

Beyond European Union Membership: Rule of law in EU-Ukraine Association Agreement

I. Dyvoniak¹

¹ *International Doctorate School of the University of Murcia, i.dyvoniak@um.es*

1. Introduction

'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, *the rule of law* and respect for human rights, including the rights of persons belonging to minorities' (Article 2 TEU).

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

Perhaps, the latter articles of the Treaty European Union [1] (before- Amsterdam Treaty) are the primarily liable for the wider democratization of Central and Eastern European countries being granted the role of both paramount incentive and severe restriction to the EU membership. The EU umbrella covers now 28 member states which, despite controversial and diverse historical backgrounds are united in their common values into a supranational legal organization. Thus, technically, every country with a geographical reference to Europe is entitled to apply for the EU association (incentive approach), albeit, only in case the applicant country shares the same values as Article 2 TEU stipulates.

The mere adherence to the EU cornerstone principles is not sufficient to start the accession process, since the only *de-jure* observance is relevant (restriction approach). In this vein, the EU has created a ramified legal framework for the potential candidates based on the system of progress evaluation introduced during the Copenhagen European Council Meeting in 1993. The Conclusions of the latter named by the legal community *Copenhagen criteria* or *conditionality* stress that any candidate country must have 'achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities (political criteria)' [2]. Apparently, the Copenhagen political criteria correlate with the Articles 2, 49 TEU.

2. The European Union common values and accession process

The EU shared values play the pivotal role in all the stages of enlargement process: *ex-ante*, *amid* and *post* accession. *Ex-ante* enlargement is characteristic for the EU neighboring countries which legal systems are far from being consistent with the Copenhagen political criteria (Ukraine, Moldova, Georgia); though they express the strong will to democratic transformation in line with the EU requirements. The European Union shapes such 'transitional democracies' [3] through its external policy tools (i.e. European Neighboring Policy (hereinafter, "the ENP"); Partnership and Cooperation Agreements; Eastern European Partnership (hereinafter, "the EaP") designed to gradual convergence of the EU and 'target' country legal orders. The status of 'EU neighbor' does not imply the membership perspective as such; however the country may view it as a pre-condition to accession [4]. Moreover, the Copenhagen political criteria are bestowed significance in *ex-ante* enlargement by both the European Council and Commission deviated from the primal Copenhagen message "to stress the absolute priority of the Copenhagen political criteria before beginning and continuing the accession negotiations with any candidate country" [5]. To wit, deriving from the language, Ukraine, Georgia or Moldova have to guarantee

democracy, rule of law, protection of human rights and minorities under EU conditionality to gain the accession prospect.

Finally, the *post* accession relations turn into internal policy of EU with its Member States contrary to the *ex-ante* and amid enlargement processes guided by the EU external actions. The soft-law instruments concede the EU hard-law binding for all its members with the possibility of infringement proceedings under Articles 258, 260 TFEU. Though, the *post* accession relations are out of scope in this paper, it should be noted that the European Commission elaborated a Rule of Law Framework in 2014 aiming at better reaction to member states breach of the Article 2 TEU provisions on common values. To eliminate the 'rule of law backsliding post-EU accession' [6], the Framework aims to activate the 'politicized' Article 7 TEU dealing with the serious and persistent breach of the EU shared values and, in this wise, renders the first comprehensive interpretation of rule of law as conceived by the EU.

Obviously, the groundbreaking EU values pierce the whole spectrum of EU legal and political relations inside and outside its borders. It is argued the rule of law is a 'prerequisite for the protection of all other fundamental values upon which the EU is founded'. [7]. In the following study, the rule of law tends to be assessed in the narrow meaning: as understood by the European Union in the course of *ex-ante* enlargement, specifically with regard to EU-Ukraine Association Agreement.

