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ORIGINAL PAPER

Overcoming the diversity-consistency dilemmas in EU Rule of Law external action

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Abstract The development of a coherent EU Rule of Law external action strategy requires that the Union overcome two "diversity dilemmas" and one "consistency dilemma." The three dilemmas are interrelated and ought to be approached holistically. The first diversity dilemma pertains to the great divergence in the current uses and understandings of the concept of the Rule of Law. The second emanates from empirical reality, rather than conceptual challenge. In the contemporary global system, the EU faces a broad, possibly widening, set of political regimes which pose distinctly different Rule of Law challenges. A meaningful Rule of Law external action strategy therefore cannot be based on uniformity of conceptualization or policy prescriptions but must contend squarely with a reality of great, and arguably growing, variance. Grappling with diversity while maintaining conceptual and policy coherence represents the third key challenge to the development of a coherent EU Rule of Law external action strategy. Resolving the consistency dilemma necessitates accommodating diversity within a coherent conceptual and policy framework. This, in turn, requires that, in its external action, the EU approach the Rule of Law as a central pillar of a broader, liberal political-development agenda and that it adopts a vertical (rather than the traditional horizontal) understanding of the concept, involving broadly progressive, cumulative, and hierarchical spheres of Rule of Law conditions.

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Introduction

The idea and ideal of "the Rule of Law" has, at least since the seminal judgement of the European Court of Justice (ECJ) in the case of *Le Verts v. Parliament*, gradually but consistently gained prominence in the European Union (EU).[1] The concept, which first entered the DNA of European integration in the 1980s as a potent instrument for the self-construction of a supranational legal edifice, evolved in the post–Cold War era to also become a central pillar of EU "external governance" policies (Lavenex and Schimmelfennig 2009) toward candidates and potential candidates for accession (Mineshima 2002; Baracani 2008; Dalara 2008), associated states (Magen 2005; Burlyuk 2014a), and countries and regional organizations far beyond Europe, not least in Asia (Kleinfeld 2009; Jetschke and Murray 2012).

Accordingly, there is by now no shortage of formal EU commitments to the Rule of Law as a normative good nor, more controversially, to the goal of promoting it abroad (Magen and McFaul 2009; Pech 2012). The Union collectively and each individual Member State have vowed to safeguard the Rule of Law internally and to advance it externally as a matter of EU treaty law (Pech 2010; 2012). In global fora too, all EU countries have pledged to protect and promote the Rule of Law, notably by their unanimous adoption in September 2012 of the UN *Declaration of the High-level Meeting on the Rule of Law at the National and International Levels* (United Nations 2012). Indeed, in referring to the *Declaration*, the EU's representative to the UN stated that the "Rule of Law is of critical importance for the EU's external action" and promised that the Union act zealously and concretely to promote it as an essential means of advancing peace, stability, and development at both the national and international levels.[2]

Still, Europe's ebullient normative attachment to the Rule of Law should not be mistaken for conceptual clarity regarding the scope and content of the term, let alone its successful translation into a coherent external action strategy. The Union's founding treaties lack any definition of what the Rule of Law actually entails (Pech 2010) and the practice of EU Rule of Law promotion has, with a high degree of justification, come under scathing criticism for its rigidity (Börzel et al. 2008; Nicolaidis and Kleinfeld 2012), inconsistency (Kochenov 2009; Wolff 2013), and ineffectiveness (Burlyuk 2014b; Pech 2015).

The development of a coherent EU Rule of Law external action strategy, this article submits, requires that the Union overcome two "diversity dilemmas" and one "consistency dilemma." The three dilemmas are interrelated and ought to be approached holistically.

[1] See Case 294/83 *Les Verts v. Parliament* [1986] ECR 1339, where the ECJ famously distinguished between the European Community (EC) and traditional International Organizations by, *inter alia*, defining the EC as a "*Community based on the Rule of Law*" (para. 23). For a detailed analysis of the Rule of Law in European legal traditions and EU law, see Ricardo Gosalbo-Bono (2010). For a discussion of the applicability of the notion of the Rule of Law at the international level, see Chesterman (2008).

[2] Statement on behalf of the EU and its Member States by Gilles Marhic, Minister Counsellor, Delegation of the EU to the UN, at the Sixth Committee on Agenda item 83: The Rule of Law at the national and international levels (10 October 2014) (available at: http://www.eu-un.europa.eu/articles/en/article_12682_en.htm).

The first diversity dilemma, addressed in the "The first diversity dilemma: conceptualizing the Rule of Law" section, pertains to the great divergence in the current uses and understandings of the concept of the Rule of Law. Here, the article contends, the EU must opt for a substantive, "democratic Rule of Law" (Magen and Morlino 2009: 6-10) conception that is broadly consistent with the one articulated by the Commission in its March 2014 Communication (Commission 2014), with two additional elements.

