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The Introduction and Consolidation of the Rule of Law in Ukraine: Domestic Hindrances at the Level of the Demand for Law

Olga Burlyuk¹

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Abstract Ukraine's rule of law compliance remains poor however the evaluation scale is drawn and whatever resources external donors commit to foster the rule of law in the country. This article examines the domestic hindrances to the introduction and consolidation of the rule of law in Ukraine. It argues that systemic shortcomings in the application of the rule of law in Ukraine are not only and not so much due to deficiencies in the supply of law, or the shape of laws and institutions, as they are due to deficiencies in the elite and popular demand for law, or societal attitudes to law and its 'rule'. The findings reveal a low demand for (the rule of) law among Ukrainian political and business elites, legal professionals and the wider population and expose obstacles to meaningful legal change at the level of power structures, professional and popular social norms. The findings' implications for future research and policy are addressed in the conclusion.

Keywords Rule of law · Ukraine · Supply of law · Demand for law

1 Introduction

The trials of Yulia Tymoshenko and other Ukrainian politicians from 2010 onwards attracted international attention concerning the functioning, or rather malfunctioning, of Ukraine's system of justice. The undisguised use of the judiciary, prosecutions and law enforcement by state authorities as oppression tools during the so-called Euromaidan protests in the winter of 2013–2014 demonstrated to the world – and to the Ukrainian population itself – that shortcomings in the application of the rule of law in Ukraine are indeed systemic and that a Ukrainian citizen need

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not be an opposition politician to become a victim of selective justice. Ukraine declared a commitment to the rule of law through its Constitution and numerous international treaties. Yet, following two decades of continuous domestic reforms, supported by substantial diplomatic, financial and technical resources committed by the Council of Europe, the USAID, the European Union, the OSCE and other Western donors to promote the rule of law in Ukraine, Ukraine scores poorly on rule of law compliance regardless of how the evaluation scale is drawn. This article examines the domestic hindrances to the introduction and consolidation of the rule of law in Ukraine. The analysis is very timely: the Euromaidan, which was essentially a popular uprising against the impunity of state authorities and specifically the judiciary and the prosecution and law enforcement authorities,¹ was a critical juncture and opened a window of opportunity for substantial change in Ukraine.² For domestic and external actors aspiring towards genuine legal reform in the country to seize this opportunity, they need to know whether and how to alter their rule of law promotion efforts so as to target the real obstacles to reform.

The article explores three potential sources of hindrances to the introduction and consolidation of the rule of law in Ukraine, namely: political and business elites and the power structure; legal scholars and practitioners and professional social norms; and the wider population and popular social norms. The focus of the analysis at the level of the demand for law is guided by the advances in the scholarship on legal change, in particular in post-Soviet countries. This scholarship asserts that the supply of law alone is not enough: the demand for law, or 'the bundle of attitudes and behaviour toward law as affected by historical experience, both personal and societal', is also very important.³ Attitudes, perceptions and value patterns of the elites and the wider population may and do affect the impact of legal texts and institutions and thus constitute a powerful constraint on any meaningful legal reform, regardless of the quality of the supply.⁴ The empirical reality in Ukraine – i.e. years of rule of law reforms targeted mainly, if not exclusively, at the supply of law and the transformation of legislative and institutional frameworks that resulted in little or no improvement – suggests that the real obstacles to legal change lie elsewhere. The findings of this study confirm this hypothesis: while there are serious deficiencies in the supply of law, or the shape of laws and legal institutions, it is deficiencies in the elite and the popular demand for law that cause systemic shortcomings in the application of the rule of law in Ukraine.

The investigation into the demand for law in Ukraine offered by this article makes a valuable empirical and analytical contribution to the existing knowledge.

¹ See the results of recurring surveys on the socio-demographic structure and demands of Euromaidan protesters by Ilko Kucheriv Democratic Initiatives Foundation, *EuroMaidan Stats 2013*. http://dif.org.ua/en/mass_media/oblectiv-v-infografici.htm, and Maidan-December and Maidan-February: what has changed. <http://dif.org.ua/en/publications/press-relizy/vid-mchi-sho-zminilos.htm>. Accessed 18 December 2014.

² The concept of critical junctures is used as developed by Capoccia and Kelemen (2007, p. 341).

³ Hendley (2001, at p. 72).

⁴ See Ajani (1995, p. 93); Aslund (1999, p. 96); Dragneva and Dimitrova (2010, p. 297); Feldbrugge (2000, p. 213); Hendley (1999, p. 89); Hendley (2001); Holmes (1999, p. 88); Pistor (1999, p. 105); Sharlet (1998, p. 59).

Relatively little English-language scholarship exists on rule of law developments and legal change in Ukraine, notwithstanding Ukraine's geopolitical importance and sheer size. The scholarship on the rule of law in post-communist states focuses almost exclusively on Central and Eastern European countries (CEECs) acceding to the EU and Russia as the successor of the Soviet Union. Occasionally, a reference is made to the entirety of 'post-communist countries', 'post-Soviet societies' or 'Russia and its neighbours', but in practice the analyses often draw on the empirical evidence from Russia only and generalise them to the region overall. Ukraine is different from both, however. Unlike the CEECs, Ukraine possessed historic legacies of Eastern Orthodoxy, experienced stronger influences of the Russian Empire and the Soviet Union and enjoyed much weaker incentives from the EU. Unlike Russia, Ukraine was continuously linked to Western information flows and experiences, was affected less strongly by the Eurasian (Mongol) practices and underwent its own combination of domestic political, legal and social transformations since 1991. Many of the obstacles to reform in modern Ukraine are inheritances from the *recent* past, or from 'post-communism gone astray'.⁵ Thus, while certain similarities can be observed, Ukraine provides a distinct context for scholars to research and analyse and for rule of law promoters to work with. Moreover, available studies on the rule of law in Ukraine, be they contributions from scholars or practitioners, often share the focus of rule of law promotion efforts and scrutinise the supply of law dimension, the gaps in material and procedural legislation or the flaws in the design and capacity of relevant institutions.⁶ This study focuses on the demand for law level and so enriches our understanding of the complexity of introducing and consolidating the rule of law in Ukraine. It also helps to comprehend the starting point of Ukraine in its pursuit of the rule of law ideal and to know what kind of institutional and attitudinal atmosphere confronts domestic and external rule of law promoters. The latter often believe that post-Soviet states emerged as 'empty vessels'⁷ and that 'a free and empty space came into existence onto which everything could be built from scratch'.⁸ Ukraine is not an empty vessel of any kind, as this study reveals.

Next to official documents, public discourse, English-language scholarly articles and international reports on the subject, the analysis engages with Ukrainian legal scholarship on the rule of law, legal culture and legal change in Ukraine. This body of literature is not yet integrated into Western scholarship. The analysis also draws on original empirical data from formal and informal in-depth interviews with experts from Ukraine and abroad (who deal with Ukraine) conducted throughout 2010–2013. Moreover, the article analyses findings from multiple public opinion surveys on matters of law and law enforcement institutions, conducted by different

⁵ Kubicek (2009, p. 323, at p. 339).

⁶ See, for example, Allison (2012); Dietrich and Blue (2002); Danish Helsinki Committee (2012) Legal Monitoring in Ukraine IV: Does Ukraine Try to Improve the Rule of Law? Ukrainian Reactions to the Council of Europe's Parliamentary Assembly Resolution (1862, 2012); Kyiv International Institute of Sociology, Final Report: Survey on Corruption and Service Delivery in the Justice System in Ukraine; Neill and Brooke (2008); Vitvitsky (2011, p. 41).

⁷ Dragneva and Wolczuk (2012, p. 217, at p. 235).

