

# Variation in EU External Policies as a Virtue: EU Rule of Law Promotion in the Neighbourhood

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## Abstract

The scholarship on European Union external relations ties good performance to enhanced coherence across EU policies, often understood as uniformity, and interprets any sign of variation as incoherence and double standards. This article challenges the virtuousness of such uniformity in the case of EU rule of law promotion in the neighbourhood and examines the parameters of the possible and the necessary. The findings reveal that variation in EU rule of law conceptions is inherent to the EU approach and inevitable due to the nature of the rule of law concept and the studied political context. Moreover, this variation in itself does not entail incoherence of EU rule of law promotion, as a shared understanding of the core meaning of the rule of law frames EU efforts across cases, and is even desirable for effective rule of law promotion, under law and development theory and practice.

## Introduction

The European Union proclaimed the ambition of fostering change in its neighbourhood, and researchers follow its efforts closely. The scholarship on the subject ties good performance to enhanced coherence and interprets any variation as double standards on the part of the EU. With respect to EU rule of law promotion, scholars link coherence to the existence of a uniform rule of law conception applied across bilateral relationships. However, relevant EU instruments rarely specify what the rule of law stands for and, if they do, these specifications are rather superficial and inconsistent (Pech, 2012, pp. 22–8). There is even less uniformity in EU external relations in the neighbourhood because there are no treaty obligations and decisions of the European Court of Justice to rely upon as in EU internal affairs, and no *acquis communautaire* for the partner state to adopt as in accession contexts. The absence of a uniform rule of law conception professed by the EU across its external relations is criticized and problematized in the literature. The EU is blamed for yet again failing to offer a credible definition of a value it aspires to promote, which is believed to undermine the effectiveness of EU rule of law promotion (Kochenov, 2009; Leino and Petrov, 2009; Mineshima, 2002; Pech, 2012; Wennerström, 2007; Wichmann, 2010). Although diverse in theoretical and methodological approaches, the scholarship shares two assumptions: that agreeing upon a uniform rule of law conception is *possible* (so, had the EU wanted to have one, it would have succeeded) and that having a uniform conception is *necessary* (because the absence of one is undesirable and problematic). A strong positive connotation associated with coherence (and negative – with incoherence) and justification of the need for greater coherence by the costs of incoherence for the effectiveness of the EU are

widespread in the debate on coherence in EU external policies at large (Cremona, 2011; Duke, 2011; Gebhard, 2011).

Such reasoning is problematic, however. First, coherence does not equal uniformity. Coherence in EU external policies is commonly understood as the absence of contradictions and the presence of synergies, with the emphasis on the latter (Gauttier, 2004, pp. 25–6; Marangoni, 2012, p. 4; Portela and Raube, 2012, p. 4). It is ‘best defined simply as the adoption of determinate common policies and the pursuit of those policies by EU Member States and institutions’ (Thomas, 2012, p. 458). The term ‘consistency’, mentioned in Articles 3 and 13 of the Treaty on European Union (TEU), is said to denote coherence in the above meaning and emphasize a procedural obligation of co-ordination (Hoffmeister, 2008, p. 161). The standard of coherence, hence, does not require a uniform EU rule of law conception and can be satisfied with a transversal one, just as variation in EU rule of law conceptions in itself is not a sign of incoherence.

Second, coherence in EU external policies is subject to challenges at the vertical, horizontal, inter- and intra-institutional, and external levels (Nuttall, 2005, pp. 96–107). The external challenges to coherence are especially relevant in the neighbourhood context, but are often overlooked by the scholarship. The degree of coherence feasible (that is, the very possibility of formulating a uniform EU rule of law conception) is thus questionable.

Finally, there are three potential causal relationships between coherence and effectiveness of EU external policies: positive (coherence increases effectiveness), negative (coherence decreases effectiveness) and null (coherence has no impact on effectiveness) (Thomas, 2012, pp. 461–2). Therefore, whether greater coherence in the form of a uniform EU rule of law conception called for in the scholarship is a virtue or a vice should be subject to analysis – not assumption.