3. EU-Ukraine Association Agreement: 'common values approach'

The basis for addressing Ukraine in the light of *ex-ante* enlargement derives from its historical pathway. The ambiguous plans of the EU integration are being constantly declared as the priority of Ukrainian external policy since gaining independence in 1991. To this extent, the EU-Ukraine Partnership and Cooperation agreement (hereinafter, "the PCA") was signed in 1994 (in force –since 1998), the ENP instrument regarded Ukraine as a EU 'neighbor' together with the other 15 'ring of friends' [8] countries in 2004 which was later upheld by the Eastern Partnership EU initiative in 2009 to enhance the cooperation with the 6 ENP countries. Finally, as a result of long-lasting euro integration affords coupled with the tragic events of Dignity Revolution in 2013-2014, the Association Agreement was signed in 2014 to enlighten a 'new chase' of EU-Ukraine bilateral relations. Van der Loo *et al.* point out at 'integration-oriented' character of EU-Ukraine AA meaning the EU law concepts, principles and provisions must be incorporated and further harmonized with the Ukrainian legislation as if Ukraine is a part of the Union [9]. In this scenario, Ukraine *de-facto* could convert into a 'shadow member state' [10] upon implementation of the Agreement.

In its legal design, the EU-Ukraine AA incorporates the association features (Article 217 TFEU) of Copenhagen political conditionality, from the one hand, implying the Ukrainian commitment to the European common values and, from the other hand, setting the high evaluation standards to monitor the regulatory approximation to the aforementioned values.

[Parties are] COMMITTED to a close and lasting relationship that is based on common values, that is respect for democratic principles, rule of law, good governance, human rights and fundamental freedoms..'

[Preamble, EU-Ukraine AA].

To this end, a complex institutional network (Association Council, Association Committees, sub-committees, Civil Society Platform) is delineated empowered with 'the full decision-making capacities' [11]. The Association Council may adopt binding decisions based on the results of ministerial meetings. Consequently, Ukraine is regarded as a

Partner rather than mere recipient under previous PCA or ENP which *static* nature precluded the explicit enhanced Ukrainian integration. [12]. Likewise, the mutual leverages, rights and obligations permit to treat the Agreement as *horizontal* partnership to compare with the previous PCA which was ill-designed to be mutually beneficial [13].

The *strict* conditionality tendency 'more reforms – more benefits' shapes this bilateral relationship with an aspiration of Deep and Comprehensive Free Trade Area (hereinafter, "the DCFTA") establishment as a key objective. The specific voluminous guidelines are incorporated in the agreement to draw a path to regulatory and legislative approximation of Ukrainian legislation to the EU internal market. However, the EU makes it obvious that the DCFTA is impossible without the commitment to its common values having included the suspension clause in case of violation [14]. When making it a step-by-step direction with clear exposition, benchmarks and deadlines how to achieve a gradual convergence of Ukrainian and EU internal markets, the Union does not give any interpretation of rule of law, democracy and other essential elements.

Considering the paramount meaning of the EU common values in both its internal and external policy, so as to safeguard and guarantee the smooth Ukrainian legislative transformation, it seems vital to clarify the legal essence of the common values encapsulated in the Agreement, particularly the rule of law as 'a prerequisite for the protection of all other fundamental values upon which the EU is founded' [15]. The main question to this extent is how the rule of law is understood in the EU-Ukraine AA.

4. External vs. domestic rule of law interpretation

To answer it, the two possible scenarios may be screened: the first one refers to Ukraine as third-country, and thus the rule of law should be explained from the virtue of EU external action; the second implies Ukraine is 'quasi member state' for the purposes of the Agreement to be treated as if Ukraine is a part of the EU domestic policy.

When tackling the first scenario, Ukraine is deemed as a third country with the 'neighbor' rank under the ENP and the EaP remaining still in force along with the AA. Besides the latter, the Copenhagen political criteria are also relevant in the context of Ukraine as country with the EU membership ambition. Deliberately or not, there is still no uniform rule of law explanation in the EU external framework. The apparent aspect is that the EU approach to rule of law differs in external relations than in the ones with its member states [16]. In the absence of rule of law definition, some scholars [17] admit the EU purposiveness to the 'rule of law' consistent interpretation, as it could be adjusted to every country political and legal situation, while the others point out at the EU improvidence when the lack of formal 'rule of law' notion leads to no further obligations for the recipient country [18]. Both under the ENP with its low incentives and under Copenhagen conditionality, the EU upholds *country-to-country* based approach to rule of law. In case of Ukraine as the EU 'neighbor', the rule of law is associated with a right to a fair trial, independent and impartial judiciary, well-trained public administration at all levels as well as the effective and efficient law enforcement institutions [19].