⁸ Knieper (2010, p. 111, at pp. 123–124).

agencies in and about Ukraine. These surveys provide a set of Ukraine-specific primary data on the subject and allow this study to make an empirical contribution to the scholarship on legal change in the wider region.

The article proceeds as follows. The first section identifies two paradoxes in Ukraine's rule of law compliance – the façade arrangement paradox and the Brownian motion paradox – and argues that drawbacks in the supply of law alone do not explain these systemic problems. It is the ruling political and business elites that undermine change to the existing power structures at the legislative and implementation stages. The second section analyses the demand for law and its rule among legal professionals, in particular the reception that the rule of law concept received from legal scholars and practitioners. The findings reveal that the majority of legal elites were hostile to this novel for Ukraine concept and still prefer rule *by* law to the rule *of* law in both theory and practice, sustaining the old power structures and state-society balance. The third section analyses popular attitudes to law and law enforcement institutions through the prism of public opinion surveys, contextualised with expert comments, interview responses and secondary literature. The findings expose a population which is distrustful of law and the system of justice in its entirety, and which, although it demonstrates a high level of tolerance for infringements and operates under informal rules, is ready to protest when violations of human rights cross the line. The article concludes with a discussion of the findings' implications for future research and policy, the rule of law promotion theory and practice.

2 Two Paradoxes in Ukraine's Rule of Law Compliance and the Role of Ruling Elites

This section examines the current state of Ukraine's rule of law compliance at the country-wide level and argues that Ukraine performs poorly however the assessment scale is drawn. The systemic shortcomings are best captured by two paradoxes: the façade arrangement paradox and the Brownian motion paradox. It is the willingness of the ruling political and business elites to preserve the status quo or to make changes for their own benefit that accounts for the failure of the legislative clauses to work in practice and the failure of multiple reforms to result in overall progress.

2.1 The Façade Arrangement Paradox

The first paradox in Ukraine's adherence to the rule of law is that, although spelled out thoroughly at the fundamental constitutional level, the necessary rule of law clauses fail drastically in reality. Thus, their role is reduced to a façade arrangement. When asked about the rule of law reforms in Ukraine, a Ukrainian professor of law replied briskly and with irony: 'Rule of law reforms? Which reforms? There is nothing to reform: everything is nicely written down and spelled out!' The Constitution of Ukraine contains clauses that constitute a conceptual baseline on the rule of law, e.g. separation of power, judicial independence and a transparent

legislative process.⁹ Moreover: it lays down both the principle of the rule of law (*verkhovenstvo prava*) and the lawful state (*pravova derzhava*).¹⁰ Even the Venice Commission, in ‘Opinion on the Constitution of Ukraine’ of 1997, concluded that ‘the important elements of the rule of law have found a proper expression’ in the adopted text of the Constitution (p. 2). However, this is not what one observes in Ukraine or reads in evaluation reports or scholarly literature on the effectiveness of law in Ukrainian society. What one finds are descriptions of the state of affairs in terms of ‘a lawless society’, where people ‘routinely disobey the law’, where ‘a near-universal cynicism about law’ and ‘an ambivalent attitude to law’ prevail and where ultimately ‘lawlessness is the only law’.

Indeed, Ukraine scores badly *however* the evaluation scale is drawn and has a poor rule of law reputation globally.¹¹ The World Justice Project Rule of Law Index illustrates the current state of Ukraine’s *in*-compliance with the rule of law. Included in the assessment for the first time in 2011, Ukraine repeatedly receives low scores for all identified rule of law factors and sub-factors, ranking last or close to last globally, regionally and by income group. The category of order and security and fundamental rights dimensions is where Ukraine performs reasonably well. However, it fails badly with regard to access to and the delivery of justice, accountability and openness of the government and the regulatory enforcement process. The measures on the limitedness of government powers by the legislature and judiciary, on the independence and impartiality of civil and criminal justice systems and on the transparency of state administration and regulation are close to zero. And, traditionally, corruption comes out as critical for all branches of state power.¹²

Problems with the functioning of the system of justice and concerns about the independence, impartiality, effectiveness, efficiency and accountability of the judiciary and law enforcement institutions; the functioning of administrative and regulatory institutions at national and local levels; deficiencies in material and procedural law, legislative gaps and the lack of consistency and coherence within and between laws; and the problems with the protection of human rights and fundamental freedoms form the usual core of evaluation studies on Ukraine. Systemic, large-scale, high-level corruption in Ukraine (as opposed to episodic, petty corruption familiar to less corrupt societies) is named as one of the major reasons for all of the above.¹³ Although the fight against corruption is at the top of

⁹ See Hague Institute for the Internalisation of Law (2007, p. 12); Tamanaha (2007, p. 1).

¹⁰ The relevant clauses are in Arts. 1, 3, 5, 6, 7, 8, 19, 21, 22, 24, 29, 55, 58, 62, 124, 126 and 129 of the Constitution of Ukraine.

¹¹ Ukraine is included in all the main assessment studies, including Freedom House’s Freedom in the World, Nations in Transit, Freedom of the Press and Freedom on the Net, Transparency International’s Global Corruption Barometer and Corruption Perceptions Index, World Governance Indicators by World Bank and Rule of Law Index by World Justice Project.

¹² A total of 66 countries were assessed in 2011, 97 in 2012–2013 and 99 countries in 2014. In all three reports, Ukraine was assigned to the ‘Eastern Europe & Central Asia’ region and the lower-middle income group. For Ukraine country results, see WJP Rule of Law Index 2011, at pp. 100, 143; WJP Rule of Law Index 2012–2013, at p. 148; WJP Rule of Law Index 2014, at p. 155.

¹³ The list is based on a wide range of primary and secondary data on Ukraine, including Council of Europe reports, Venice Commission opinions, evaluation reports by various international actors mentioned earlier, interview data and academic articles.

the election agendas of all political forces and is subject to efforts by public authorities, civil society organisations, international donors and other stakeholders, most of the measures to address corruption in Ukraine have so far been ineffective.¹⁴

2.2 The Brownian Motion Paradox

The second paradox in Ukraine's rule of law compliance concerns the fact that the rule of law reform process in Ukraine resembles Brownian motion: a lot of movement, doubtful progress. The path from declaratory clauses of the Constitution to their implementation in reality proved to be a labyrinth. Koziubra, one of the most renowned legal scholars in Ukraine, explains that:

In Ukraine, the process of consolidating the principles of *verkhovenstvo prava* and *pravova derzhava* [...] takes place with tremendous contradictions, deformations and rollbacks. I would not even dare to claim what prevails in this process in the years of independence – progress or regress, achievements or losses.¹⁵

Rule of law promoters and evaluators focus mainly on shortcomings in the supply of law and technical problems connected to law-making, arguing that laws and legal institutions are lacking, laws and legal institutions that do exist are of poor quality, and those that are of sufficient quality are not applied or enforced properly. The supply of law in the books and the capacity of legal institutions in Ukraine have deficiencies, no doubt. However, the tremendous, fundamental and far-reaching changes implemented in the last two decades must be acknowledged. Ukrainian reformers not only drafted an astonishing volume of laws,¹⁶ but also established a great number of new legal and judicial institutions. The constitutional framework was designed from scratch in the deficit of the experience of constitutionalism.¹⁷ A bulk of material and procedural codes were adopted, regulating matters which were formerly non-existent. Administrative justice was introduced literally from scratch. And the complexity of Ukrainian state and municipal administration surprises the majority of external observers.¹⁸ Ukraine does possess an extensive legal system, and law-making is flourishing. Even a specialised Commission on Strengthening Democracy and Establishing the Rule of Law has existed since 2005 as the guardian of democracy and rule of law matters and cooperates closely with the Venice Commission and the Ukrainian community of legal experts. Interviewed Ukrainian legal analysts emphasised that material law is where there are least problems in Ukraine.