The second diversity dilemma emanates from empirical reality rather than conceptual challenge. In the contemporary global system, the "The second diversity dilemma: different regimes, different Rule of Law challenges" section demonstrates, the EU faces a diverse, arguably diversifying, set of political regimes. These range from reasonably consolidated democracies (such as Brazil, India, Indonesia, and South Africa), to competitive authoritarian regimes (such as Egypt or Kazakhstan), and from broadly functioning closed authoritarian regimes (such as China and Russia) to fragile states and areas of limited statehood (such as Afghanistan, the Democratic Republic of Congo, Libya, Mali, or Syria).[3] Theoretically and practically, diverse regime types pose distinctly *different* Rule of Law challenges which cannot be approached in a schematic, one-size-fits-all manner.

This does not mean, as Marangoni and Raube (2014) suggest, that the quest for coherence in EU external action could be interpreted as a vice as much as a virtue, but it does mean that a coherent EU Rule of Law external action strategy cannot be based on uniformity and that coherence should not be mistaken for the rigid, technocratic application of similar institutional prescriptions in target states.

Grappling with diversity in a clear-eyed manner while, at the same time, maintaining policy coherence represents the third major challenge for the development of a meaningful EU Rule of Law external action strategy. Resolving this "consistency dilemma," the "The consistency dilemma: the Rule of Law as political development and hierarchy" section contends, lies not in ignoring diversity or somehow homogenizing EU Rule of Law external policy, but rather in accommodating diversity within a unified conceptual and policy framework.

This requires the endorsement of two main ideas: first, a coherent EU external action strategy ought to approach the Rule of Law as a central pillar of a broader liberal political-development agenda—which also includes the values of democracy, human rights, and good governance—and where the Rule of Law is seen as a core dimension (perhaps *the* core dimension) of effective statehood and human-welfare-enhancing governance. And, second, whereas lawyers are typically conditioned to think about the Rule of Law horizontally (as a spectrum in which thin or formal conceptions contrast with substantive or liberal ones), the "The consistency dilemma: the Rule of Law as political development and hierarchy" section proposes a vertical conceptualization, involving broadly progressive, cumulative, and hierarchical spheres of Rule of Law conditions.

[3] A discussion of regime classification lies beyond the scope of this paper. For a good overview of the literature and the current state of regime types, see Moller and Skaaning (2013).

The first diversity dilemma: conceptualizing the Rule of Law

The Rule of Law, for centuries the near exclusive purview of constitutional lawyers and political philosophers, has, especially in the last decade, been lauded as a panacea for a host of ills (poverty, democratic dysfunction, conflict) and has become the darling of both policy-makers and scholars in a plethora of disciplines, ranging from comparative democratization (Carothers 1998; Diamond and Morlino 2005) and development economics (Trubek 2003; Dam 2006; Haggard and Tiede 2011), to security studies (USAID 2005; Paris 2010; Haggard and Tiede 2014) and historical institutionalism (Weingast 1997; Fukuyama 2010).

Indeed, the Rule of Law today commands near-universal respect.[4] Amid a host of deep cleavages, between east and west, north and south, and liberal and non-liberal societies, as Tamanaha observes, "there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the 'Rule of Law' is good for everyone" (Tamanaha 2004: 1).

Yet the Rule of Law's very popularity makes it uniquely vulnerable to conceptual over-stretch and abuse. As Kleinfeld aptly observes, the phrase is commonly brandished by diverse groups to imply at least five meanings that are in fact distinct but seldom clearly differentiated by those who invoke the term: (1) government bound by law, (2) equality before the law, (3) law and order, (4) predictable, efficient justice, and (5) public power respectful of fundamental rights (Kleinfeld 2006).

The challenge of definition is further exacerbated by the fact that the Rule of Law is a highly memetic concept—seeping and adapting over time to contextualized legal, political, and economic discourses. Hence, for Dicey, who coined and popularized the phrase, the concept represented one of the two legs upon which the constitutional order of England consistently rested since the Norman Conquest of 1066 (Ardnt 1957). For Neumann, a Weimar Republic jurist and member of the Frankfurt School writing in the 1920s, it stood for one of the two defining characteristics of the modern nation state—the Rule of Law (or *Rechtsstaat*) being in perpetual, irreconcilable struggle with the modern state's other basic characteristic, sovereignty (Neumann 1986). Whereas, in the 1940s, Hayek perceived the Rule of Law as the essential safeguard against the totalitarian tendencies of state socialism (Hayek 1944), by the late 1980s, Hayek's disciples invoked the concept in their assault on Keynesian economics (Magan 2009). For the World Bank, the notion that Rule of Law is essential for healthy economic development became a central axiom since the mid-1990s (Trubek 2003). And, for the UN today, the Rule of Law is progressively becoming perhaps the dominant organizing principle of a peaceful and secure international order (United Nations 2012).

