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Cracks in the Foundations: Understanding the Great Rule of Law Debate in the EU

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Abstract

The article offers a succinct conceptual and analytical framework for approaching the 'great rule of law debate' currently unfolding in the EU (European Union) and the contending positions of the various EU institutions embroiled in it. It addresses the challenge of conceptualization imbued in the notion of the rule of law, and critically examines the definition of the concept provided by the EC (European Commission). It then demonstrates that over the course of modern European integration, the rule of law emerged as a central dimension in four distinct core areas of EC/EU identity and activity. Should the contemporary crisis of foundational values persist or deepen, each of the four is expected to be adversely affected. Finally, the article explores the emerging 'rule of law turn' in the EU.

Keywords: rule of law; European Union; conceptualization; liberal democracy

Introduction

This opening article of the symposium offers a succinct conceptual and analytical framework within which observers of the EU (European Union) may wish to approach the 'great rule of law debate' currently unfolding in the Union, and the contending positions of the various EU institutions embroiled in it.

Section I addresses the challenge of conceptualization imbued in the idea and ideal of the rule of law, and critically examines the definition of the concept provided by the EC's (European Commission) new Framework – the first, and so far only, comprehensive conceptualization of the rule of law ever to be articulated by an EU institution.

Section II proceeds to demonstrate that, over the course of European integration, the rule of law emerged as a central dimension in four distinct core areas of EC/EU identity and activity: (1) as a value upon which the Union itself is founded and which is the assumed shared patrimony of all Member States, (2) as a prerequisite of the trust necessary for the operation of the Internal Market and Area of Freedom, Security and Justice (AFSJ), (3) as an eligibility criterion for EU membership and (4) as a central element in the Union's external relations and self-understanding as a global actor committed to the deepening of a liberal international order. Should the contemporary crisis of foundational values persist or deepen, it argues, each of the four is expected to be adversely affected.

Lastly, section III asks why the Commission has opted to frame the current crisis exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU (Treaty on European Union), and why have the remaining institutions tacitly followed? The nature of the illiberal policies pursued by the Member States which instigated the crisis, particularly Hungary and Poland, provides only partial justification for this

choice. Framing the debate in terms of the rule of law, it suggests, is explicable with reference to four additional factors, and marks a distinct 'rule of law turn' in the thinking of EU policy-elites, a turn that is also identifiable in like-minded international organizations.

I. The Rule of Law: Definition at Last!

Alongside the principles of human dignity, freedom, democracy, equality and human rights, the rule of law is defined, by Article 2 TEU, as a value upon which the Union itself is founded and which is 'common to the Member States'. Yet no provision of the treaties or EU legislation ever defined what is actually meant by the 'rule of law' or how the term relates to the other foundational values listed in Article 2. Similarly, the rule of law is mentioned in the preambles, but never defined, in the statute of the CoE (Council of Europe), the ECHR (European Convention on Human Rights) and the UN (United Nations) Universal Declaration of Human Rights. If for no other reason, therefore, the Commission's Framework (Commission of the European Communities, 2014a) is of substantial constitutional significance to the Union, since it provides for the very first time, a public, comprehensive conceptualization of the concept by an EU institution.

The importance of this conceptualization stems from the fact that the Commission's formulation not only posits a pan-European definition of an idea and ideal with ancient roots, and varying interpretations, in the legal traditions of the Member States (Gosalbo-Bono, 2010, pp. 240–59), but also because the rule of law is today a polysemic, hotly contested term – at once a powerful 'social imaginary' (May, 2014, pp. 1–16), universally lauded moral good (United Nations, 2012) and a concept distinctly prone to definitional abuse (Magen, 2009, p. 55).

This dual nature of the rule of law – its legal-normative weight and susceptibility to conceptual stretching – is worth untangling, since it underlies the current controversy and the role that the various EU institutions should, and should not, play in it.