¹⁴ Chebanenko et al. (2011, at p. 40).

¹⁵ Koziubra (2010b, p. 6, at p. 8).

¹⁶ As of 13 December 2012, the Parliament of Ukraine had adopted 60 Legal Codes and 4885 Laws of Ukraine.

¹⁷ Osiatynski (1996, p. 78, at p. 82).

¹⁸ In interviews, EU and Council of Europe officials expressed their astonishment at the huge Ukrainian bureaucracy.

However, there is no steady improvement in Ukraine's adherence to the rule of law to report, as the previous sub-section argues. With a great deal of movement overall, but no movement in a particular direction, reform efforts resemble Brownian motion. Senior legal practitioners confessed in interviews that, in many respects, working in the Soviet times was easier, because there was significantly more legality and less politics in the system of justice. The problem rests not with the lack of a political will for change as such: it is in abundance, as the multitude of reform activity confirms. The problem rests with the lack of a political will for continuous, steady, long-term, durable change.¹⁹ The ruling elites wish to preserve the status quo or change it for their own benefit; hence, there is little (if any) continuity in the rule of law reform. Ukraine is described as 'the blackmail state', where political and business elites encourage corrupt practices in order to maintain power.²⁰ Political antagonism in Ukraine characterises a relationship not between ideologies, but between spheres of influence: the most important division is not between the executive, legislative and judicial branches of power or political parties, but between the ruling and non-ruling political forces and business clans.²¹ Ukraine's political system is described as 'weak, fractured, highly personal and ideologically vacuous while judiciary and media fail to hold politicians to account'.²² Consequently, the elites 'collude behind the façade of political competition', 'colonise both the state apparatus and sections of the economy' and exercise 'state and regulatory capture'.²³ Domestic political decisions are at the same time the most important catalysts and the most important impediments to reform; the so-called 'oligarchisation of power' and the dominance of oligarchic clans in domestic political processes in Ukraine pose a serious obstacle to the introduction and consolidation of the rule of law.²⁴

What is important for the rule of law reform and what distinguishes Ukraine from other post-Soviet states, however, is the presence in Ukraine of multiple oligarchic clans and constant competition between them. A periodic rotation of the ruling elites ensures permanent reform activity, which, although intended to serve their particular needs, occasionally serves the general 'good cause'. It also provides some openness to the system and allows new elites to emerge on the political landscape. Ultimately, it renders impossible the conservation of the status quo and leaves a window of opportunity for change open.

Overall, there is little demand for the rule of law and legal change among the elites in power at any given time, unless it leads to consolidating power structures favourable to themselves. The new legislation is manipulated and the existing legislation is abused or left unimplemented, undermining change to the existing

¹⁹ A very large number of interviewees raised this argument.

²⁰ Darden (2001, p. 67); Kubicek (2009, at p. 331).

²¹ Minakov (2011, p. 43, at p. 46).

²² Taras Kuzio, *Populism in Ukraine in Comparative European Context* (2009, at p. 35) (conference paper). http://www.taraskuzio.net/conferences1_files/Populism_Ukraine_Paper.pdf. Accessed 18 December 2014.

²³ Chebanenko et al. (2011, p. 34).

²⁴ Allison (2012, at pp. 26–27); Dietrich and Blue (2002, at p. v); Hovshovsurka (2006); Puglisi (2008, p. 55).

power structures. Representatives of all political and business groups resorted to corruption to multiply their power and wealth, albeit to a varying extent. The phenomenon peaked under President Viktor Yanukovich, who converted ‘a relatively correct democratic electoral win into the most egregious case of “state capture”’²⁵ and managed Ukraine ‘as though it were a private company’.²⁶ The ongoing investigations into the abuse of power by his family and allies are yet to unveil the real scale of violations. And it remains to be seen whether the new, largely old, Ukrainian authorities will abandon the traditional methods of power and state capture on the hype of the Euromaidan and under the close eye of civil society. The implementation of the ECHR Judgment in the famous *Oleksandr Volkov v. Ukraine* case (Appl. No. 21772/11) from 9 January 2013 will serve as a litmus test of sorts. In the opinion of the Court, this case of a politically-motivated dismissal of a Supreme Court Judge under the Yanukovich government disclosed ‘serious systemic problems as regards the functioning of the Ukrainian judiciary’ (para. 199), and the proper execution of the judgment by Ukraine would involve ‘the restructuring of the institutional basis of the system’ (para. 200). The motion to reinstate Volkov in the post of a Supreme Court Judge, as prescribed by the ECHR, had been defeated twice by the former Parliament, in February and July 2014. A new motion has been filed with the new Parliament on 12 December 2014 and, as of 18 December 2014, is under consideration by the parliamentary committees.

3 A Cold Reception of the Rule of Law by Ukrainian Legal Professionals

This section examines the professional demand for law and its rule, in particular the path of the rule of law concept in Ukraine and the reception it enjoyed from legal scholars and practitioners. One could expect legal professionals, especially legal scholars, to be in the vanguard of introducing and consolidating the rule of law in Ukraine, but this is only partially the case. During interviews in Kyiv, experts speaking on the rule of law in Ukraine employed rather unconventional – and surely unexpected – comparisons and metaphors: starting from the Ten Commandments, the beauty of a woman and love and marriage, to etiquette, buildings and laboratories, to even shields and brothels (which featured twice). This indicates what an unsettled area of debate and public life the rule of law is in Ukraine. The findings reveal that the majority of legal elites were in fact hostile to this novel for Ukraine concept, questioned its very utility and basic meaning and still prefer the Soviet rule *by* law to the rule *of* law in both theory and practice, sustaining the old power structures and state-society balance.

²⁵ Emerson (2010, at p. 1).

²⁶ Hewko (2010); Jarabik and Shapovalova (2010, at p. 1).

3.1 Discovering the Rule of Law: *verkhovenstvo prava*

The very notion of the rule of law is genuinely new for Ukrainian legal scholarship, public debate and society as a whole: even a Ukrainian term for the concept did not exist some 25 years ago. The word combination '*verkhovenstvo prava*' (the supremacy of law or Ukrainian for the rule of law) appeared for the very first time in the Conception of a new Constitution of Ukraine on 19 June 1991, which provided that the future Constitution should declare 'the rule of law, of the Constitution and of the laws of the Republic' (Sect. 1). The subsequent Project of a new Constitution of Ukraine, adopted by the Parliament on 1 July 1992, provided that, 'The rule of law principle is in effect in Ukraine' (Art. 5). The term *verkhovenstvo prava* was used officially for the first time only in the Constitutional Agreement on 8 June 1995, which provided that, 'The rule of Law principle is in effect in Ukraine' (Art. 1; the word 'law' capitalised). And, eventually, the final text of the Constitution adopted on 28 June 1996 declared that, 'The rule of law principle is acknowledged and in effect in Ukraine' (Art. 8).

A thorny path of this new concept into the above texts is revealed by members of the drafting expert commission. One of them admitted in an interview that at the time the majority of experts had no or scarce knowledge of the rule of law concept, 'had not even heard of Dicey' and remained highly sceptical of including a reference to *verkhovenstvo prava* in the Constitution. The rule of law was considered an attribute of the Anglo-American legal family and therefore unsuitable for Ukraine with roots in the continental legal family and a historical inclination towards German legal philosophy.²⁷ Instead, many favoured the concepts *pravova derzhava* (lawful state or Ukrainian for *Rechtsstaat*) and *verkhovenstvo zakonu* (the supremacy of the law or rule by law), familiar from the Soviet times.²⁸ Holovatyi, another member of the expert commission, later a member of the Venice Commission and Head of the Commission on Strengthening Democracy and Establishing the Rule of Law, was the main proponent of including the rule of law clause. Yet, even he admits that the concept remained obscure to him and made it to the constitutional documents mostly as an 'ideological slogan', marking a split from the Soviet era of *verkhovenstvo zakonu*.²⁹ The capitalisation of the word 'law' in one of the documents may reflect such an ideological significance of the rule of law clause for the authors. Ultimately, both *verkhovenstvo prava* and *pravova derzhava* were included in the Constitution (Arts. 8 and 1), making Ukraine a rare country whose Constitution establishes both the rule of law and *Rechtsstaat*. Notably, *verkhovenstvo zakonu* is not mentioned in the Constitution, although some scholars insist on its indirect fixation.³⁰

²⁷ Also in Knieper (2010, at p. 125); Sharlet (1998, at pp. 59–61).

