp. 292, 307.

⁵⁰ For example, Pech, 'The Rule of Law as a Guiding Principle', at p. 22, and Wennerström, *The Rule of Law*, p. 157.

⁵¹ Walker, 'The Rule of Law and the EU', at p. 124.

⁵² Walker, 'The Rule of Law and the EU', at p. 124.

⁵³ Interviewees 32, 38, 39, 49 and 51 and EU officials in public meetings and discussions.

real meaning and significance of values for progress in EU-Ukraine relations is said to constitute a fundamental problem. A senior EEAS official with long-lasting experience of working with Ukraine commented that:

‘If I look at the fundamental thread in our discussion, it is values. And the fact that values genuinely matter. That they are not camouflage for something else. I think Ukrainian government and many Ukrainians may also think that way: that the EU talks about values because we don’t really want to have Ukraine integrated, so it is a good excuse. (...) I think this is the fundamental thing where Ukrainians do not understand what the EU really is. It is a community of values. It is something where a Ukraine which does not meet the value criteria is not a Ukraine we can have, because it is not foreign policy, the EU is not foreign policy, it is domestic politics! One rotten apple in a basket...’⁵⁴

Similarly, a Ukrainian diplomat expressed a degree of personal concern and disappointment about the fundamental misunderstanding in the Ukrainian government: ‘There are *no* common values with Ukraine... And these are *the key*. Which, by the way, our decision-makers in Ukraine persistently fail to understand: that the material side of the question is *not* decisive! The *ideational* side is!’⁵⁵

Invoked for the identification purpose, the rule of law remains an abstract political ideal, as analysed in the previous section, and no rule of law components are specified.

Authorisation and regulatory functions of the rule of law are utilised by the EU actively. The authorisation dimension of 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; whereas the regulatory dimension stands for the understanding of the rule of law as a ‘meta-rule’ about the principal significance of legal rules for a polity.⁵⁶ Both use-values view the rule of law as an end in itself. In a politico-legal way, the EU uses the rule of law as an assertion of ‘the rule of law, not men’. Conceived in this way, the rule of law is linked to fighting impunity and eliminating the abuse of power by those holding it. The emphasis falls on the separation of power, due process and equality before law, with ‘the rule of law administered by an independent judiciary and a right to a fair trial’.⁵⁷ From the onset, the indispensable priorities and strategic goals of EU engagement in Ukraine have been the emergence and consolidation of a stable, open and pluralistic democracy;⁵⁸ well-functioning, independent, impartial, effective and efficient

⁵⁴ Interviewee 51.

⁵⁵ Interviewee 49.

⁵⁶ Walker, ‘The Rule of Law and the EU’, at pp. 120, 122.

⁵⁷ ENP Review 2011, p. 4.

⁵⁸ PCA 1994, Preamble, Article 2; Common Strategy 1999, p. 1; Action Plan 2005; Revised FSJ Action Plan 2007; Association Agenda 2009; Country Strategy Paper 2007-2013.

judiciary and law enforcement institutions (police, prosecution and penitentiary systems, professional bar association);⁵⁹ and meritocratic, well-trained public administration at national, regional and local levels.⁶⁰

So, in its authorisation use-value, the rule of law as promoted by the EU in Ukraine has three manifestations. First, it features in relation to the constitutional reform and the conduction of free and fair elections in Ukraine, necessary for the democratic organisation of power. The EU has made diplomatic efforts and committed technical assistance to foster development or revision of the relevant legislation and practices, in cooperation with the Council of Europe, the Venice Commission and the OSCE. Second, perhaps most candidly and frequently, the rule of law appears and is understood in relation to the functioning of the system of justice.⁶¹ Judicial reform is the favourite target of rule of law promotion efforts due to its 'pivotal position in legal system'.⁶² Over the years, the EU has allocated substantial technical assistance to the reform of the judiciary and law enforcement institutions in Ukraine.⁶³ This assistance targets the legislative frameworks and administrative capacity of the relevant institutions and, ultimately, aims to change the existing power structure and social norms. Finally, the EU connects the rule of law with good governance and institutional development, and assistance is provided to reforming public institutions and procedures at the national, regional and local level in order to improve their stability, efficiency, transparency, accountability, certainty, clarity, consistency and continuity.⁶⁴

As for the regulatory use-value, the EU links the rule of law to culture and civil society and communicates a need for a change of mentality with respect to the value of individual and the social meaning of law and state. The idea that 'the rule of law starts up here' (in the mind) was highlighted during the interviews, by

⁵⁹ Each programming document since the Common Strategy 1999, including specialised documents like JHA Action Plans 2001/2007 and Visa Liberalisation Action Plan 2010.