Traditionally the purview of constitutional lawyers and political philosophers, the rule of law has, particularly over the last decade, been heralded as a panacea for a host of human ills – poverty, democratic dysfunction, conflict – and become the darling of policy-makers and scholars in a plethora of disciplines: from comparative democratization (Magen and Morlino, 2008; Fukuyama, 2015) and development economics (Dam, 2006; Haggard and Tiede, 2011), to security and conflict-resolution studies (USAID, 2005; Grenfell, 2013; Haggard and Tiede, 2014). Amidst a host of deep cleavages, between east and west, north and south, as Tamanaha (2004) 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' (p. 1). As such, whoever defines and speaks for the rule of law commands potent moral as well as legal authority.

As its popularity soared, however, the rule of law became uniquely vulnerable to conceptual over-stretching. The term is commonly brandished by politicians, diplomats, jurists, economists, soldiers, journalists, bureaucrats and academics to imply at least six meanings that are distinct, but seldom differentiated by those who invoke the term: (1) state authority bound by law, (2) equality before the law, (3) law, order and human security, (4) respect for property rights, (5) predictable, accessible and efficient justice,

and (6) public power respectful of fundamental rights. In addition, international lawyers and organizations increasingly call for the building of an 'international rule of law', meaning a world governed by rules not force (Chesterman, 2008; United Nations, 2012).

The conceptualization challenge is exacerbated by the highly memetic nature of the term; its propensity for seeping and adapting over time to particular legal, political, and economic contexts and agendas. Hence, for Dicey the concept represented one of the two legs upon which the constitutional order of England has rested since the Norman Conquest of 1066 (Ardnt, 1957). For Neumann (1986), 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 sovereignty. Whereas in the 1940s Hayek (1944) perceived the rule of law as the bulwark against the totalitarian tendencies of state-socialism, by the late 1980s Hayek's disciples invoked it in their assault on Keynesian economics and advocacy for neo-liberal reform. For the World Bank, the notion that the rule of law is essential for healthy economic development became a core axiom since the mid-1990s (Haggard and Tiede, 2011). For the soldier fighting an insurgency and the diplomat engaged in state-building, the rule of law is a central pillar of counter-insurgency doctrine and post-conflict reconstruction (Grenfell, 2013). And for the UN today the rule of law has arguably become the predominant organizing principle for a fair international order (United Nations, 2012).

Does this plurality of understandings render the concept meaningless due to 'abuse and general over-use' (Shklar, 1987, p. 1)? I would argue that it does not, but that Member States and Council anxiety about the Commission's new Framework is at the very least understandable given, *inter alia*, the multi-faceted nature of the term and its malleability in the face of shifting political agendas.

Still, it is submitted, 'the rule of law' is capable of meaningful definition, the Commission's new Framework contains a tangible conceptualization of the term and that conceptualization is composed quite precisely of several constitutive principles.

At the heart of the struggle for conceptualization of the rule of law lies a fundamental choice between what has been variably called 'formal' and 'substantive' (Craig, 1997), 'negative' and 'positive' (Selznick, 1999) or 'rule-book' as opposed to 'rights'-based (Dworkin, 1985) understandings. Formal, or thin, conceptions focus on the conditions necessary for law to restrict sheer arbitrariness in the use of public power.

Accordingly, for Dicey (1908): '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 'except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land' (p. 188). Restraining discretionary use of power is similarly at the heart of Hayek's (1944) definition: 'Stripped of all technicalities … government in all its actions is bound by rules fixed and announced beforehand …' (p. 54).

Formal conceptions tend to stress procedural safeguards for Leviathan to obey: laws must be public so that they can act as a reliable guide to people (there should be no secret laws); the meaning of laws ought to be reasonably clear; 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 generally insensible to the political morality imbued in the law, or the nature of the political regime producing it, provided the formal precepts of the rule of law are met. Thus, according to the chief contemporary protagonist of the thin conception, Joseph Raz (1979): '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' (p. 4).

Thin, formal or negative conceptions of the rule of law are fundamentally at odds with the letter and spirit of Article 2 TEU and are clearly rejected by the Commission (Commission of the European Communities, 2014a, p. 4) and the jurisprudence of the Court of Justice (von Danwitz, 2014). Indeed, regardless of any disagreement about the efficacy and legality of the Commission's Framework, it can be safely assumed that all EU institutions engaged in the current rule of law controversy would wholeheartedly reject Raz's formulation and endorse a far 'thicker', more positive conceptualization; one that accepts the basic safeguards in the thin definition but goes on to insist that the rule of law cannot be divorced from political morality, fundamental rights or democracy.