²⁸ Records of the Parliamentary hearings on the Constitution reveal that representatives of the communist and socialist parties categorically and repeatedly tried to change the formulation of Art. 8 towards *verkhovenstvo zakonu*, rejecting *verkhovenstvo prava* altogether.

²⁹ Holovatyi (2008, p. 31, at p. 35).

³⁰ For example, in Androshchuk (2005, p. 1); Selivanov (1997, p. 8); Shapoval (1999, p. 5).

So, in 1996, the Constitution of Ukraine established that the rule of law principle was effective in Ukraine. Yet, apart from those directly involved in the drafting process, few had ever heard of it before.³¹ The appearance of a new term and concept was accompanied by silence for a long time. In the late 1990s and early 2000s, academic publications on the topic were few, the rule of law clauses in legislation rare, and references by politicians and journalists in domestic public discourse minimal. *Verkhovenstvo prava* was perceived as something borrowed mechanically from the West without proper comprehension and conceptualisation. Some denied the very usefulness and relevance of this novelty and the principle behind it, gave purely positivist accounts of *verkhovenstvo prava* and thus found no value added to the traditional principle of *verkhovenstvo zakonu*. A few examples can illustrate the situation at that time. From among two hundred articles in the *Constitutional Court of Ukraine Bulletin* in 1997–2006, only six articles touched upon the rule of law. Tkachuk, then a Judge of the Constitutional Court of Ukraine, opens his article about the application of the rule of law principle by Ukrainian courts published in the autumn of 2005 with a sentence, ‘The rule of law principle is a new phenomenon for Ukraine’.³² And Kundelska, in an article on the transposition of the rule of law into Ukrainian legislation published in December 2006, lists 17 legal acts that contain the word combination ‘*verkhovenstvo prava*’ and concludes that the rule of law in Ukraine ‘is today not a virtual, imaginary, but such a reality that finds its reflection in a number of regulatory legal acts’.³³

The more or less active use of the term and attempts by scholars to comprehend the rule of law doctrinally and by practitioners to capture it in legal acts began in the mid-2000s. A number of events that happened at the end of 2004 and the beginning of 2005 served as critical junctures. On 2 November 2004, the Constitutional Court of Ukraine, in paragraph 4.1 of its Decision No. 15-p/1/2004, made its first and to date only attempt to define authoritatively the rule of law principle. The Court stated the absoluteness of distinguishing between *pravo* (law) and *zakon* (the law, legislative act), which was a big step forward and generated enthusiastic reactions and commentaries. However, the Court described the meaning of *verkhovenstvo prava* with abstract categories like ‘the reign of law in society’, ‘fairness’, ‘the spirit of law’ and ‘socially legitimate morals and customs’, which made the proposed definition rather futile and void of meaning in the predominantly positivist and dogmatic Ukrainian realities. This attempt to give an official definition to the rule of law is characterised today as unsuccessful.³⁴ A month later, on 3 December 2004, the Supreme Court of Ukraine passed its famous decision on the Presidential elections. Together with the follow-up decision of 20 January 2005, these are referred to by the proponents of the rule of law as ‘without exaggeration, historic decisions’ that ‘transformed the rule of law from an abstraction, which it was considered until now, into reality’ and thus gave ‘a tangible impulse for the actualisation of the issue of

³¹ Some Ukrainian experts admitted in interviews that they personally had not.

³² Tkachuk (2005, at p. 94).

³³ Kundelska (2006, p. 117, at p. 118).

³⁴ Holovatyi (2011, at p. 171).

ensuring the rule of law in Ukraine'.³⁵ The political dimension notwithstanding, the decisions were a breakthrough in purely legal terms. In the absence of relevant provisions in election legislation, the Court justified its decision to cancel the results of the second round of Presidential elections by the rule of law clause of the Constitution (Art. 8). Belated as it may seem to have been, this was the first time the rule of law principle was invoked directly in Ukraine. Finally, in December 2005, a high-level international academic conference entitled 'Rule of law: issues of theory and practice' took place in Kyiv and directly concentrated public attention and scholarly efforts on the topic for the first time in Ukraine.³⁶

Since 2005, the rule of law has spread quickly in Ukraine's domestic public discourse and has become its stable element. However, such references are usually made in domestic polemics and communication with the outside world in the context of Ukraine's European integration and democratic choice narratives. The rule of law is mostly perceived as an abstract attribute suitable for demagoguery only and is not utilized much in constructive debates. One of the interviewees, a Ukrainian professor of law, suggested that for Ukrainian elites the rule of law 'serves as a trademark of sorts' and 'is now raised as a banner: once it was "we are going to communism", and now it is "we are going to the rule of law"'. International treaties, bilateral cooperation documents, titles of rule of law promotion projects all facilitate the introduction of the rule of law into Ukrainian public discourse. As for the principle's normative consolidation, the incorporation of the rule of law clauses into Ukrainian legislation is still very unsystematic, one could even say accidental, and by all means insufficient; surprisingly so, given Ukraine's propensity for façade arrangements discussed earlier.

3.2 Debating the Rule of Law in Ukrainian Legal Scholarship

Even in the atmosphere of superfluous enthusiasm in the early years of independence, the rule of law received a rather cool welcome from the vast majority of legal scholars and remains highly debated at present. Within what is a single and rather self-contained school of thought, there is no unity in the views regarding the very spirit in which the concept should be interpreted. The rule of law is an essentially contested concept and is bound to have varied meanings and understandings.³⁷ However, in Ukraine, the debate challenged its very utility, necessity and relevance.

The introduction of the rule of law to Ukrainian legal doctrine required a re-examination of concepts inherited from the Soviet times, with the main battle unfolding between *verkhovenstvo prava* and *verkhovenstvo zakonu*.³⁸ Similar to

³⁵ Kampo (2008, p. 1, at p. 2); Koziubra (2005, p. 3, at p. 4); Rabinovych (2006, p. 210, at p. 210).

³⁶ The conference was mentioned by many interviewees – Ukrainians. It was a joint effort of the OSCE Project Co-ordinator in Ukraine, the National Commission on Democracy and the Rule of Law, the Ukrainian Legal Foundation and the National University 'Kyiv-Mohyla Academy'. It resulted in a special issue of the academic journal *Ukrainian Law* (Vol. 2006/1).

³⁷ Gallie (1956, p. 167); Waldron (2002, p. 137).

³⁸ Androshchuk (2005); Gaivoronskyi (2003, p. 26); Holovatyi (2008); Kuznietsova (2005, p. 1); Onishchenko (2007, p. 76); Selivanov (1997).