⁶⁰ PCA 1994; Common Strategy 1999; Action Plan 2005; Association Agenda 2009; National Indicative Programmes (NIP) 2000-2003, 2004-2006, 2007-2010, 2011-2013.

⁶¹ Country Strategy Paper 2007-2013 and National Indicative Programme 2007-2010 identify 'Rule of law and judicial reform' as a separate sub-priority. National Indicative Programme 2011-2013 speaks of the functioning of the judiciary as the first sub-priority in the area of good governance and the rule of law.

⁶² Brian Tamanaha, 'The Primacy of Society and the Failures of Law and Development', in: 44 *Cornell International Law Journal* (2011), p. 209, at p. 222.

⁶³ The reform of the judiciary is always in EU action programmes for Ukraine. It received special emphasis in Annual Action Programmes (AAP) 2003, 2005 and 2010.

⁶⁴ The reform of public institutions features under 'institutional, legal and administrative reform' in NIP 2000-2003 and NIP 2004-2006, 'regulatory reform and administrative capacity' in NIP 2007-2010 and 'good governance and the rule of law' in NIP 2011-2013. It can be found in all AAPs, respectively. Since 2004, assistance programmes are tied to support for implementation of the key working document in place: PCA 1998 (AAP 2004), Action Plan 2005 (AAPs 2006-2009), Association Agenda 2009 (AAPs 2010 part 1, 2011 part 1, 2012 part 1).

both EU officials and Ukrainian experts. Ultimately, the rule of law in this capacity translates into the primacy of human rights and fundamental freedoms and the balance in the relationship between the people and the state.⁶⁵ To this end, the EU provides assistance to the protection and popular awareness of human rights and fundamental freedoms, human development and the empowerment of various elements of civil society. As with the constitutional reform, the Council of Europe is the specialised international organisation, and the EU grants it full support.⁶⁶

The instrumental use-value of the rule of law features on the EU rule of law promotion agenda for Ukraine prominently. The rule of law functions instrumentally when it is being understood as a means to other ends rather than an end in itself.⁶⁷ The major linkages exist between the rule of law and democracy, economic development and security. These are said to form 'a *matreshka* in which all dolls are the same size and you never know which one should be at the core'.⁶⁸ Democracy and the rule of law come as one criterion, priority or sector of cooperation most frequently. The linkage between the two is regarded as a result or a sign of their 'essential complementarity and interdependence'⁶⁹ insofar as the two are 'interconnected and interdependent' principles⁷⁰ unified in 'an organic combination'.⁷¹ There is no clear causality between the rule of law and democracy built into the policies by the EU or reported in the literature. Remarks of a different kind are made. First, the rule of law is a latecomer in the field where democracy has been long established.⁷² Second, a sequence can be observed in EU practices in the accession contexts: whereas democratic processes are emphasised prior to the opening of accession negotiations, the rule of law criterion gets a priority once the negotiations are underway.⁷³ These hold in the case of Ukraine: the rule of law concerns appeared later than concerns with democracy and market economy, and the negotiations of the Association Agreement had a comparable effect on the definition of priorities as suggested for accession negotiations, for the

⁶⁵ PCA 1994, Preamble and Art. 6; Common Strategy 1999, p. 2; Action Plan 2005 and Association Agenda 2009, sections on Democracy, rule of law, human rights and fundamental freedoms.

⁶⁶ Thus, various international and European human rights instruments are mentioned across EU-Ukraine cooperation documents. Support to civil society and NGOs is a separate priority sub-area for EU assistance in NIP 2002-2003 and NIP 2004-2006 and features in AAPs 2000-2004.

⁶⁷ Walker, 'The Rule of Law and the EU', at p. 123.

⁶⁸ Nathalie Prouvez, Chief of the Rule of Law Section at the United Nations Office of the High Commissioner for Human Rights, conference 'Chinese and European Perspectives on the Rule of Law and International Law', 12 December 2012, Brussels.

⁶⁹ Marise Cremona, 'Values in the EU Constitution: The External Dimension', in: *CDDRL Working Papers* (2004), p. 1, at p. 4.