However, the Association Agreement is an innovative legal instrument different from the ENP in its legal nature, level of complexity and, more importantly, in its consequences. Its *integration-oriented* character let assume that Ukraine is treated differently than one of 'ring of friends' and, by this differentiation it steps to the new advanced level of the joint relationship. Accordingly, the enhanced legal approximation and subsequent convergence of Ukrainian and the EU legal orders as intended by the AA, give

a clue to consider the EU common values provisions to be also interpreted equally for Ukraine and its member states.

The rule of law is mentioned 9 times in Preamble and in so-called 'political clause' of the Agreement (Title 1, Arts.2, 3; Title 2, Arts.4, 6; Title 3, art.14). It is discerned both a value and principle upon which the reciprocal contracting relations are built. Since the Agreement refers to the International documents promoting rule of law [20], it looks vital to search for the rule of law definition in there.

The Helsinki Act has no precise rule of law mention in its text while both the Universal Declaration on Human Rights and European Convention include rule of law as a core element in the Preambles. The Charter of Paris for a New Europe embodies it to the overall democracy 'basket' containing only one evident comparison of rule of law with the independent courts. In the aforementioned international legislation, rule of law is an abstract category indispensable element of democratic societies, guiding principle of international law and basis for stable human-oriented legal orders. Though, no formal meaning can be found in the latter hard-law acts as well.

The advisory body to Council of Europe (hereinafter, "CoE") – Venice Commission makes a first formal attempt to determine the rule of law to 'help international organizations and both domestic and international courts in interpreting and applying this fundamental value' in its Report, 2011 [21]. As part of CoE, the Union, thus, shares the consensus interpretation of the Venice Commission having indicated '*Legality, including a transparent, accountable and democratic process for enacting law, legal certainty, prohibition of arbitrariness of the executive powers, independent and impartial courts, effective judicial review, respect for human rights and non-discrimination and equality before the law*' as the rule of law non-exhaustive characteristics [22]. Obviously, the deviation from a vague concept to an explicit meaning facilitates the European Commission as a Treaty guardian to better react at the Article 2 TEU breach, use 'nuclear option' of Article 7 TEU and, all of a lump, to unequivocally demonstrate the core values foundation to its citizens and to broader international community. When the prime idea was to activate Article 7 TEU against member state, the Union Framework on rule of law goes far beyond this mission serving as an indicator for the EU external partners on *what* is the rule of law cornerstone principle and *how* it is safeguarded in the concrete.

In the light of the EU-Ukraine AA, the Union shows an unambiguous aptitude to regulatory approximation of Ukrainian legal system to the EU standards 'in innovative way' based on the core values. The time-consuming legislative reforms could be ill-implemented and thus, the whole Agreement achievements might be at risk if the breach of rule of law principle is detected. To this manner, the convergence of Ukraine to the EU must be done in all the dimensions, not only to incorporate the EU norms on DCFTA, but to start with the implementation of EU rule of law credential. It is possible only in the second scenario when Ukraine is considered as if a part of the EU, though short of the membership perspective. In this case, Ukraine will achieve the maximum harmonization with the EU upon successful and timely implementation of the Agreement provisions and, as a consistent step, may apply for the EU membership under Article 49 TEU.

5. Conclusion

The pioneer EU-Ukraine AA has brought extensive scientific debates on its legal nature, legal effect and constitutional challenges of implementation since there were no antecedents in EU external policy to compare. Aiming to establish deep and

comprehensive free trade area, it goes far beyond the 'economic issues' also influencing the quality of democracy, governance and the rule of law, as the essential elements of EU-Ukraine bilateral relations. The principle of rule of law is of particular importance since it is a 'backbone' of the EU and a precondition to EU membership. The reference to rule of law is made during *ex-ante*, amid and *post-accession* relations, both in EU domestic and external actions. Though, in the first two stages, the Union lacks a uniform interpretation of rule of law applying vague *country-to-country* approach when dealing with potential or formal candidates. It is argued that Ukraine, being at *ex-ante* stage of EU integration has to imply the *domestic* rule of law interpretation as if it is part of the EU. It stems from the nature of the Agreement which is precisely directed to regulatory approximation of Ukrainian legal order to the EU internal market and common justice and security area. In this respect, the EU common values including rule of law are to be understood by Article 2 TEU and further expounded by the Framework on rule of law. Consequently, legality, legal certainty, prohibition of arbitrariness, independent and impartial judiciary, effective judicial review, respect for human rights and equality before the law are to form the basis for the rule of law essentials in EU-Ukraine Association Agreement.

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