Russian, there are two different words for law and the written law as a legal act in Ukrainian: *pravo* and *zakon*. This distinction is familiar to other languages and legal systems: the Roman *jus* and *lex*, the German *Recht* and *Gesetz*, the French *droit* and *loi*, and others. Accordingly, *verkhovenstvo zakonu* (supremacy of the law) is best described as the rule by law or *prééminence de la loi*. It refers to the supremacy of the state-generated law and entails that *zakon* – as the highest in the hierarchy of legal acts – shall be applied unconditionally. Drawing on legal formalism and positivism, *verkhovenstvo zakonu* reached an extreme in the Soviet legal system. The Soviet ideology insisted – as a matter of legal theory – that *zakon* is *pravo* and that there is no *pravo* outside *zakon*. In turn, *verkhovenstvo prava* (the supremacy of law) is a Ukrainian equivalent to the rule of law or *prééminence du droit*. It is founded on *pravo* as opposed to *zakon* and recognises the existence and applicability of unwritten forms of law, such as the principles of law, judicial precedent and legal custom. More generally, it asserts that law as a unique social substance (and not merely the state-authored laws) shall govern social relations. Importantly, the Council of Europe in PACE Resolution 1594 ‘The principle of the rule of law’ (2007, para. 4) and the Venice Commission in ‘Report on the rule of law’ (2011, paras. 4, 15 and 33) emphasised that the concept of *verkhovenstvo zakonu* found in some post-Soviet states is not a proper equivalent for the rule of law; that treating it as such runs contrary to the essence of the rule of law; and that *verkhovenstvo prava* is the only proper equivalent of the rule of law.

Presently, the concept of *verkhovenstvo zakonu* (rule by law) prevails in the thinking and practice of Ukrainian legal professionals and elites in general. The attitudes towards *verkhovenstvo prava* (the rule of law) still vary in the extreme, even though ‘the spectrum of opinions has somewhat narrowed’ in comparison to the 1990s.³⁹ The rule of law is no longer rejected as meaningless, but it is considered to be too theoretical and too abstract to be applied. Matters of conceptual scope are left for the few concerned legal scholars, while legal practitioners continue to function on the premise that ‘law is what we think about it’, to quote an interviewed former Judge of the Constitutional Court of Ukraine.

3.3 The Rule of Law as a Shift in Ideology

The equating of rule by law and the rule of law – *verkhovenstvo zakonu* and *verkhovenstvo prava* – is inherited by the Ukrainian legal doctrine from the Soviet one. The two concepts stand for conflicting visions of the organisation of power in society. It is a ‘worldview confrontation of two opposite ideologies ... Soviet ... and countries of Western democracy’, a confrontation of ‘two mutually exclusive doctrines – legal positivism and natural law’.⁴⁰ Proponents of the rule of law call for a shift in Ukraine’s meta-ideology from state-centric to human-centric and for a respective revision of the relationship between society and the state and between law and the state. The rule of law is positioned in these accounts as a safeguard of

³⁹ Koziubra, (2010b, at p. 7).

⁴⁰ Holovatyi (2006, pp. 1379, 1602).

human rights and a counterweight to the impunity of the state.⁴¹ The neo-Soviet state-centric governance, when a person is a dependent object and not a subject whose interests the state serves, persists in Ukraine. A shift to human-centric governance, when activities of state institutions are dedicated to the realisation and protection of human rights, is named as a major precondition for the introduction and consolidation of the rule of law in Ukraine.

Similarly, the relationship between law and the judiciary and between state and politics is traditionally problematic for Ukrainian and Soviet legal scholarship.⁴² The Constitution of Ukraine laid down the formal foundations for the depoliticisation of justice, spelling out the necessary principles and mechanisms. Yet, the relationship between the judiciary and politics proved to be more sophisticated. A shift, doctrinally and practically, from law legalising a given political order to law legitimising it, from law as a superstructure to law autonomous from politics and economy, from a department of justice to an administration of justice occurs extremely slowly. Neither a paternalistic approach to understanding the genesis and nature of human rights, nor a one-sided positivist interpretation of law itself have been surmounted fully in domestic legal science.⁴³

3.4 Appealing to the ‘Normality’ of the Rule of Law

Proponents of the rule of law appeal also to the universal and contextual normality and desirability of rule of law compliance. They emphasise the recognition of the rule of law by regional and universal international organisations and democratic countries and argue that it is meaningless to deny its value. The appeals to universality are reinforced by invoking the Europeanness of the rule of law. Similar arguments were made earlier by scholars with respect to the CEECs.⁴⁴ Having the rule of law in Ukraine’s constitutional system is regarded as ‘a result of the introduction into the [Ukrainian] national legal system of the best properties of European constitutional heritage, its norms and standards’.⁴⁵ Joining the Council of Europe in 1997 required not only a substantial correction of Ukrainian legislation, but also ‘a change of our traditional ideas about law and legal thinking overall’.⁴⁶ The rule of law as a pan-European principle is also an inevitable element of Ukraine’s integration with the European Union.⁴⁷

Ukrainian scholars complement such an external legitimisation of the rule of law with attempts to ground the ‘normality’ of the rule of law for Ukraine in

⁴¹ Averianov (2010, p. 72); Bohinich (2010, p. 99); Koziubra (2010a, p. 24, b, p. 36); Rabinovych (2010, p. 19).

⁴² Burbank (1995, p. 23); Butler (1988); Collins (1982); Koziubra (2005, at p. 3); Onishchenk (2008, pp. 207–208).

⁴³ Koziubra (2007, at p. 4).

⁴⁴ See edited volumes on the subject: Czarnota et al. (2005); Krygier and Czarnota (1999); Sadurski et al. (2006).

⁴⁵ Holovatyi (2011, at p. 160).

⁴⁶ Koziubra (2004, p. 3, at p. 7).

⁴⁷ Burlyuk (2014, p. 133).

Ukraine's own legal past. The rule of law debate comes hand in hand with identity search and attempts to grasp the European in Ukraine's legal culture. The legal culture of the Ukrainian people was formed under varied and dubiously positive influences of legal cultures of multiple states.⁴⁸ Some link the causes hindering the introduction of the rule of law into Ukraine's political and legal culture to the Russian factor.⁴⁹ Others conclude that even in the conditions of the domineering geopolitical influence of Russia, the Ukrainian legal system developed under strong influences of late Roman law, Lithuanian Statutes, Magdeburg law and other sources common to the legal systems of European states and that the later layers of Eurasian civilization were unable to erase these 'primordial foundations' of Ukraine's legal system.⁵⁰ Accordingly, the legal system of Ukraine – its genesis, sources of law, their internal structure, methods of systemising normative material, terminology – belongs to the continental legal family; and Ukraine should return to the European legal space and rid itself of the negative components inherited from the past.

What is important in the case of Ukraine – and what distinguishes it from Russia and some other post-Soviet states – is that the territory of Ukraine in its modern borders, notwithstanding the adoption of Eastern Christianity in the 10th century, was subjected to ponderable influences of the West throughout its subsequent history. The selection of East–West junction legal guidelines is quite characteristic of Ukrainian law. Such a combination of historical legacies places Ukraine halfway between the post-communist and post-Soviet states of Central and Eastern Europe, which have by now rejoined the community of European states, and post-Soviet states further East, which are pursuing varying models of a Eurasian state. Although the ideal of the rule of law in Ukraine has not yet attained the prestige it enjoys in the West, the gradual dominance of Western, in particular European, legal guidelines in this East–West dichotomy raises hope of the eventual success of the rule of law reform. For now, low demand for (the rule of) law among the majority of Ukrainian elites – political, business and legal – obstructs the introduction and consolidation of the rule of law in Ukraine. In fact, due to corruption and the involvement of the system of justice in the overall power structures in the country, discussed in the previous section, the problems extend not only to compliance with the rule *of* law, but even to compliance with the rule *by* law. The easiness and scale of the instrumental use of the system of justice by the Yanukovich government during the Euromaidan protests in the winter of 2013–2014 exposed just how little progress in reforming professional social norms has been made. The poor performance of legal professionals is reflected in the low levels of trust in and respect for the law and the system of justice among the population, analysed in the following section.