⁷⁰ Pech, 'Rule of Law as a Guiding Principle', at p. 13.

⁷¹ Kochenov, 'Behind the Copenhagen Façade', at p. 11.

⁷² Pech, 'Rule of Law as a Guiding Principle', at p. 11.

⁷³ Wennerström, *The Rule of Law*, p. 216.

potential of a much closer integration brought the rule of law concerns to the forefront.

The rule of law is positioned often as a precondition for economic and social development. 'The Union considers that the rule of law is a prerequisite for the development of a functioning market economy'.⁷⁴ The level of rule of law compliance is linked to business and investment climate, while promoting the rule of law is presented as 'an instrument for investment promotion and protection'.⁷⁵ A political, regulatory and trading framework that enhances economic stability and institutionalises the rule of law is said to increase Ukraine's attractiveness to investors, reduce its vulnerability to external shocks and stimulate job creation. Good performance on the rule of law account is a precondition for a privileged relationship with the EU, and economic integration is of primary concern here. Such practical, instrumental value of the rule of law for establishing closer economic ties with the EU underlies virtually all cooperation documents and was highlighted by EU officials.⁷⁶ In practice, promotion of the rule of law as a precondition for economic and social development is about legislative adaptation to ensure interoperability or minimal compatibility of institutional structures, procedures and standards in Ukraine and the EU,⁷⁷ and the EU provides substantial technical and financial assistance to this end.⁷⁸

Finally, the EU uses the rule of law instrumentally based on the linkage between the rule of law and stability and security.⁷⁹ The promotion of democracy, human rights and the rule of law throughout the neighbourhood is meant to contribute to stability in and around the EU. Like all of the above, this use-value of the rule of law has been present since the very inception of EU-Ukraine relations and is reflected already in the Partnership and Cooperation Agreement (PCA) of 1994. However, it gains real substance with the EU enlargement to the East, the need to prevent spill-over of crime and illegal migration from Ukraine and the adoption

⁷⁴ Common Strategy 1999, p. 2.

⁷⁵ Wider Europe Communication 2003, p. 13.

⁷⁶ The linkage between the rule of law and economic development is particularly bright in the Wider Europe Communication 2003 and is present (albeit less central) in all ENP policy papers. Also Interviewees 31, 39, 40, 45 and 46.

⁷⁷ Interviewee 34.

⁷⁸ Assistance for legislative adaptation forms part of the broader institutional and legal reform and concerns primarily support in identifying and translating relevant EU legislation and drafting Ukrainian equivalents. The former concerns general regulatory aspects (e.g., financial regulations, statistics or antimonopoly regulations) and sector-specific regulatory aspects (e.g., sanitary and phyto-sanitary standards for food products).

⁷⁹ Some authors place the biggest emphasis on this dimension, for example: Cremona, 'The European Neighbourhood Policy: Legal and Institutional Issues', at p. 1; Cremona, 'Values in the EU Constitution'; Marise Cremona, 'Values in EU Foreign Policy', in Malcolm Evans and Panos Koutrakos (eds.), *Beyond the Established Orders: Policy Interconnections between the EU and the Rest of the World* 2011, p. 275; Wichmann, *Rule of Law Promotion*, pp. 215-219.

of the Justice and Home Affairs (JHA) Action Plan in 2001.⁸⁰ The rule of law in this capacity is associated with border management and document security, migration and asylum, fighting organised crime (including money laundering and trafficking in human beings, weapons and drugs), fighting corruption, cooperation on the matters of criminal and civil justice.⁸¹ The cooperation in this sector is focused, and EU assistance is substantial and advanced.⁸²

So, all four rule of law use-values are employed by the EU simultaneously. Importantly, there is no formal normative hierarchy among the use-values (and rule of law conceptions) asserted by the EU and no hidden normative hierarchy apparent from the above analysis. Moreover, the EU openly utilises the instrumental use-value of the rule of law. This study asserts that the ability of the rule of law to serve other ends and be useful from an instrumental perspective makes it only more valuable, not less. Therefore, the fact that the EU uses the rule of law for its ability to serve other ends does not mean that the EU compromises the rule of law for other benefits or fails to appreciate its true value. To the contrary, it demonstrates that the EU recognises the complex role of the rule of law for state and society and reinforces it on the agenda accordingly.