Drawing on the above, this article challenges the virtuousness of uniformity in the case of EU rule of law promotion in the neighbourhood and looks for the parameters of the possible and the necessary instead. The article critically examines the process in which the rule of law gains meaning in EU external relations and analyzes the sources and implications of variation in EU rule of law conceptions. The findings reveal that variation in EU rule of law conceptions across EU external relations is inherent to the EU approach and is inevitable due to the nature of the rule of law concept and the non-accession political context. An EU rule of law conception in a given case is a product of complex vertical, horizontal, inter- and intra-institutional co-ordination within the EU and external co-ordination between the EU, the relevant partner state and other rule of law promoters in the field. At the same time, this variation does not mean that EU rule of law promotion is incoherent: a shared understanding of the core meaning of the rule of law frames EU efforts at the political level and serves as a reference for substantiating the rule of law with concrete institutional attributes and reform steps at the practical level. Moreover, according to law and development scholarship, such variation, or a context-sensitive conceptualization of the rule of law in co-operation with the partner state, is desirable for effective rule of law promotion. This article contributes to the debate on coherence in EU external policies by demonstrating on the example of EU rule of law promotion in the neighbourhood that variation in EU external policies, commonly interpreted as adverse incoherence, can be meaningful, inevitable and even desirable for good performance. Additionally, the article enriches our understanding of rule of law promotion as an EU

foreign policy tool and the EU as a rule of law promoter, which are both under-researched in the scholarships on EU external relations and rule of law promotion, respectively.

A few remarks on research design should be made here. The rule of law as an essentially contested concept is indefinable in isolation from the institutional and actor context in which it is embedded (Gallie, 1956; Tamanaha, 2011; Waldron, 2002). Scholars should not seek to conceive its 'best use', but should study a particular instance of its continued use by an actor (Gallie, 1956, p. 189). Accordingly, this article examines the rule of law as a distinct legal and political category in EU external relations with neighbouring countries. It reinforces three analytical distinctions made in the literature between the rule of law in EU internal affairs, the rule of law in EU external relations within accession and outside of accession (Pech, 2012; Wennerström, 2007). The empirical focus lies on EU rule of law promotion outside of accession, specifically in the states covered by the European Neighbourhood Policy (ENP). EU relations with the ENP states differ from relations of membership and accession, because the latter are significantly more structured and legalized, and from relations with other world regions, because the ENP states are members of other regional European organizations and often have an ambition of EU membership.

To focus the inquiry and reach the necessary level of detail, EU rule of law promotion in Ukraine is selected as a case study due to the empirical affluence of EU-Ukraine co-operation as the most elaborate relationship under the ENP. The case study is used instrumentally to elucidate the process in which the rule of law gains meaning, not to learn something about EU rule of law promotion in Ukraine as such. The analysis builds on original empirical data collected through document analysis, semi-structured expert interviews and participant observation at policy-oriented events conducted in 2009–13. The main category of respondents were EU officials working on relations with ENP states at the European External Action Service (EEAS), Commission Directorates General (DGs) and the Secretariat of the Council, as well as members and policy advisers at the European Parliament (EP) and officers from the EU Delegation to Ukraine. Additionally, I interviewed Council of Europe officials, officers at rule of law projects implemented in Ukraine by the EU, the Council of Europe (CoE), the Organization for Security and Cooperation in Europe (OSCE), USAID, and private donors and Ukrainian diplomats, officials and policy analysts. Interviews and participant observation were particularly valuable in uncovering the interactive processes behind policy decisions reflected in the documents.

The article proceeds as follows. The next section analyzes the EU approach to rule of law promotion and the reasons for an open EU rule of law conception, leading to variation. The ensuing three sections analyze how the rule of law concept is substantiated for a particular country and policy area at hand, addressing the internal co-ordination within the EU, the external co-ordination between the EU and the relevant partner state and the external co-ordination between the EU and other rule of law promoters active in the same field (the Council of Europe, the OSCE and the United States). The article concludes with the analysis of the findings' implications for future research and policy.

## **I. An Open EU Rule of Law Conception: A Deliberate Approach**

Scholars who criticize the lack of a uniform EU rule of law conception used in EU external relations argue that this is 'more an absence of a proper approach than a

consciously vague approach' (Wennerström, 2007, p. 293). Contrary to this, interviews with EU officials revealed that leaving the rule of law concept open is a deliberate and even a desirable for the EU approach. According to policy-makers, the EU never wanted, intended or sought to have a definition for the rule of law, assured that finding a uniform conception is either impossible or even more problematic than having none. A senior EU official commented strongly on the matter, having said that 'defining the rule of law is almost ridiculous'.