Does this plurality of understandings render the concept meaningless due to "abuse and general over-use" as Shklar claimed already in 1987? (Shklar 1987: 1) Far from it. At the heart of the struggle for conceptualization of the Rule of Law lies a fundamental choice between what Craig has called "formal" versus "substantive" (Craig 1997),

[4] This is evident for example in the universal endorsement of the UN *Declaration of the High-level Meeting on the Rule of Law at the National and International Levels* (United Nations 2012). Similarly, out of a total of 47 UN Security Council Resolutions adopted in 2013, 25 (or 53 %) refer to the Rule of Law.

Selznick "negative" and "positive" (1999), and Dworkin termed "rule-book" as opposed to "rights" conceptions of the Rule of Law (Dworkin 1985).

Formal, thin, or negative conceptions demand the essential separation of law from politics (or "autonomous law") and focus on the conditions necessary for law to restrict sheer arbitrariness in the ruler's use of power. Hence, for Dicey, "the Rule-of-Law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint," so that no individual could be lawfully punished by the state "except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land" (Dicey 1885: 188). Restraining discretionary use of power is similarly at the heart of Hayek's definition: "Stripped of all technicalities…government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers … and to plan one's individual affairs on the basis of this knowledge" (Hayek 1944: 54).

Formal, thin conceptions—sometimes dubbed "government by law, not by man"—stem from the historic struggle to curb arbitrary violence in human societies and therefore tend to stress procedural safeguards for Leviathan to obey: Laws must be open and public so that they can act as a guide to people (there should be no secret laws); the meaning of laws must be reasonably clear so that ordinary people can be guided by them; laws should be relatively stable, so that people can plan their lives by them; laws must be prospective, not retroactive; and the making of laws themselves must be governed by known, clear, and relatively stable rules. Principles of due process also form part of these formal guarantees, as do rules of evidence.

At the same time, thin conceptions are not concerned, *strictu sensu*, with the political morality imbued in the laws themselves, nor with the nature of the regime producing the laws—whether democratic or non-democratic, capitalist or socialist, liberal or theocratic—provided the formal precepts of the Rule of Law are met. Hence, according to the chief modern proponent of a thin conception, "A nondemocratic legal system, based on the denial human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform the requirements of the Rule-of-Law better than any of the legal systems of the more enlightened Western democracies" (Raz 1979: 4).

Apart from their long historical lineage, thin conceptions of the Rule of Law possess significant appeal in that the attributes constitutive of the concept are straightforward and parsimonious. And yet, Raz's position, whereby the negative, restraint-centered conception exhausts what is of value in the Rule of Law, must be rejected as a possible conceptual basis for an EU external action stratagem.

While the restraint of arbitrary power remains at the foundation of the Rule of Law, over the past decades, a definitive "thickening" of the concept, going beyond its original, negative meaning, has taken place. A thick, substantive, or positive conception of the Rule of Law accepts all the constitutive attributes of the thin definition but insists that the Rule of Law cannot be divorced from fundamental elements of political morality—notably fundamental rights and democracy.

In a substantive conception, laws enshrine and protect political and civil liberties, as well as procedural guarantees. It assumes that all those wielding public power must themselves be embedded in a comprehensive legal framework, so that individuals can enforce their rights against the state as a whole. Since government itself is ruled by law,

corruption and other forms of illegality are prohibited. The requirement that rights should be actually defendable means that the central institutions of the justice system, including lawyers, courts, the police, and prosecution, are at least reasonably fair, competent, and efficient. This assumes a reasonably effective structure of state institutions, wielding a degree of administrative capacity reasonably adequate to carrying out the functions of the state. It further means that judges ought to be impartial and independent of the remainder of the state apparatus—otherwise, the ability of individuals to uphold their rights before them would be endangered by political dependence and manipulation.

Articulated more fully, we can identify eight main constitutive attributes of a thick, democratic understanding of the Rule of Law:

1. There is a constitutional order—a legal hierarchy in which the relationship between legal rules are themselves legally ruled, and where all actors are permanently subject to rules that govern their conduct.
2. The constitutional order (whether fully or partially codified) is supreme and is interpreted by a constitutional court; the state apparatus is effective—legislative, executive, and justice system institutions (courts, prosecutors, police, detention centers and jails) possess and exercise effective institutional and administrative capacity.
3. No one is above the law—the law is equally applied across the country's territory, to everyone, including government and state agents.
4. Illegality and corruption are discouraged, detected, and sanctioned across all branches of the government and state administration.
5. Fundamental political and civil rights are guaranteed and upheld equally (so that they also apply to disadvantaged groups, including women and minorities).
6. All security forces are subservient to civilian government; the police force is professional, efficient, and respectful of individual's legally protected rights; and treatment of detainees and prisoners is humane.
7. The judiciary is independent from undue influence from executive, legislative, and special interests.
8. Access to justice in criminal, civil, and public matters is fair and reasonably expeditious.