In a thick, or 'democratic rule of law', conception (Magen and Morlino, 2008, p. 10), 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 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. Articulated fully, we can identify eight main constitutive attributes of a thick, democratic understanding of the concept:

1. There is a constitutional order – a legal hierarchy in which the relationships 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 centres 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 an 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.

The Commission's Framework contains a definition of the rule of law which unequivocally recognizes, and endorses, the constitutive principles imbued in the thin *and* thick conceptions. In its explication of the concept's place within the EU order, the Commission states explicitly that the rule of law is 'a constitutional principle with both formal and substantive components', that respect for the rule of law 'is intrinsically linked to respect for democracy and for fundamental rights' and that the principles of the rule of law are in practice 'the vehicle for ensuring compliance with and respect for democracy and human rights' (Commission of the European Communities, 2014a, p. 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 of the European Communities, 2014a, p. 4)

Anchoring these principles in the case law of the Court of Justice, Annex I of the new Framework (Commission of the European Communities, 2014b, pp. 1–2) provides a six-part conceptualization:

1. Legality: meaning 'a transparent, accountable, democratic and pluralistic process for enacting laws'.
2. Legal certainty: requiring that 'rules are clear and predictable and cannot be retrospectively changed'.
3. Prohibition on arbitrariness of the executive powers: involving, in essence, respect for private spheres of people's lives and 'protection against arbitrary or disproportionate intervention'.
4. Independent and effective judicial review, including respect for fundamental rights.
5. The right to a fair trial and the separation of powers: meaning specifically the 'right to a tribunal that is independent of the executive power in particular'.
6. Equality before the law.

While embodying the important principles, the Commission's definition contains two sets of noteworthy limitations.

First, it eschews (more by omission than design perhaps) certain attributes of a contemporary, democratic understanding. For example, the Commission's definition makes no mention of corruption or access to justice. Though the two could be said to be subsumed under the general principles of legality and equality before the law, respectively, the lack of explicit mention of these dimensions in the current context is striking. Similarly, the principle of civilian control of security forces – which is so central to the rule of law in much of the world – is conspicuous in its absence. The omission is jarring given the European Court of Human Rights' finding that several EU Member State security services

and governments colluded in the running of clandestine CIA (Central Intelligence Agency) detention and interrogation centres in the aftermath of the 9/11 attacks.[1]

Lastly, neither the Commission nor the remaining institutions ever venture to distinguish the rule of law from the other foundational values listed in Article 2 TEU, draw conceptual boundaries between it and its sister concepts of 'democracy' and 'human rights', or explain how the rule of law enables the proper functioning of either. This is regrettable, particularly as the instigation of an Article 7 TEU procedure is dependent upon a clear risk of a serious and persistent breach of the 'values' (plural) referred to in Article 2 TEU, not the rule of law per se. Moreover, other international organizations have already attempted to define and relate the notions of democracy, human rights and the rule of law (Venice Commission, 2011, p. 12).

II. Why the Rule of Law Matters in and for the European Union?

Respect for the rule of law, and the maintenance of at least reasonably effective rule of law institutions and practices, form central attributes of modern, functioning, legitimate political order (Fukuyama, 2015). In this most rudimentary sense, the EU's relation to the concept is no different from that of any other contemporary democratic polity. Over the course of modern European integration, however, the rule of law emerged as a central dimension in four distinctive core areas of EC/EU identity and activity. Should the current series of 'rule of law crises' (Reding, 2013, p. 6) persist or deepen, each of the four is expected to be adversely affected.