The reasons for leaving the rule of law concept open, also raised by EU officials, come down to two: the highly contested nature of the rule of law in general and in the EU in particular and the highly political nature of external relations in the neighbourhood. The meaning of the rule of law is contested at multiple levels, as EU Member States, EU institutions and states-partners of the EU all have their own rule of law conceptions.<sup>1</sup> Such contested nature of the rule of law reinforces the usual challenges to coherence in EU external policies (analyzed in the ensuing sections), all the way to the perceived impossibility of formulating a definition that would be appreciated by all actors involved. To complicate matters further, co-operation with neighbouring states occurs within vague legal frameworks, unlike in membership and accession contexts. 'What is appropriate for a relationship based on candidacy does not translate easily into a relationship based on partnership' (Cremona, 2004, p. 23). In the ENP framework, the EU is not in a position to impose anything – including a rule of law conception – on its partners and operates within differentiation and joint ownership principles instead (Burlyuk, 2014b).<sup>2</sup> The principle of differentiation enables the EU to define the rule of law in harmony with the partner's domestic institutional context and the parties' integration ambitions and priorities. Thus, it serves the contextual dependence of the rule of law concept (Tamanaha, 2011, p. 213). Similarly, the principle of joint ownership ensures that, while EU rule of law promotion policy is ultimately unilateral (Cremona, 2004, p. 7; Wolczuk, 2011, p. 7), 'it is not blind', to quote a senior EU official. Moreover, under the TEU, the EU does not enjoy the competence to produce an authoritative rule of law conception for non-Member States. Competence- and membership-wise, the Council of Europe regionally and the UN globally are better placed for the task (Zurn *et al.*, 2012, Chapters 5, 6 and 11). The EU relies on them gladly, as multiple references to other international organizations and instruments throughout EU policy documents illustrate. So, the political context limits the freedom of the EU to define the rule of law to its liking and necessitates further external co-ordination. At the same time, reliance on other international actors and engagement of the partner state in formulating a rule of law conception potentially strengthens the legitimacy and credibility of EU efforts and may facilitate subsequent policy implementation.

The analysis of the EU approach to rule of law promotion in the absence of a uniform rule of law conception demonstrated that the EU operates with an abstract rule of law ideal at the political dialogue level and determines its concrete institutional attributes for a particular country and policy area at hand at the practical co-operation level (Burlyuk, 2014a). Policy documents and interview data reveal that, in non-accession contexts, the

<sup>1</sup> Wennerström (2007, Chapters 2 and 3) analyzes legal differences in rule of law conceptions of EU Member States and institutions.

<sup>2</sup> These principles feature in all ENP policy papers, including the 2004 'Strategy Paper', the 2006 'Strengthening the ENP', the 2007 'A Strong ENP', the 2011 'A New Response to a Changing Neighbourhood' and the 2012 'Delivering on a New ENP'.

rule of law for the EU is about partner state's reliability and readiness for closer integration and so about the quality of system outputs – not a set of institutional attributes.<sup>3</sup> In interviews, EU policy-makers frequently spoke of the existence of a shared pre-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 doctrines and EU actors. Knowingly or intuitively, they appealed to the conceptual baseline on the rule of law: a coherent directing idea that law should serve its social goals by co-ordinating social relations, minimizing arbitrariness and providing order in society (HIIL, 2007, p. 12; Tamanaha, 2007, p. 1). The UN, the Council of Europe and the Venice Commission advocate the existence of a consensus on the core meaning of the rule of law.<sup>4</sup> In A new EU framework to strengthen the rule of law, adopted in March 2014, the EU formally subscribed to these and stated that, although 'the precise content' of the rule of law may vary at national level, its 'core meaning' is common and includes (as a minimum) legality, legal certainty, prohibition of arbitrariness, independent, impartial and effective justice and equality before the law. It is against this core meaning of the rule of law that the concept is then substantiated with institutional attributes and reform steps for a country and policy area at hand.<sup>5</sup> And it is this shared pre-understanding that frames co-operation and ensures a degree of coherence across different EU external relations and rule of law conceptions, despite variation in particularities.

The end product of such an EU approach is context-sensitive rule of law conceptions. The subsequent variation across EU policies is usually interpreted as incoherence and double standards obstructing the effectiveness of EU rule of law promotion. However, this variation is not random and, moreover, can be viewed as a desirable and even an ambitious approach to rule of law promotion. In the last decade, law and development scholars and practitioners once again came to a realization that 'society is the all-consuming center of gravity' and that the great deficit of universal solutions is in linking to local cultural and historical frameworks (Tamanaha, 2011, p. 219). When it comes to law and social change, universalism and context are in complex interaction, and one cannot be eliminated in favour of the other (Knieper, 2010, p. 123). Scholars stress the need for rule of law promotion enterprise worldwide 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) towards an ends-based approach (which defines the rule of law through social goals, end-purposes it is to serve in a society and views institutional change instrumentally as means to achieve ends). The latter accounts for the social, the contextual and the cultural in the rule of law and is prone to be more effective (HIIL, 2007, p. 30; Kleinfeld, 2006, pp. 33–4; 2012, Chapter 1; Rittich, 2006). From law and development perspective, variation in EU rule of law conceptions across bilateral relationships and even within bilateral relationships across policy areas and time constitutes a virtue – not a vice.