How does this substantive, democratic formulation compare with the EU's understanding of the concept? The March 2014 Communication (Commission 2014) provides, for the first time, a public, comprehensive conceptualization of the Rule of Law by an official EU institution. This is important not only because different legal traditions in Europe have given rise to varying doctrines and expressions of the term and the Commission's statement advances a pan-European understanding of the term, but also because the founding Treaties themselves provide no such definition.[5]

Article 2 TEU (as amended by the Treaty of Lisbon) states that, "[T]he 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

[5] On the different legal traditions and doctrines of European states in relation to the Rule of Law, see Gosalbo-Bono (2010): 240-258).

minorities. These values are common to the member states…"[6] Yet no provision of the Treaties define what is meant by the term "Rule of Law" or what is its relation to the other foundational values listed in Article 2 TEU. The Communication explains that while the precise content of the principles and standards stemming from the Rule of Law may vary at national level, sources of European law "provide a non-exhaustive list of these principles and hence define the core meaning of the Rule of Law as a common value of the EU in accordance with Article 2 TEU" (Commission 2014: 4).

According to the Commission, those principles include "legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law" (Commission 2014: 4).

What is most immediately apparent from the Commission's conceptualization is its tacit rejection of formal, thin understandings of the Rule of Law, and its wholehearted endorsement of a substantive, indeed liberal-democratic conception. The linkage to democracy and fundamental rights is hardly surprising given that the EU Treaties consistently link the Rule of Law to the remainder of a set of liberal-democratic values—as evident most clearly in Article 2 TEU and Article 21 TFEU—but the degree to which the Communication emphasizes the interrelation between the Rule of Law, on the one hand, and democracy and human rights, on the other, is striking. Indeed, the Commission asserts that respect for the Rule of Law is both intrinsically linked to respect for democracy and for fundamental rights and that the principles of the Rule of Law "are the vehicle for ensuring compliance with and respect for democracy and human rights" (Commission 2014:4).

The Commission certainly endorses a substantive definition of the Rule of Law but, at the same time eschews, by design or omission, certain constitutive attributes of a thick understanding of the concept. For example, the Commission's definition makes no explicit mention of corruption or access to justice. Although the two could be said to be subsumed under the general principles of legality and equality before the law, respectively, the lack of explicit attention to these issues in the Communication is odd. Similarly, the fact that the Commission does not appear to even consider questions of institutional effectiveness and administrative capacity of justice institutions, nor the principle of civilian control of security forces (which is so central to the Rule of Law in much of the world) undermines the comprehensiveness of its conceptualization.

The second diversity dilemma: different regimes, different Rule of Law challenges

The "third wave" of global democratization (Huntington 1991)—a wave whose advent is conventionally marked by Portugal's transition to democracy in April 1974 and that reached its zenith some three decades later—precipitated several key transformations in the nature of political regimes around the globe. Coupled with the persistence of autocratic regimes, these transformations have combined to shape an international system characterized by considerable, arguably growing, regime diversification, which in turn generated diverse Rule of Law challenges. Six main drivers of diversity can be identified in this context:

[6] Article 2 Treaty on European Union (TEU)

First, both the absolute number and percentage of democratic states in the world have surged over the past four decades; the latter was despite the fact that, over the same period, a substantial number of new states were created in the international system, primarily as the result of decolonization and the disintegration of the Soviet Union and Yugoslavia. Of the total of 46 new sovereign states created between 1974 and 2004, 32 became democracies. Between 1975 and 1995, over five dozen electoral democracies were created or restored worldwide (Diamond 2008: 54). While some of these managed to make a successful transition to liberal democracy, others foundered in a "gray zone" (Carothers 2002) or backslid into various forms of autocracy (Moller and Skaaning 2013).

The great numerical leap in the number of states and democracies was coupled with a second powerful diversifying force. Whereas, prior to the 1980s, the province of democracy was largely confined to developed Western countries—some of whom had established institutions of accountability and the Rule of Law before the emergence of free electoral contestation and universal suffrage (Greif 2006; Fukuyama 2010)—the third wave was a global phenomenon, carrying democratic Rule of Law institutions, procedures, and norms far beyond their historically bounded confines.[7] From Portugal, democratization quickly spread to the rest of the Iberian Peninsula and Greece, then in the 1980s to Latin America, and in the period 1990–2000 to much of Central and Eastern Europe, and substantial portions of Eurasia, the Asia-Pacific region, and Sub-Saharan Africa. Today, some 62 % of the world's states rank as at least electoral democracies, including over 90 % of Latin American and Caribbean countries, over half of the former Communist bloc, and two fifths of Sub-Saharan Africa and Asia (Diamond 2008; Puddington 2013).