A cross-cutting issue

The rule of law as a legal and political category in EU external policies is a cross-cutting issue and hence ‘unavoidable’. Due to the many use-values it can serve and is put to serve by the EU, the rule of law (or rather partner’s compliance with the rule of law) is relevant for virtually any EU policy area and sector of bilateral cooperation; a point stated explicitly in some EU documents⁸³ and emphasised repeatedly in the interviews.⁸⁴ As an EEAS official commented: ‘Well, it is difficult to see good governance and rule of law as a “sector”, because elements of these are present in everything we do.’⁸⁵ ‘We see values as super-linked and inseparable, and they all feature through each other’, another EU official stated.⁸⁶ Edric Selous, Director of the Rule of Law Unit in the Executive Office of the UN Secretary-

⁸⁰ Richard Whitman and Stefan Wolff (eds.), *The European Neighbourhood Policy in Perspective: Context, Implementation and Impact* 2010, pp. 4-5.

⁸¹ PCA 1994, Preamble, Art. 6; and specifically JHA Action Plan 2001; Revised FSJ Action Plan 2007; Visa Liberalisation Action Plan 2010.

⁸² The security dimension does not feature in NIP 2000-2003. However, upon the adoption of JHA Action Plan 2001, border management appears as a prominent area in AAP 2002 and is included in NIP 2004-2006. From 2002 onwards, JHA matters are firmly on the agenda, and substantial funds are allocated in each AAP.

⁸³ The rule of law is positioned as a cross-cutting issue in the most recent programming document, NIP 2011-2013 (p. 27).

⁸⁴ Interviewees 14, 31, 32, 38, 39, 40, 45, 46, 47, 51 and 55.

⁸⁵ Interviewee 39.

⁸⁶ Interviewee 46.

General, compared the rule of law to gravity, having said that both are ‘the invisible force that keeps everything in balance’.⁸⁷ Implicitly, policy-makers appeal to the connectedness of law principle: law is connected to every aspect of society.⁸⁸ The rule of law is an unavoidable issue in EU external policy: just as ‘all roads lead to Rome’, everything leads to the rule of law, even when it is not mentioned in the text directly. According to an EU official from a thematic DG, the rule of law is a *de facto* element of any cooperation: ‘For the rule of law there is no definition. It is everything, it is too big, it is too broad. It includes a million of things... So the rule of law is not mentioned in our text as a separate priority or condition. But the thing is: you come down to it all the time. Everything leads to it. You could say that *de jure* it is not a condition, but *de facto* it is.’⁸⁹

The assertion that the rule of law is essentially behind everything the EU does, even if not mentioned under its own name in cooperation documents, challenges mechanical extrapolations of rule of law conceptions based solely on rule of law references in the documents and requires more qualitative, necessarily contextual reading of the texts.

CONCLUSION

This article conceptualised the EU approach to the rule of law as a legal and political category in EU external relations with third states outside of accession, drawing on a particular instance – EU rule of law promotion in Ukraine. The main finding of empirical research is that the rule of law in the said context has little to do with the essentialist scholarly definitions of the concept. Instead, it constitutes an abstract ideal which frames the relationship of the parties at the political level (with appeals to the existence of a shared understanding of this ideal and the multiple use-values it may serve in a society) and a banner under which the parties realise a variety of activities at the practical level (with concrete institutional attributes identified for the country and policy area at hand in function of the said use-values). The idea behind such an EU approach is to allow for the substantiation of the concept in harmony with domestic institutional contexts of its partners and in line with the parties’ ambitions and priorities. In practice, in the promotional dimension, the EU invokes all four rule of law use-values (identification, authorisation, regulation and instrumental), thus reflecting multiple motivations of the parties and the cross-cutting nature of the rule of law. Overall, the EU approach is composite or holistic: in external relations with

⁸⁷ Conference ‘The Chinese and European perspectives on the rule of law’, 12 December 2012, Brussels.

⁸⁸ Tamanaha, ‘The Primacy of Society’, at pp. 214, 224, 232.

⁸⁹ Interviewee 47.

non-accession states, the EU applies the rule of law in whatever way the latter may be useful and valuable, in order to reach the ultimate end-goal: make the partner more reliable and ready to advance in integration with the EU, thereby minimising risks from such integration for European citizens and businesses. Through diplomatic efforts and technical and financial assistance provided under the umbrella of rule of law promotion, the EU seeks to target all four objects of rule of law reform: laws, institutions, power structure and professional and popular social norms. However, the major attention and support are devoted to changing legislative frameworks and institutional capacity.