<sup>3</sup> 'The EU Justice Agenda for 2020', published in 2014, stated that the aim of EU engagement in the neighbourhood is 'to ensure EU citizens and businesses are protected in their relations' with these states.

<sup>4</sup> UN GA Resolution A/Res/67/1 of 2012 on the Declaration of the High-level meeting on the rule of law at the national and international levels; PACE Resolution 1594 of 2007 on the principle of the rule of law; the 2011 Venice Commission Report on the rule of law. The ratio of the universal and the particular in European conceptions of the rule of law and human rights is debated. See Leino (2002; 2005); Leino and Petrov (2009).

<sup>5</sup> The question of 'governance by bureaucrats' in this respect requires separate investigation.

In any case, the EU approach requires substantiation of the rule of law ideal with concrete institutional attributes and reform steps for a country and policy area at hand, with the core meaning of the concept as a reference. This process involves complex internal and external co-ordination and reinforces the usual challenges to coherence.

## II. A Kaleidoscope of Priorities: External Policy Formulation in the EU

First of all, an EU rule of law conception is a compromise between various EU actors and a product of vertical, horizontal, inter- and intra-institutional co-ordination of priorities inside the EU. The formulation of EU rule of law promotion policies occurs in a highly complicated institutional setting, characterized by the multiplicity of actors and the complexity of co-ordination among them.<sup>6</sup> Although one of the aims of the Lisbon Treaty was to consolidate external policy-making, in practice things have become only more complicated (Duke, 2011; Petrov *et al.*, 2012).<sup>7</sup> It remains a challenge for the EU to ensure coherence across three internal dimensions: vertically between EU institutions and Member States (Hillion, 2008), horizontally between EU internal and external policies and between various policy areas or sectors (Gauttier, 2004), inter-institutionally between different EU institutions and intra-institutionally between different departments of an EU institution (Christiansen, 2001). Each EU actor has its own set of priorities concerning the rule of law and uses a different vocabulary to express them. The major dividing lines lie between EU actors, between political and practical levels of external relations and between policy areas or sectors of co-operation. These differences ultimately lead to variation in the emphasis given to the rule of law at the political level, the rule of law elements prioritized at the practical level and the words with which these elements are framed in policy documents.

As discussed in the previous section, a transversal understanding of the core meaning of the rule of law exists in Europe and frames EU rule of law promotion. However, when it comes to spelling out the details, differences between EU Member States and particularities of their legal systems become apparent. In light of their domestic rule of law conceptions, Member States pay attention to different rule of law elements and expect to see different institutional arrangements in the partner state to match those. At the same time, under the TEU, Member States are key actors to take political decisions on the advancement of integration and influence the degree of prioritization of the rule of law in political dialogue of the parties. Moreover, the degree of scrupulousness with which Member States assess the partner increases with the increase of integration ambitions and the attention paid to that country by the Commission (Burlyuk, 2014c).

Different policy areas or sectors of co-operation and EU actors behind them (for example, interested Member States or thematic Commission DGs) benefit from greater rule of law compliance in a partner state in multiple and sometimes dissimilar ways. Owing to 'the connectedness of law principle' (Tamanaha, 2011, p. 214), the rule of law is relevant for all spheres of social life and constitutes a cross-cutting category in EU policies – not a sector of its own.<sup>8</sup> Notwithstanding the legislative mainstreaming of the

<sup>6</sup> The complexity of co-ordination was emphasized by interviewed EU officials, CoE officers and Ukrainian diplomats alike.

<sup>7</sup> A similar confession was made by interviewed EU officials.