Third, as both the number and dispersion of electoral democracies expanded worldwide, not all instances of transition to electoral democracy matured into substantive, liberal democracy—i.e., states that do not only hold regular, free, and fair elections but also ensure reasonably strong protection of civil liberties and political rights under an effective Rule of Law. Indeed, one of the most striking developments in the nature of political regimes around the globe over the past three decades has been the opening of a broad gray zone (Carothers 2002) on the democratic spectrum. Democratic regimes now range widely between high-quality liberal democracies to "hybrid regimes" (Diamond 2002) that display weak Rule of Law conditions and barely fulfill the minimal conditions necessary to count as an electoral democracy.

Mapping this development across the world's political regimes between 1972 and 2012, Danish scholars Moller and Skaaning usefully distinguish between four types of democracies: (1) *Minimalist democracy*: The thinnest definition of democracy (sometimes referred to as "Schumpeterian") requires only that competition for meaningful political power occur via reasonably free elections; (2) *Electoral democracy*: maximizes the electoral dimension—by adding criteria such as equal and universal suffrage and high levels of electoral integrity—but does not venture beyond the electoral, procedural dimension of democracy; (3) *Polyarchy*: following Robert Dahl's concept and terminology (Dahl 1971), views core political civil liberties—such as freedom of expression, association, and assembly—as additional, essential elements of democracy,

[7] Broadly speaking, Western Europe, some Scandinavian states, North America, and several former colonies of the British Empire (Australia, New Zealand, India, and Israel) (Huntington 1991).

thus venturing beyond the purely electoral sphere; and (4) *Liberal democracy*: entails not only inclusive and fair elections, but solid protection of political and civil rights, and—what scholars such as O'Donnell view as the defining attribute of substantive democracy—namely a developed and robust Rule of Law (O'Donnell 2005).

Empirically, Moller and Skaaning's findings confirm the spread of the gray zone, particularly during the latter part of the third wave in the period 1990–2000. On the democratic side of the spectrum, whereas in 1988 only 9 countries were minimalist democracies, in 2012, the number was 30. The two regions of the world where this trend was most prevalent are Latin America and the Asia-Pacific region (Moller and Skaaning 2013).[8]

Fourth, just as the range of democratic regimes has broadened over recent decades, the gamut of authoritarianism has also stretched over the same period of time. The demise of long-established dictatorships in the Iberian Peninsula in the late 1970s and early 1980s, followed by the collapse of the Soviet Union and the end of the Cold War, did not obliterate traditional autocracies entirely, but it did pose a deep challenge to their legitimacy and efficacy (Magen and McFaul 2009). As electoral democracy diffused widely across the globe, the validity of closed, overtly authoritarian regimes diminished. Single-party and military dictatorships collapsed through most of Latin America in the 1980s, and then much of post-communist Eurasia and parts of Asia and Africa in the 1990s. Yet, more often than not, these "transitions" resulted in the emergence of either minimalist democracies, or what have been variably described as "electoral authoritarianism" (Schedler 2013), "competitive authoritarianism" (Levitsky and Way 2010), or "electoral autocracies" (Moller and Skaaning 2013).

Electoral autocracies combine multiparty elections with a panoply of authoritarian manipulations so severe and systematic as to deny genuine political contestation and essentially make elections instruments for the perpetuation of the incumbent regime. Thus, electoral autocracies differ from both closed autocracies—in that the former do not tolerate multiparty elections—and minimalist democracies—in that, in electoral autocracies, there is no genuine political contestation and therefore no real uncertainty as to who will win political power. Indeed, electoral autocracies now number as many as a third of the total number of regimes. Levitsky and Way (2010) identify 35 regimes in five regions that were or became "competitive authoritarian" between 1990 and 1995. Looking at the global distribution of regime types in 2012, Moller and Skaaning (2013) categorize 56 states as multiparty autocracies.

Fifth, despite the fact that an unprecedented number of countries experienced transitions to at least electoral democracy or have morphed into some form of competitive authoritarianism in the last three decades, a substantial number of closed autocratic regimes has endured the third wave. Unlike electoral autocracies systems, closed autocracies eschew multiparty political organization and activity, with the more restrictive among them denying political rights or prohibiting political party organization of any kind. Some 22 closed autocracies persist in the world (Moller and Skaaning 2013),

[8] The broadening of the spectrum of regimes on the democratic side of the ledger can also be gleamed from the Freedom House Index figures of the last four decades. Whereas, in 1974, there were only 39 democracies in the world, all 39 ranked as "free" states—i.e., they were all reasonably high-quality, liberal democracies. In contrast, by 2003, out of the 117 states in the world tagged by Freedom House as constituting electoral democracies, only 88 qualified as "free"—meaning that approximately a third of all electoral democracies were in a diminished category of states that were only "partly free" (Freedom House 2005).

and this category too is quite diverse. Long-standing monarchies remain in Bahrain, Brunei, Kuwait, Oman, Qatar, Saudi Arabia, and the United Arab Emirates. Single-party regimes endure in China, Cuba, Eritrea, Laos, Madagascar, and Vietnam. States such as Burkina Faso, Swaziland, and Turkmenistan continue to be ruled as personalistic dictatorships. Full-blown totalitarianism persists in North Korea. Iran remains an entrenched theocracy. Pakistan and Sudan are in effect military dictatorships, and new military dictatorships were actually established in recent years in Fiji (December 2006), the Central African Republic (March 2013), and Egypt (August 2013).