These findings contribute to the understanding of the EU as a rule of law promoter and have a number of implications for future research and policy. First, the above means that while the EU rule of law conception is indeed fluid at the general level – across countries and at the abstract political level, it is quite concrete at the specific level – within a particular bilateral relationship and for a certain area of practical cooperation. Formulating a case-specific institutions-based rule of law conception is an integral element and a necessary practical step in the essentially ends-based approach of the EU to rule of law promotion and reform. This explains how the EU manages to pursue rule of law promotion policies regardless of the absence of a uniform definition of the phenomenon promoted. It also implies that the EU is coherent in its approach to promoting the rule of law abroad, whereas the variation in the content of this promotion is inherent to the design of the approach. Such knowledge modifies one's understanding of (in)coherence and (in)consistency in EU external policies and encourages within-case analysis as a method suitable for studying the substance of EU rule of law promotion.

Second, the above reaffirms that what the EU does under rule of law promotion is similar to what other rule of law promoters do and have been doing for decades: external support to internal legal and institutional reform. Moreover, conceptualising the rule of law is a primary (and a permanent) challenge for all rule of law promoters worldwide, whether these are individual states, inter- or non-governmental organisations, and is not unique for the EU. A comparison of the EU to other actors deserves a separate investigation and is beyond the scope of this article.⁹⁰ However, this study does challenge the analyses of the EU as a *sui generis* development actor, which can be found in the rather insular European studies scholarship. Outside of accession, the peculiar 'transformative power' the EU is believed to have over the acceding states is missing. The common mechanisms of legal change and external stimulus to internal reform are at work, while EU efforts are subject to the usual challenges to rule of law promotion. Therefore, EU value

⁹⁰ For a recent comparative study of a kind, see Frank Schimmelfennig, 'A Comparison of the Rule of Law Promotion Policies of Major Western Powers', in Zurn et al. (eds.), *Rule of Law Dynamics*, p. 111.

promotion in the neighbourhood and beyond should be analysed as part of broader global phenomena, and further integration between the scholarship on the EU and the wider literature on legal change, development and domestic transformation is needed. With regard to future EU development policies, this study encourages the EU to learn more actively and deliberately from the experiences and mistakes of other development actors.

Finally, the EU approach to rule of law promotion as conceptualised above has its advantages and disadvantages. On the one hand, and this is the dominant interpretation in the European studies scholarship, the absence of a uniform EU rule of law conception undermines the legitimacy, credibility and eventually effectiveness of EU rule of law promotion. On the other hand, in line with the growing criticism of rule of law promoters worldwide for being oriented too much at institutions and too little at end-goals of the rule of law, one could argue that the EU is ambitious in its approach and agenda. In the last decade, scholars and practitioners stress the need for the rule of law promotion enterprise to move away from an institutions-based approach to rule of law reform (which defines the rule of law through its institutional attributes and views establishing a particular set of institutions as a goal in itself) and towards an ends-based approach (which defines the rule of law by the value, goals, end-purposes it is to serve in a society and so views institutional change instrumentally as means to achieve ends). The latter accounts for the social, the contextual, the cultural and thus is prone to be more effective and successful.⁹¹ The EU approach to rule of law promotion is just that: it is holistic, context-sensitive and has at its core the ideal, the end-goals of the rule of law, not its institutional attributes. Therefore, the current EU approach, which is often interpreted as inappropriately vague and incoherent, might as well be understood as a more ambitious approach and even as the way forward for the development field overall.

The conceptualisation of the EU approach to rule of law promotion offered in this article can be generalised widely: the suggested holistic understanding to a large extent holds for the EU approach to advancing values other than the rule of law (the ideals of democracy and good governance, for instance), as well as for the EU approach to fostering values in countries other than Ukraine (within the non-accession political context and beyond). Further empirical research should verify the scope conditions of the conclusions drawn in this article and their generalisation limits.

⁹¹ HiiL, *Rule of Law Inventory Report*, p. 30; Rachel Kleinfeld, 'Competing Definitions of the Rule of Law', in Thomas Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*, 2006, p. 31, at pp. 33-34; Kleinfeld, *Advancing the Rule of Law*, Chapter 1; Kerry Rittich, 'The Future of Law and Development: Second-Generation Reforms and the Incorporation of the Social', in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development: A Critical Appraisal*, 2006, p. 203.