⁴⁸ Dmytriienko and Dmytriienko (2010, p. 297); Husariev (2009, p. 22); Loboda (2009, p. 31).

⁴⁹ Holovatyi (2008, Chapter XV).

⁵⁰ Kozziubra (2008, at pp. 5–6); Tseliev (2006, at p. 52).

4 The Disillusionment of the Ukrainian Population with Law and the System of Justice

Exploring the meaning people attach to law in relation to their everyday lives also has the potential to expose the foundations of the low demand for law, the low regard for the rule of law and the poor rule of law compliance record of a country. 'Ukraine is a post-totalitarian, post-colonial and post-genocide country. All these were bound to leave a trace on the consciousness and sub-consciousness of the people', writes Losiev.⁵¹ A deficit of legal culture at all levels is a general characteristic of the Ukrainian society, state and legal system.⁵² To provide a more nuanced picture of the situation, this section examines findings from a range of public opinion surveys conducted by a number of authoritative institutions independently from each other and contextualises these with experts' comments and secondary literature.

4.1 The Absence of Support for Law Enforcement Institutions

The activity of state bodies meant to uphold the rule of law and to secure and maintain justice, law and order – the judiciary, the prosecution system and the police – enjoys an extremely low degree of support from the population in Ukraine. Recurrent nationwide sociological polls on the subject are conducted by the Razumkov Centre. Accordingly, as of March 2013, 59.8 % of Ukrainians do not support the activity of the court system in Ukraine, merely 4.7 % (!) support the activity of the court system fully and 25.4 % support the judiciary's activities in isolated cases.⁵³ The support for the prosecution system is slightly higher than for judiciary, with 7.1 % of the population supporting its activities fully, 26.7 % favouring certain practices and 54.2 % disapproving of how the prosecution functions.⁵⁴ Finally, actions of the police are supported fully by 9.2 %, and partly by 30.3 % of the population, while 53.9 % do not support them at all.⁵⁵ The people's trust in the judiciary, the prosecution system and the police decreased in the last 5–10 years, with Ukrainian courts being supported the least at all times. This is alarming, if one agrees with Koziubra that 'the judiciary is, in a way, a litmus paper for the rule of law principle'.⁵⁶

⁵¹ In Yermolaiev et al. (2011b, at p. 59).

⁵² Kalynovskyi (2008); Koziubra (2006, p. 3); Oliinychuk (2006, p. 1); Trebin (2011); Volkovytska (2009, p. 63).

⁵³ Razumkov Centre, Sociological Poll: Do You Support the Activity of the Courts in Ukraine? (recurrent, 2005–2013). http://www.razumkov.org.ua/eng/poll.php?poll_id=169. Accessed 18 December 2014.

⁵⁴ Razumkov Centre, Sociological Poll: Do You Support the Activity of the Prosecution in Ukraine? (recurrent, 2005–2013). http://www.razumkov.org.ua/eng/poll.php?poll_id=173. Accessed 18 December 2014.

⁵⁵ Razumkov Centre, Sociological Poll: Do You Support the Activity of the Police (Militia)? (recurrent, 2005–2013). http://www.razumkov.org.ua/eng/poll.php?poll_id=172. Accessed 18 December 2014.

⁵⁶ Koziubra (2007, at p. 7).

The same law enforcement institutions are perceived by Ukrainians as the most corrupt. The annual surveys by the Gorshenin Institute reveal that the police, the courts and the prosecution service are the top 1, 2 and 4 most corrupt state institutions in the opinion of the population. While respondents could give multiple answers, in 2008, 51.7 % named the police, 49.4 % the courts, and 37.9 % the prosecution service. The situation did not change much in 2009: 54.4 % of the respondents named the police, 46.5 % the courts, and 24.1 % the prosecution service.⁵⁷ A similar picture is presented by Transparency International Global Corruption Barometers 2007, 2009 and 2010, although the judiciary takes the lead here: the judiciary and the police are perceived as the most and second most corrupt state institutions, respectively.⁵⁸ A more nuanced public opinion poll was carried out by the Razumkov Centre in 2009, targeting the *degree* of corruption in particular areas. The results for the judicial system, the police and the prosecution service were similar and showed that about three quarters of the population believe that these institutions are saturated with corruption, another 15 % think that corruption occurs here and there, and the remaining 5–10 % do not know how to answer.⁵⁹

As for the trust in the judiciary, according to the European Social Survey (ESS), Ukraine ranked last among European countries with a score of 1.91 out of 10, or 'do not trust'. The police received a better evaluation: 2.27 out of 10, or 'most likely do not trust'; but also here Ukraine is at the bottom of the list.⁶⁰ A large share of the population is convinced that one can buy a court judgement (61.9 % of respondents in 2010 and 59.5 % in 2009), an acquittal (53.6 %/52.4 %) or the life and freedom of another person (29.3 %/28.7 %).⁶¹ The results of a phone survey showed even higher percentages.⁶²

Unsurprisingly, the population has reservations about the possibility of achieving justice in the Ukrainian courts. Four in ten respondents (42.1 % in 2010 and 39.7 % in 2009) replied that justice is possible, but it will cost one a lot of money; three in ten (31.2 and 32.3 %) said it is not possible; and only one in ten (11.3 and 10.7 %) believed it is possible, because the law is the same for everyone.⁶³ Ukrainians do not see domestic courts as the most effective mechanism for protecting their rights and seem to be confused about where best to seek protection. According to a survey conducted between

⁵⁷ Gorshenin Institute, *Mental Bases of Choice: Annual National Social Research Program October 2006 – November 2007, 2008*, at p. 14; Gorshenin Institute, Project 'Ukrainian Statehood': *Annual National Social Research Program January-December 2008, 2009*, at p. 18.

⁵⁸ Chebanenko et al. (2011, at p. 35).

⁵⁹ Razumkov Centre, *Sociological Poll: To What Extent is Corruption Spread in Each of These Spheres?* http://www.razumkov.org.ua/ukr/poll.php?poll_id=516. Accessed 18 December 2014.

⁶⁰ Holovakha and Horbacyk (2010, at p. 94).

⁶¹ Gorshenin Institute, Project 'Ukrainian Statehood': *Annual National Social Research Program January-December 2008, 2009*, at p. 16; Gorshenin Institute, *Self-portrait Ukraine 2010: Annual Program of National Social Research 2009–2010, 2010*, at p. 21.

⁶² Gorshenin Institute, *Corruption in Ukraine*. http://gorshenin.eu/researches/2_Corruption_in_Ukraine.html. 10 December 2010. Accessed 18 December 2014.

⁶³ Gorshenin Institute, Project 'Ukrainian Statehood': *Annual National Social Research Program January–December 2008, 2009*, at p. 16; Gorshenin Institute, *Self-portrait Ukraine 2010: Annual Program of National Social Research 2009–2010, 2010*, at p. 21.