Last but not least, a meaningful EU Rule of Law external action strategy must increasingly contend with a category of *de jure* states that are non-democracies not because they are functioning autocracies but because they are characterized by conditions of limited statehood, state fragility, or even collapse (Lockhart and Ghani 2009; Risse 2013). While state fragility itself represents a broad spectrum, approximately a third of the world's states today are entities whose central government is so weak that they have little practical control over much of their territory or borders; are unable to provide essential public services, including law and order; are mired in poverty; and are typically afflicted by widespread conflict, criminality, and corruption (Lockhart and Ghani 2009; OECD 2014).

Areas of limited statehood—which are proliferating rapidly in the EU's southern and eastern peripheries—not only typically contend with insurgency, civil war, and other grave challenges pernicious to the maintenance of Rule of Law conditions, but they often lack a functioning central government and experience governance by alternative rulers (local or external) which can be welfare-enhancing, criminal or radical spoilers. As such, areas of limited statehood confound traditional defense, diplomatic, trade, and aid policies since these assume the existence of at least a reasonably functional interlocutor-state.

Cumulatively, these six drivers of diversification leave the EU with a formidable diversity challenge. Since the Rule of Law represents an essential, constitutive aspect of the nature of socio-political systems (Diamond and Morlino 2005), the wide gamut of regimes observed in the EU neighborhood, and the international system more broadly, is inherently reflected in pronounced variance in Rule of Law conditions along that gamut.

Thus, for example, a coherent EU Rule of Law promotion strategy vis-à-vis reasonably consolidated democracies—such as Brazil, India, and South Africa—would focus on the preservation of high-levels of judicial independence, progressively improved access to justice, and the encouragement of such democracies to become more involved Rule of Law promoters themselves (Stuenkel 2013). When it comes to electoral autocracies—such as Belarus, Russia, or Venezuela—on the other hand, a meaningful strategy would concentrate on very different Rule of Law priorities: reducing the politicization of law (notably the state's use of legal proceedings against political opponents), improving the integrity of both vertical (electoral) and horizontal accountability mechanisms, strengthening human rights protections, and combating corruption (O'Donnell 2005).

Similarly, whereas in functioning closed authoritarian states—such as Laos, North Korea, Saudi Arabia, or Turkmenistan—the heart of a Rule of Law promotion strategy lies in prevention of state-led cruelty, predation, and arbitrary use of Leviathan's power (Shklar 1987), in areas of limited statehood and (post)-conflict zones—in Afghanistan,

Iraq, Libya, Northern Nigeria, Mali, Sinai, or Syria, for example—the most immediate priorities in the improvement of Rule of Law conditions are typically very different, extending from protecting civilians from the worst effects of civil war, insurgency, terrorism, sectarian, or sexual violence (often perpetrated by non-state actors as well as state agencies), to providing law and order services in the absence of the state, to establishing institutions of transitional justice and (re)building Rule of Law institutions in the aftermath of war or genocide (Rose-Ackerman 2004; Call 2007).

Diverse regime types, therefore, pose vastly different Rule of Law challenges which cannot be approached in a schematic, one-size-fits-all manner. A coherent EU Rule of Law external action strategy must not—contrary to the opinion of some analysts (Burlyuk 2014c)—be grounded in uniformity of conception or action. In its quest to develop a coherent, meaningful Rule of Law external action posture, the EU cannot shirk grappling with diversity.

The consistency dilemma: the Rule of Law as political development and hierarchy

How should the EU contend with diversity yet, at the same time, maintain a high degree of conceptual and policy consistency in its Rule of Law external action? Managing the diversity-consistency dilemmas successfully depends on the adoption and determined application of two guiding ideas:

First, an EU external action strategy ought to understand the Rule of Law as a core dimension (arguably *the* core dimension) of political development in human societies. And, second, it should embrace an approach to Rule of Law development that is broadly hierarchical and cumulative, focusing on fundamental aspects of the Rule of Law at the lower levels of political development while shifting its priorities toward progressively wider and more refined Rule of Law conditions in societies displaying higher levels of political development. These two notions are explored in the remainder of this paper.