<sup>8</sup> For example, the cross-cutting nature of the rule of law is highlighted in the 2014 'A New EU Framework to Strengthen the Rule of Law'. It was also often emphasized in interviews.

rule of law in the last two decades, or the process of its gradual, progressive integration into various aspects of EU policies and actions (Pech, 2012, p. 13; Wennerström, 2007, p. 227), disentangling various ‘shared values’ (for example, the rule of law, democracy, human rights, good governance) and promotion processes in EU policy documents and discourse remains a challenge. Different issues, or similar issues from different angles, or even same issues under different titles, are addressed under the ‘rule of law umbrella’, reflecting sector priorities. The effects of horizontal and intra-institutional variation are particularly visible in the outcome documents: DG Justice would place focus on the functioning of judiciary and law enforcement institutions and enhanced co-operation in civil and criminal justice; DG Home would highlight the urge to improve border management, control of migration and fight against organized crime; and DG Trade would put the country’s regulatory framework and business climate at the core.

Another important distinction lies between the levels of political dialogue and practical co-operation, or macro and micro levels (Casier, 2010). While the former concerns political priorities and statements, the latter comprises the programming and implementation of practical co-operation and EU assistance. The two levels differ in nature, the degree of concretization and the established vocabulary. EU officials argued in interviews that ‘the rule of law’ category is as use-ful for political dialogue as it is use-less for operationalizing the co-operation, identifying action points and designing assistance projects. Therefore, current practice is guided by an informal agreement: frame general political priorities of the EU in a region, country or policy area with grand categories like democracy, rule of law or good governance and determine concrete reform steps covered by these broad categories with relatively tangible categories. This agreement resonates in different vocabulary used for formulating co-operation priorities and action points and used in general as compared to sector-specific documents. Line DGs, EU Delegations and specific projects usually do not use categories like ‘the rule of law’. As an EU officer at a thematic DG commented:

The rule of law and things like that are too broad. We cannot put everything in our documents, but have to keep them focused, concrete, framed in terms of benchmarks, action points, and then also directly linked to our specific subject matter. [. . .] Generally, those grand words, like the rule of law, democracy, good governance, independent judiciary and so on, they are left for the EEAS to be used in political dialogue. [. . .] They are not really part of our vocabulary, not an operational tool for us.

In practice, this means that references to the rule of law are limited to political sections of policy and co-operation documents and often do not feature among sub-priorities and action points or in sector co-operation documents altogether. For example, there is no single reference to the rule of law in the 2008 EU-Ukraine Visa Facilitation Agreement, the 2008 Readmission Agreement or the 2010 Visa Liberalization Action Plan, although rule of law compliance is central to progress on visa-free regime. Thus, researchers are misled into an impression of the disappearance of the rule of law from some texts (for example, an agreement’s preamble as opposed to body of text or an action plan’s political dialogue section as opposed to sections on sector co-operation) or its complete absence in others. The rule of law may well be present, only described through its institutional attributes. As an EU official from a thematic DG argued, the rule of law is a *de facto* element of any co-operation:

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.

The complex institutional configuration of EU external policy-making constitutes a sifter through which an EU rule of law promotion policy travels. A rule of law conception must be acceptable for all EU actors, who each have a different set of priorities and a customary vocabulary of their own. Therefore, a range of rule of law elements is emphasized in different bilateral and policy contexts, producing further variation in EU rule of law conceptions.

### III. Sharing the Driving Seat: Partner State's Involvement

An EU rule of law conception is also a product of external co-ordination between the EU and the relevant partner state. Scholarly accounts that do not disregard the partner state altogether, acknowledge the relevance of the partner state for the shape of EU external policies at the implementation stage, or for the adoption, application and internalization of the selected rules (Grabbe, 2006; Lavenex & Schimmelfennig, 2009; Magen & Morlino, 2008; Schimmelfennig & Scholtz, 2008). This article argues that, with respect to EU rule of law promotion in the neighbourhood, the partner state is an important actor also and already at the stage of policy formulation, or during the selection of rules for transfer. Partner state's stakeholders – policy-setting and implementing ministries and agencies, regional and municipal authorities, concerned industries and society groups – are involved in policy formulation through consultations under the umbrella of joint ownership principle. Although there are no grounds to claim that the partner state is in the driving seat, demand is important for political and practical reasons and leads to further variation in EU rule of law conceptions. Importantly, if within the EU there is a consensus on the essence of the rule of law and the ideal is contested mostly on particularities, the partner state may not have the same, similar or receptive pre-understanding of the concept. Although this does not preclude the EU from pursuing its policies, it does make external coherence and co-ordination a bigger challenge.