May 2006 and March 2009, recourse to a domestic court is perceived as being slightly less effective than applying to the European Court of Human Rights (13.0 % against 14.8 %) and only less than 1 % more effective than campaigns of civil disobedience, like picketing or a hunger strike (13.0 % against 12.1 %).⁶⁴

The skills of defending one's rights with strict legality have not yet taken shape in Ukraine, and even protest actions usually constitute a spontaneous explosion of resentment rather than a constructive struggle for people's rights and interests.⁶⁵ The international community is familiar with the two largest-scale and otherwise remarkable popular uprisings in Ukraine: the Orange Revolution in 2004 and the Euromaidan in 2013–2014. In fact, civic protest actions at a lower scale, both local and thematic, occur in Ukraine regularly and with increasing frequency. The popular protest specifically against the failures of the system of justice and the absence of the rule of law has been intensifying in recent years. In 2011–2013, the so-called cases of 'Oksana Makar', the 'father and son Pavlychenky', the 'Vasylykiv terrorists' and the 'Vradiivka rapists' became *causes célèbres* in Ukraine, gained national resonance and mobilised protesters all around the country. The culmination of people's frustration with the system of justice progressively becoming a system of *in-justice* was the Euromaidan – a popular uprising against the impunity of state authorities and specifically the judiciary, the prosecution service and law enforcement. The trigger for this protest was the decision of the government not to conclude an Association Agreement with the European Union at the Eastern Partnership Summit in November 2013 (hence, the name 'Euromaidan'). However, it was the use of force against peaceful protesters at the beginning of December 2013, followed by the selective prosecution of protesters and the adoption of the so-called 'dictatorship laws' in mid-January 2014 that brought millions of people out on the streets and kept them there for months.⁶⁶

The tendency of such civic protests against the impunity of state authorities to become more frequent, consistent, constructive, at the grass-roots level and spontaneous (i.e. not initiated or sponsored by any political force, but organised by local activists through social media) is vital in the context of this study on the demand for law in Ukraine and distinguishes Ukraine from other post-Soviet states. The civil society in Ukraine is maturing, activating and self-organising. Ukrainian experts unanimously agree that the most recent events have given an extra boost of consciousness to Ukrainian civil society,⁶⁷ and it is now a question of whether this boost will be institutionalised, sustained and capitalised on.

⁶⁴ Razumkov Centre, Sociological Poll: Which Mechanism of Human Rights Protection is Currently the Most Effective in Ukraine? (recurrent, 2006–2009). www.razumkov.org.ua/ukr/poll.php?poll_id=205. Accessed 18 December 2014.

⁶⁵ Yermolaiev et al. (2011a, at p. 27).

⁶⁶ The blunt violation of human rights and the impunity of violators remained the main reason for protests throughout the Euromaidan. See the results of recurring surveys among the protesters conducted by Ilko Kucheriv Democratic Initiatives Foundation at: www.dif.org.ua/en/publications/press-relezy/vid-mchi-sho-zminilos.htm.

⁶⁷ See Ilko Kucheriv Democratic Initiatives Foundation, Maidan i Hromadianske Suspilstvo – Opytuvannia Ekspertiv [Maidan and Civil Society – An Expert Survey]. http://www.dif.org.ua/en/polls/2014_polls/maidanja-ekspertiv.htm. Accessed 18 December 2014.

4.2 To Law or Not to Law?

The attitudes of the Ukrainian population to law as a social regulator and to legislation as its normative expression are ambiguous. On the one hand, the majority of the population (although not an overwhelming one – 58.2 %) consider that laws and other legislative acts should be respected. On the other hand, a comparable majority (53.3 %) are convinced that laws in Ukraine are not observed.⁶⁸ Similarly, according to a survey by the Social Research Centre ‘Sofia’ in June 2008, only 16.0 % of Ukrainians to some extent consider Ukraine to be a *pravova derzhava* (lawful state), while over three quarters of the people (77.8 %) believe it is not. As for what could improve the situation and provide law and order, Ukrainians are divided. Practically half the population (48.5 %) see a solution in effective and ‘proper’ legislation (so appealing to the supply of law), whereas a third (33.1 %) keep faith in strong political leaders. Notably, one in ten respondents (8.2 %) is convinced that nothing is capable of changing the situation for the better.⁶⁹

Furthermore, over a quarter of the population (26.6 %) think that not all laws are perfect and, therefore, one should treat them taking into consideration one’s personal interests and another 6.7 % openly say that laws are there to be broken.⁷⁰ As a Ukrainian expert describes, ‘Ukrainian citizens [...] do not act openly against the law, but they also do not follow it... As the saying goes, “the strictness of our laws is compensated by the optionality of their observance”. And following this principle the society lives at the moment.’⁷¹ In the context of similar legal transformations in Poland, scholars noted the ‘disintegration in legal consciousness’: a sense of the presence and the validity of law is accompanied by a sense of the destruction of normativity, when law is seen as a collection of texts, a source of certain goods, but not a legal duty.⁷² Regarding Ukraine, experts speak of ‘a peculiar attitude to law’, which is not as neglectful as it is estranged and aloof.⁷³ At an abstract level people may genuinely subscribe to the rule of law, but in practice their needs can be met only by following a different set of social norms. A Ukrainian expert expounds this duality: ‘The very process of breaching the law is perceived by us as routine, common, correct, acceptable... And at the same time psychologically a Ukrainian believes himself to be law-abiding. He wants to be law-abiding, but he goes and pays a bribe... because it is a custom. So, practically, he breaches the law without realising it.’⁷⁴ The difference between what is common for the West and what one observes in Ukraine and other post-Soviet countries is not in

⁶⁸ Gorshenin Institute, Self-portrait Ukraine 2010: Annual Program of National Social Research 2009–2010, 2010, at p. 15; Gorshenin Institute, Corruption in Ukraine. http://gorshenin.eu/researches/2_Corruption_in_Ukraine.html. 10 December 2010.

⁶⁹ Yermolaiev and Levtsun (2009, at pp. 16, 35).

⁷⁰ Gorshenin Institute, Self-portrait Ukraine 2010: Annual Program of National Social Research 2009–2010, 2010, at p. 15.

⁷¹ Yermolaiev et al. (2011a, at p. 33).

⁷² Zirk-Sadowski (2006, at p. 307).

⁷³ Yermolaiev et al. (2011a, at p. 34).

⁷⁴ In Yermolaiev et al. (2011b, at pp. 32–33).

the recourse to informal rules as such, but in the relationship between formal and informal rules: in the West, the informal rules complement the formal law, whereas in post-Soviet countries 'formal and informal normative systems run parallel to each other'.⁷⁵

4.3 Attitudes to Law as a Matter of Trust

Partly, such mixed attitudes to law and law enforcement institutions pertain to a generally mistrustful attitude of Ukrainians to people and institutions. According to ESS 2009 data, Ukrainians occupy one of the lowest rankings among citizens of European countries regarding the level of trust towards the overall majority of the people. With a score of 4.11 out of 10, Ukraine's result is interpreted as 'fluctuation between trust and distrust, with an inclination towards distrust'.⁷⁶ A survey by SRC 'Sofia' reveals a similar situation: less than half of the respondents (43.6 %) believe to some extent that the majority of the people can be trusted and practically the same percentage of respondents (42.8 %) agree fully or partly that most people will try to cheat you, if there is such a possibility.⁷⁷ A significant trust level exists in small groups, among family, relatives and friends. Group solidarity occurs also in professional groups, but a person's professional identity has no precedence over a person's private identity.⁷⁸ The fine balance in the so-called 'F-connection' (finance, firms, friends, families and favourites) present in many post-Soviet states, including Ukraine, is intriguing for Western observers.⁷⁹ Such strong preventive distrust is believed to distinguish Ukrainians even from their closest neighbours – Russians and Belarusians.

At another level there exists distrust in societal and state institutions altogether, an attitude towards the state as a strange force. Experts speak of 'cardio-patriotism', or hearty, emotional but not rational patriotism characteristic of Ukrainians: the love for the country does not pertain to the state.⁸⁰ Ukrainians are said to lack a constructive and organic attitude towards state institutions, including laws. The necessary common rules are treated as strange external establishments; hence, the distancing, the aspiration to adapt or to evade this law.

4.4 Legal vs. Just: A Disconnection between Law and Justice

Additionally, it appears from sociological polls that law (understood narrowly: as formal legislation) is not perceived as an adequate or appropriate social regulator. As mentioned above, a large part of the Ukrainian population believes that laws are not perfect and should be applied or ignored in accordance with one's interests; exceptions are therefore possible and welcome. At a deeper level, people see a

⁷⁵ Pistor (1999, at p. 106).