The notion of political development pertains to the existence and quality of political, legal, and social structures supportive of human security, freedom, and well-being (Kingsbury 2007). In a state of high political development, individuals and communities live in an environment possessing a high degree of physical security, rule-based contestation of power, and effective but open, responsive, and accountable institutions of political, economic, and social organization (Sen 1999). Human freedom is respected and advanced through political, economic, and civic rights and the effective combating of illegality.

Taken together, the highest levels of political development are achieved in high-quality liberal democracies (Diamond and Morlino 2005), although, within the category of free states, there exist both substantial variations in quality and dangers of backsliding.

Clearly, at the higher echelons of political development, Rule of Law conditions are intimately connected with effective, liberal statehood and democratic government (Magen and McFaul 2009; Magen and Morlino 2009). Rule of Law conditions at these higher levels enshrine and protect political and civil liberties, as well as guarantees of due process rights. It insists that those wielding public power must themselves be embedded in a comprehensive legal framework, so that individuals can enforce their rights against the state as a whole. Since government itself is ruled by law, corruption

and other forms of illegality are prohibited. The requirement that rights should be actually defendable means that the central institutions of the justice system, including lawyers, courts, the police, and prosecution, are at least reasonably fair, competent, and efficient. This assumes a reasonably effective structure of state institutions, wielding a degree of administrative capacity at least reasonably adequate to carry out the functions of the state. It further means that judges are generally impartial and independent of the remainder of the state apparatus—otherwise, the ability of individuals to uphold their rights before them would be endangered by political dependence and manipulation.

Although the two concepts are not synonymous, the relationship between advanced Rule of Law conditions and liberal democracy is intimate and multidimensional. Strong Rule of Law conditions uphold the political rights of a democratic regime, protect the civil liberties and rights of the entire population, including minority and other disadvantaged groups, and exercise horizontal accountability—networks of responsibility that entail that public and private agents, including the highest state officials, are subject to appropriate controls on the lawfulness of their public acts.

Moreover, as Carothers observes, at the higher levels of political development, the reach of the Rule of Law goes beyond checks on naked power and formal processes of accountability to permeate institutions and spheres across society: "The Rule-of-Law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law. Democracy includes institutions and processes that, although beyond the immediate domain of the legal system, are rooted in it" (Carothers 1998: 96).

Conversely, low levels of political development are characterized by weak or absent human security; weak or absent protection of political, social, and economic rights; and high levels of violence, criminality, and chaos. These may emanate from a predatory or cruel state that systematically abuses its populace (North Korea) but is more typically the outcome of conditions of insurgency, civil war, and state disintegration (Afghanistan, Iraq, Mali, Syria). Taken together, low levels of political development exist most prominently in closed authoritarian regimes and areas of limited statehood, with intermediate levels of political development prevalent in hybrid regimes.

Indeed, several notable analysts identify the Rule of Law as the most important dimension of human welfare enhancing governance; one that marks positively the highest quality democracies and is sorely lacking in low-quality democracies and electoral autocracies. Diamond and Morlino, for example, identify the Rule of Law as "the base upon which every other dimension of democratic quality rests." When the Rule of Law is weak, they aptly observe: "participation of the poor and marginalized is suppressed; individual freedoms are tenuous and fleeting; civic groups may be unable to organize and advocate; the resourceful and well connected have vastly more access to justice and power; corruption and abuse of power run rampant as agencies of horizontal accountability are unable to function properly; political competition is distorted and unfair; voters have a hard time holding rulers to account; and thus, linkages vital to securing democratic responsiveness are disrupted and severed" (Diamond and Morlino 2005: xvii).

In a similar vein, O'Donnell has argued that key impediments to the consolidation of high-quality democracy in many Latin American countries stem from flaws in the Rule of Law. In many new, low-quality democracies as well as more authoritarian subspecies of hybrid regimes, O'Donnell observed, laws, judicial criteria, and

administrative regulations, discriminate against women and minorities; the rich and powerful manage to exempt themselves from the law; the state bureaucracy does not respond to public needs; access to fair and impartial justice is denied by inefficient and corrupt courts; and corruption and illegality are a daily reality, particularly in urban centers (O'Donnell 2005).

Approaching the Rule of Law from the perspective of political development allows EU external action policy chiefs to not only integrate Rule of Law activity with the closely related fields of democracy and human rights promotion but would also enhance consistency within diversity by pointing to broadly hierarchical spheres of Rule of Law development.

Whereas lawyers are typically conditioned to think about the idea and ideal of the Rule of Law horizontally—as a spectrum in which thin, negative, formal, or rule-book conceptions of the term, contrast with substantive, positive, rights-based, or democratic understandings—EU external action policy planners would benefit from a more vertical conceptualization, involving cumulatively hierarchical "spheres" of Rule of Law conditions.