Politically, the response of the partner government is vital in the neighbourhood context because the EU has to rely on its political will to comply. On the one hand, the EU policy *is* essentially unilateral, and the partner has no veto power to prevent the EU from putting an item on its rule of law agenda (Wolczuk, 2011, p. 7). On the other hand, the partner is in a position to do nothing with this agenda, and the lack of implementation will refute EU efforts altogether. The risk of the latter is rather high in the case of neighbourhood countries, whose poor implementation of the reforms stipulated in EU action plans and association agendas is infamous (Solonenko, 2012). Domestic political agenda of the partner state delineates favourable, acceptable and taboo areas for EU involvement, or 'what can be done': while partner state's stakeholders may recommend and even urge certain issues on the agenda, they may resist others.

Interviewed EU officials and Ukrainian diplomats unanimously acknowledged the importance of the political agenda and response of Ukraine's government. They shared some nuances in the co-ordination between the EU and Ukraine, which help to comprehend the scope and meaning of partner state's engagement in general. First of all, to quote a senior EEAS official, the bilateral agenda is 'so enormous that it is never a question of

what we could do, but really of prioritizing and managing the list'. Second, co-operation agenda is steered by daily interaction and has a positive and a negative formative dimension. A positive agenda is about identifying areas for improving bilateral co-operation or the situation in a country, and there is wide scope for the partner to contribute. A negative agenda is formed in reaction to the assessment of the situation in a country by the EU, other international organizations and domestic nongovernmental sector. Addressing the identified problems becomes inevitable, so there is not much for the partner to influence. Third, the indicative nature of co-operation agenda facilitates a positive government response. To use the words of an EEAS official: '[I]t is easier to get an agreement on the *indicative* priorities than on *concrete* interventions that come afterwards.' Fourth, 'disagreement is usually not on what to include or prioritize, but on how much has been done'. The assessment of progress is generally a more sensitive exercise than agreeing upon co-operation priorities. Finally, the EU itself is not open to *any* input from the partner state. As a Ukrainian diplomat explained, 'everything that the EU gives to states-candidates only [. . .] is automatically closed for Ukraine'.

Stakeholders from the partner state are involved in EU policy formulation also for practical reasons: they possess expertise on domestic institutional context and rule of law reform agenda, which is necessary for a contextual substantiation of the rule of law and which the EU and its officials lack. The objective needs of the partner state influence which issues are prioritized by the parties in their bilateral co-operation and which rule of law elements receive emphasis. EU partners possess elaborate domestic institutional structures and are no empty vessels to be filled with foreign experiences. However, fieldwork reveals that EU officials posted to work on a country rarely have previous experience or knowledge thereof. Input from partner state's stakeholders is valuable particularly in positive agenda-setting and identifying potential objects of reform and areas of co-operation, or 'what needs to be done'. As for negative agenda-setting, evaluation and monitoring reports by other international and domestic actors are a valuable source of information for the EU. Moreover, EU rule of law promotion is meant to fill-in the gaps and top-up the existing efforts – not to substitute national reform plans. Substantiating the broad rule of law category with particular elements, the EU is bound to align with and complement the efforts of the domestic government. The partner's reform agenda is relevant not only politically as an indicator of favourable and un-favourable areas for external involvement, but also practically as an indicator of 'what is being done already'. Consequently, an issue can be missing from the EU rule of law promotion policy for a country simply because the home government attends to the issue itself.

Such account for partner state demand is meant to respond to the challenges of weak ownership and disconnectedness between internally and externally driven reform agendas. Concerns over policy implementation feedback into policy formulation, and the partner state has some real potential to share 'the driving seat' with the EU. However, it is up to the partner state to use this opportunity to direct EU policy by providing focused, co-ordinated and substantive input. In any case, such external co-ordination mediates the emphasis placed on the rule of law in political dialogue and the choice of issues selected for practical co-operation, causing further variation across EU rule of law conceptions towards different countries and even towards the same country at different points in time.

#### IV. One's as Good as None: Other Rule of Law Promoters in the Field

Finally, an EU rule of law conception is a product of external co-ordination between the EU and other rule of law promoters. The reliance of the EU on rule of law standards of other international organizations and their evaluation and monitoring products has been mentioned already. This section analyzes further the external co-ordination between the efforts to foster the rule of law in the neighbourhood by the EU, the CoE and the OSCE as distinct European actors and the United States as one of the most active rule of law promoters worldwide.