⁷⁶ Holovakha and Horbachyk (2010, at p. 94).

⁷⁷ Yermolaiev et al. (2011b, at p. 38).

⁷⁸ Kurkchiyan (2003, at p. 28).

⁷⁹ Dinello (1999, p. 24).

⁸⁰ Yermolaiev et al. (2011b, p. 43).

discrepancy between notions of legal and acceptable. Half (!) of Ukrainians (49.2 % in 2003 and 56.5 % in 1993) consider that not everything that is legal is acceptable, against a quarter (27.3 %/24.6 %) who believe that indeed what is legal is acceptable and another quarter (23.5 %/18.9 %) who remain undecided.⁸¹ People question the very legitimacy of law unless it coincides with social norms. Such a 'conspicuous separation of law from the spirit of justice' is a tendency which is common to all post-Soviet societies, Ukraine included. Here, law contradicts people's instinctive judgements about right and wrong; it fails to stand for morality, honesty and justice, but is rather seen as a 'tactical game requiring expertise in manoeuvre, influence, and persuasiveness'.⁸²

Having the habit of putting law and morality into separate mental categories, Ukrainians seem to be more committed to moral norms than the legal ones. When asked whether it is permissible to evade the law without breaching it, almost two thirds of respondents (63.9 %) agreed fully or in part while only one third (36.0 %) expressed reservations. The numbers for morals are reversed: when asked whether it is necessary to align one's actions with morals, three quarters of the respondents (76.9 %) said an absolute or a most-likely 'yes', while only a quarter (23.1 %) said that morals can (probably) be disregarded.⁸³

Such total disillusionment with the law, the system of justice and state institutions in general poses obstacles not only to the rule *of* law, but also to the rule *by* law. The social attitudes also make the institutionalisation of changes, whether brought about by centralised legal reform or resulting from civic protests, a challenge. Dealing with this legal nihilism and addressing the popular demand for law is an important step in consolidating the rule of law in Ukraine. The changing societal context, with people increasingly willing and ready to fight for their and others' rights and with popular solidarity growing in the face of crisis promises a more favourable environment; and it is up to domestic and external reformers to capitalise on this social demand for change.

5 Conclusion

The general finding and argument of this article is that systemic shortcomings in the application of the rule of law in Ukraine stem not only and not so much from deficiencies in the supply of law and technical problems connected to the shape of laws and legal institutions as from deficiencies in the demand for law and its rule among Ukrainian elites and the wider population. The willingness of the ruling political and business elites to preserve the existing power structures, the tendency of the elites, including legal scholars and practitioners, to equate the rule of law with the rule by law and the predominantly negative attitudes of the wider population to law and the system of justice pose significant obstacles to the introduction and consolidation of the rule of law in Ukraine.

⁸¹ Khmelko (2003, at p. 6).

⁸² Kurkchiyan (2003, at p. 43).

⁸³ Khmelko (2003, at pp. 6, 7).

The findings of this study support the broader conclusion in the scholarship on legal change that universal development solutions do not work, that the supply of law alone will not result in sustainable legal change and that ‘society is the all-consuming centre of gravity’ when it comes to law.⁸⁴ The findings enrich our understanding of Ukraine as a country transforming towards the rule of law ideal and support the claim that Ukraine – as any other country – provides a distinct context for scholars to research and for rule of law promoters to engage in. Many of the findings are in line with earlier research on Russia and post-Soviet states overall and reinforce them with country-specific empirical evidence. At the same time, it is false to treat post-Soviet states as a homogenous group almost 25 years after the dissolution of the Soviet Union: while the shared Soviet legacies do account for a large number of similarities between the states, it is the distinct post-Soviet experiences of these states, combined with the rediscovery of their pre-Soviet legacies, that account for contemporary domestic contexts and generate diversity between them.

Like this, the political and business elites in Ukraine, as in other post-Soviet states, are corrupt, disposed to authoritarianism and prefer to maintain the status quo rather than reform. However, unlike in other post-Soviet states, there is considerable competition between different oligarchic clans and sufficient openness in the system for new elites to form and enter the political landscape. This ensures rotation among the ruling elites and fuels constant reform processes, which may or may not serve the ‘good cause’, but in any case render impossible the conservation of the situation. Similar to other post-Soviet states, legal professionals in Ukraine are products of the Soviet legal culture and Ukraine’s legal system is a reformed version of the Soviet one. However, Ukraine’s formal acknowledgement of a commitment to the rule of law, the ongoing attempts to accommodate the rule of law into Ukrainian legal doctrine, the historical roots of Ukraine’s legal system in continental European legal processes and the discourse of ‘returning to Europe’ together provide a more favourable domestic context. Finally, as in other post-Soviet states, the Ukrainian population is disillusioned and distrustful of law and law enforcement institutions and governs a large share of social relations by informal rules. Yet, in comparison to other post-Soviet states, the civil society in Ukraine is significantly more mature and active, willing and capable to control the authorities and ready to protest. This promises enduring social demand for change that would constrain the ruling elites. These observations call for further within-case analyses and systematic comparative studies on the supply of law and the demand for law dimensions of rule of law reforms in different post-Soviet states.

The findings of this study also have implications for future policy and rule of law promotion efforts, in particular those of external actors. The assistance of major rule of law promoters in Ukraine (the USAID, the EU, the Council of Europe, the OSCE and others) typically focuses on transforming legislative and institutional frameworks and improving the capacity of institutions. Such changes to domestic institutional context are meant to improve rule of law compliance overall, and they are undoubtedly necessary. However, this article demonstrates that hindrances to

⁸⁴ Tamanaha (2011, p. 209, at p. 219).

legal change in Ukraine rest at a deeper level: the level of power structure and professional and popular social norms. Excessive emphasis on the supply of law explains the limited effects of the external efforts to foster the rule of law in Ukraine to date. Without the backing of demand, changes in the supply of law result in façade rearrangements and more intensive Brownian motion of reforms. A senior Ukrainian legal analyst resumed his assessment of the rule of law reform efforts in Ukraine with a joke: 'In your brothel, one should be not rearranging the beds, but replacing the staff'. Using this comparison, without targeted efforts to foster the demand for (the rule of) law or 'changes in the staff', reforms in the supply of law will be little more than 'a rearrangement of beds'.

The ways to target the demand for law more directly and intensely constitutes an area for further exploration by researchers and practitioners alike. The findings of this study suggest a few evident directions: investing in the formation of new elites (e.g. through education, training and cooperation with their counterparts from other countries); contributing to reforms in legal education and scholarship, professional (ethics) training and disciplinary mechanisms within the legal profession; and engaging with civil society at large through awareness-raising and capacity-building efforts, so as to enforce the existing structures pushing for reform and institutionalise the spontaneously emerging ones. Shaping the demand for law may be a soft and slow process, but it is necessary for power structures and social norms to alter and for amendments to legislative and institutional frameworks to result in meaningful legal change.

The Euromaidan opened a window of opportunity for substantial changes in Ukraine in all spheres of the state and society, including enhanced rule of law compliance. A change for the better is possible, but it is not automatic or inevitable: the human and institutional composition of the country remains the same, while the disillusioning outcome of the Orange Revolution 10 years earlier reminds us that the change may actually be for the worse. Nonetheless, the profound enthusiasm among the (new) elites and the population, the determination of the civil society to control every step of the new President, Parliament and Government and the regenerated attention of the international community to Ukraine and its domestic transformations provide a favourable environment for a real qualitative change. It is up to domestic and external rule of law reformers, scholars and practitioners alike, to seize this opportunity.

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