At the base, most elemental and urgent level of the hierarchy lies a dimension wholly taken for granted, and so entirely ignored, by the fathers of modern Rule of Law thinking, Dicey and Hayek. Rather than restraining an all-powerful executive, the bare foundations of the Rule of Law in areas of limited statehood and zones of conflict entail the ending of sheer chaos and the establishment of the basic conditions of "stateness"—the provision of basic human security, the capacity to generate and implement collectively binding rules, and the supply of essential public goods. In this context, the *sine qua none* of the Rule of Law is the prevention of genocide and mass violence, the restraint of violence and arbitrary abuse of brute power, the securing of borders, and the provision of minimal institutions necessary for the peaceful resolution of conflicts. The essential animus for development of Rule of Law conditions at the lower levels of the political development hierarchy, in other words, is what Shklar has called the "liberalism of fear," where the first and most primary command of the Rule of Law is to protect human beings from cruelty and the fear of arbitrary violence (Shklar 1987).

In contrast, the central challenge for the Rule of Law in most functioning closed authoritarian regimes typically involves seeking to persuade the strong state to release its iron grip over individual, civil, media, and economic life. In this context, Rule of Law development essentially involves liberalization, or as O'Donnell and Schmitter put it, "the process of making effective certain rights that protect both individuals and social groups from arbitrary or illegal acts committed by the state or third parties" (O'Donnell and Schmitter 1986: 7).

In functioning closed dictatorships, international actors concerned to promote Rule of Law development struggle between the "convenience" of engagement with a reasonably effective central government and the desire for incremental liberalization, on the one hand, and the closed autocracy's sometimes brutal suppression of individual and minority freedoms, as well as oppression of real or suspected opposition groups. In closed authoritarian regimes that tolerate no formalized opposition parties or activist civil society organizations, the main task of Rule of Law advocates is to contain the application of arbitrary state power, encourage the emergence of some notions of impartial justice, and seek to expand the boundaries of core civil liberties—of conscience, worship, religion, and expression—and spaces for individual, family, and

communal autonomy in the face of an all-intrusive state. In authoritarian countries in which a degree of internal competition exists, or which are more integrated into the global economy, international actors possess a broader range of instruments to promote greater pluralism, good governance and anti-corruption reforms, and better guarantees of economic rights (Magen and Morlino 2009: 29-39).

Once at least minimally competitive multiparty elections are present in an otherwise authoritarian regime—i.e., once the regime becomes a competitive authoritarian regime (Levitsky and Way 2010) or electoral autocracy (Moller and Skaaning 2013)—the struggle for improved Rule of Law conditions shifts, at least in part, to the legality of the contestation of power. Which stakeholders are permitted to contest political power and under what terms and conditions? Who decides on the rule of the game—the timing, institutional design, procedures, and refereeing of electoral competition? Who can monitor elections and how? If fraud or other irregularities are detected, what standard will be used to judge whether or not elections are deemed "free and fair"? And how will any disputes over the final results of elections be lawfully resolved? All these questions over the legality of the contestation of power open new opportunities for promotion of vertical (electoral) as well as horizontal mechanisms of accountability, notably separation of powers, judicial independence, and measures to detect and punish electoral fraud.

Managing diversity correctly entails avoiding the pitfall of homogenizing encountered challenges. Instead, EU policy-makers ought to approach the Rule of Law as a core dimension of political development and embrace an approach to Rule of Law development that is broadly hierarchical and cumulative—focusing prevention of cruelty, punishment for egregious violations of fundamental rights, and essential justice service provision at the lower ends of political development found in areas of limited statehood, conflict zones, and closed authoritarian regimes, while shifting their priorities toward progressively broader, more refined Rule of Law conditions in societies displaying higher levels of political development.

Conclusions

The EU's quest for the development of a coherent Rule of Law external action strategy requires that the Union overcome two diversity dilemmas and one consistency dilemma. These are interrelated and should be approached holistically. In the face of divergent understandings of the notion of the Rule of Law, the EU must wholeheartedly follow a substantive, democratic conceptualization broadly consistent with the one proposed by the Commission in March 2014. At the same time, a future EU Rule of Law strategy needs to be able to contend with the distinctly different Rule of Law challenges now emanating from a broad, possibly widening, set of political regimes in the EU's vicinity and the wider international system. A schematic, one-size-fits-all approach has never served the EU well and is increasingly untenable. Grappling with diversity while maintaining conceptual and policy coherence represents the third key challenge to the development of a coherent EU Rule of Law external action strategy. Resolving the consistency dilemma necessitates accommodating diversity within a coherent conceptual and policy framework. This, in turn, requires that, in its external action, the EU approach the Rule of Law as a central pillar of a broader, liberal

political-development agenda and that it adopts a vertical, rather than the traditional horizontal, understanding of the concept, involving broadly progressive, cumulative, and hierarchical spheres of Rule of Law conditions.

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