All four actors pursue largely similar and indisputably compatible value agendas in the region, with the rule of law firmly on the list. The CoE, the OSCE and the EU fall in line as European organizations that represent European values, and the existence of a 'network of interlocking institutions' in Europe is reported (Peters, 1996, p. 385). The EU itself is not a specialized organization and relies extensively on the other two. The CoE and the OSCE are better suited for setting rule of law standards and evaluating rule of law performance politically in terms of their mandate and membership, which translates into better legitimacy in the eyes of concerned partner states, and practically in terms of the accumulated expertise, which translates into monitoring tools and mechanisms (Merlingen and Ostrauskaite, 2004; Rotfeld, 2000). The relationship between the values promoted by the EU and those promoted by the United States is slightly more complex (Magen *et al.*, 2009). Both promote essentially the ideas of western liberal democracy. Yet, specifically for the rule of law, European organizations and the United States began with distinct legal models. Eventually, the European model prevailed due to the dominance in the neighbourhood of the CoE and later the EU (Petrov and Serdyuk, 2008, p. 195).

At the same time, 'rule of law promotion can only be on the agenda of these organisations if it somehow falls within the mandate or contributes to the purpose of the organisation' (HIIL, 2007, p. 28). Respective variation in their otherwise overlapping areas of engagement can be observed. The United States has numerous rule of law promotion programmes running throughout the world focused on facilitating bottom-up change in the system of justice, including in the ENP region (Schimmelfennig, 2012, pp. 124–5). The CoE is concerned primarily with human rights and human security, and the rule of law features in relation to adherence to human rights and their protection by domestic courts.<sup>9</sup> The Venice Commission is the key specialized agency and enjoys significant influence and authority on constitutional issues (Bartole, 2000). The OSCE historically focused on elections and gradually extended its area of activity to include democratization, good governance and the rule of law (Evers, 2010).<sup>10</sup> Finally, in EU policies, the rule of law appears in relation to the democratic organization of power and constitutional and electoral reforms; the system of justice and the functioning of judiciary and law enforcement institutions; good governance and public administration at national, regional and local levels; the protection of human rights and civil society; economic and social development and regulatory adaptation; and, finally, in relation to stability and

<sup>9</sup> 'The Council of Europe and the Rule of Law: An Overview' (CoE Report, GR-J(2008)11, 2008); 'CoE Action Plan for Ukraine' (2008–2011; 2011–2014).

<sup>10</sup> See also 'Further Strengthening the Rule of Law in the OSCE Area' (OSCE Ministerial Council Decision, 2008).

security and the management of borders, migration, fighting organized crime and corruption (Burlyuk, 2014a, pp. 38–43).<sup>11</sup>

In theory, such substantive and operational overlap should generate competition and conflict (Grandori, 1987, p. 58; Pfeffer & Salancik, 2003, p. 2). In practice, however, one observes a lot of consultation, co-ordination and even co-operation between various rule of law promoters in the region, so as to ensure complementarity, avoid duplication and simply prevent confusing their local partners. The main reasons for this are the lack of interest, motivation and capacity for reform among local partners and the limitedness of donors' own resources. In the end, each actor takes up a certain niche in the rule of law promotion business in a country. The EU, as a latecomer, had to carve a niche amongst the activities pursued by others already. Consequently, the EU co-operates with and even fully relies on other rule of law promoters as far as their understandings of the rule of law overlap and carries out its own activities as far as their understandings diverge. Notably, recent years have brought a reversal of the trend: external donors are increasingly aligning their activities with the EU agenda, recognizing the special role of the EU in its neighbourhood. The tightest co-operation, institutionalized in the format of joint programmes, exists between the EU and the CoE.<sup>12</sup> The latter was mentioned in every interview and was positioned as the key partner for the EU in half of them. Such co-operation enhances the role of the CoE, linking it to the EU – an organization with larger funds and strategic importance. At the same time, having the CoE on board is advantageous for the EU due to the former's mandate, membership and accumulated expertise, know-how and experience (Baracani, 2008; Kolb, 2013; Merlingen and Ostrauskaite, 2004).

The above has two important implications for EU rule of law promotion. First, an EU rule of law promotion policy in a particular case is a reaction to what is being done by other actors. An issue may be absent from the EU agenda simply because it is taken care of by another rule of law promoter. Second, an EU rule of law conception and EU efforts in a country are broader than what the EU does itself, because the EU co-operates a lot with other actors. The EU capitalizes on their comparative advantages and avoids duplication of effort, with the hope of increasing effectiveness of its own effort. Such external co-ordination with other rule of law promoters leads to further variation in EU rule of law conceptions across countries.

## Conclusions

This article challenged the virtuousness of uniformity in the case of EU rule of law promotion in the neighbourhood and looked for the parameters of the possible and the necessary instead. The findings reveal the inherence of variation in EU rule of law conceptions to the EU approach to rule of law promotion. They also expose the difficulty or even impossibility of achieving greater coherence, if understood as a uniform EU rule of law conception, due to the contested nature of the rule of law and the studied political

<sup>11</sup> This conclusion is based on the analysis of ENP policy papers and EU programming documents for Ukraine from 1994 onwards, including action plans, association agendas and lists of priorities, country strategy papers, national indicative programmes and annual action programmes.

<sup>12</sup> The 2007 'Memorandum of Understanding between the CoE and the EU'; and the 2014 'Statement of Intent for the Cooperation between the CoE and the European Commission in the EU Enlargement Region and EU Neighbourhood Region'.

context. These two reinforce the usual challenges to coherence in EU external policies. Eventually, an EU rule of law conception in a given case is a product of complex vertical, horizontal, inter- and intra-institutional co-ordination of priorities inside the EU and external co-ordination of priorities between the EU, the relevant partner state and other rule of law promoters. It is during this co-ordination that the rule of law category is conceptualized in various ways, in harmony with the domestic institutional context of the partner state and the integration ambitions and priorities of the parties. External challenges to coherence are particularly important for EU external policies outside of accession and membership contexts, but are often disregarded in the scholarship. The absence of a uniform EU rule of law conception in itself does not entail incoherence of EU rule of law promotion: variation is not random, as EU efforts at the political level and substantiation of the concept with concrete institutional attributes and reform steps at the practical level are framed by a transversal, shared understanding of the core meaning of the rule of law. Moreover, greater coherence in the form of a uniform EU rule of law conception, sought-for in the scholarship, does not necessarily lead to a more effective rule of law promotion policy. Law and development theory and practice call for an ends-based, context-sensitive approach to the rule of law, recognizing the social, the contextual and the cultural in it. From this perspective, variation in EU rule of law conceptions across bilateral relationships and even within bilateral relationships across policy areas and time constitutes a virtue – not a vice. Also in the rule of law promotion domain, one size does *not* fit all. To the contrary, external co-ordination with the partner state and other rule of law promoters has the potential to increase the effectiveness of EU efforts.

Thus, the key to a more effective EU rule of law promotion policy is not in enhanced coherence *across* relevant EU policies towards different partner states and formulation of a uniform EU rule of law conception. The key is in the improved internal and external co-ordination of an EU policy towards a *particular* state, so as to formulate a more nuanced and suitable rule of law conception for the case at hand. Better mechanisms of internal and external co-ordination, enhanced expertise of EU policy-makers on domestic contexts of EU partner states, causalities of development and broader rule of law promotion enterprise are where scholars and policy-makers should concentrate their efforts, leaving the struggle over the correct meaning of the rule of law behind. The EU already moves in this direction, as the creation in March 2014 of an EU framework to strengthen the rule of law internally (among EU Member States) and the informal talks on the creation of a rule of law division in the EEAS to strengthen the rule of law externally (among third-state partners) suggest. A context-sensitive, jointly owned, detailed EU rule of law conception for a particular case would also address the problem of assessing partners' compliance with the rule of law. Although compliance assessment remains a highly political exercise and a political decision of EU Member States, a concrete set of benchmarks for the partner state would address much of the current criticism by scholars and politicians.

This article contributes to the broader debate on coherence in EU external policies by demonstrating that, in the case of EU rule of law promotion under the ENP, variation, commonly interpreted as adverse incoherence, is not random – it is inevitable and even desirable. Further research should engage in in-depth analyses of EU rule of law promotion in regions other than the ENP in order to identify the scope conditions of the proposed argument and the limits of generalization to EU rule of law promotion in other non-accession contexts. Additionally, comparative studies of EU rule of law promotion within

and outside of accession are necessary to test the differences between the two political contexts and the degree of variation observed. Comparative studies also have the potential to elucidate the relative weight of the nature of the promoted phenomenon, the political reality in which promotion takes place, as well as challenges to coherence stemming from internal and external co-ordination. Finally, the virtuousness of coherence in EU policies to promote values other than the rule of law requires exploration along the lines suggested in this article. Is the rule of law a unique phenomenon to be promoted abroad due to its highly contested nature and social connectedness, or are EU policies to promote democracy, good governance and the like subject to and in need of similar variation?

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