First, and most fundamentally, as a value upon which the Union is founded and which is 'common to the Member States', the rule of law is part and parcel of the Union's DNA and the assumed shared patrimony of each of its members. As such, it can be understood to provide the normative glue that holds the entire political and legal edifice together. Historically, the rule of law offered a potent rationale for the self-construction of that edifice. In the landmark case of *Le Verts v. Parliament* [*1986*] the Court of Justice famously referred, for the first time, to the EC as 'a Community based on the rule of law'.[2] Similarly today, the functioning of the Union as a legal and political system relies upon the veracity of the working assumption that all Member States are broadly in compliance with the principles listed in Article 2 TEU. As the Court of Justice put it, in its December 2014 Opinion on EU accession to the ECHR, the Union's structure is:

> *based on the fundamental premise that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU. That premise implies and justifies the existence of mutual trust between the Member States …*[3]

Where this fundamental premise is challenged and mutual trust in the rule of law conditions of one or more Member State is eroded, the Union's DNA is corrupted and the edifice is in danger of decaying.

The potential for loss of trust should not be viewed in isolation, but in the broader context of Europe's present economic, financial and migration woes. As former EU Justice

[1] See ECtHR, Case 28761/11 *Al Nashiri v Poland*, 24 July 2014.
[2] Case 294/83 *Parti écologiste* '*Les Verts*' *v European Parliament* [*1986*] ECR 1986-01339.
[3] Opinion 2/13 of the Court of Justice of the EU, *Accession to the ECHR* (*II*), 18 December 2014, paragraph 168.

Commissioner Reding suggested in September 2013, just as Europe's economic and financial crises are feeding a growing number of systemic rule of law breaches amongst some Member States, deterioration of democratic and rule of law standards could potentially complicate efforts to successfully manage broader societal and economic predicaments throughout the EU (Reding, 2013).

High levels of trust in the rule of law institutions of Member States also represent the bedrock upon which the core Internal Market *acquis* (Kochenov, 2015, p. 13) and, a fortiori, the AFSJ rests (Wolff, 2013). The latter extends as far as the EAW (European Arrest Warrant), which removed extradition safeguards for a criminal suspect or sentenced person in favour of a Union-wide arrest and transfer system at the simple bequest of any Member State. The principles that undergirdle police, prosecutorial and judicial cooperation in these matters of life and liberty are solidarity and mutual recognition (Alegre and Leaf, 2004). Neither can be said to truly exist where confidence in the rule of law conditions of one or more members is seriously questioned.

Third, having first entered the DNA of European integration in the 1980s as an internal, constitutional principle, the rule of law assumed an external role in the aftermath of the cold war, as the Community began to contemplate expansion of membership into the post-communist world. Since Maastricht (1992), Article 49 TEU makes respect for the rule of law an eligibility criterion for EU membership, and the 1993 Copenhagen Criteria require candidates to ensure stability of institutions guaranteeing it, as a precondition for accession. In this regard, the current crises, particularly in Hungary and Poland, represent a failure of the pre-accession strategy and amount to a poignant vindication of those who feared that some candidates' commitment to EU values was incomplete or shallow at the time of accession and in its aftermath (Magen and Morlino, 2008; Sedelmeier, 2008, 2014). The resulting loss of confidence in the transformative-engagement capacity of the EU vis-à-vis candidates and potential candidates bodes ill for the future credibility of EU membership conditionality and its ability to affect positive democratic change amongst them.

The fourth and final main area where the rule of law plays a central role in the Union's identity and activities pertains to its external relations and self-understanding as a global actor committed to the deepening of a liberal international order. Article 21(1) TFEU (Treaty on the Functioning of the European Union) prescribes that the 'Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law …'. The same provision mandates that the Union shall build 'partnerships with third countries, and international, regional or global organizations which share these principles'.

That the *internal* integrity of democratic and rule of law conditions within the Union is intimately linked to the EU's *external* ability to credibly co-operate with others on the subject and promote the rule of law abroad, is a notion that is both intuitively correct and clearly recognized by EU leaders. The point is hinted at in the Commission's Framework – which states that those 'aspects of the rule of law as a common denominator of the Union are fully reflected at the level of the Council of Europe' (Commission of the European Communities, 2014b, p. 2) – and forcefully articulated by Timmermans, appointed in November 2014 as First Vice-President of the European Commission in charge of *inter alia* the rule of law. In an August 2015 speech, Timmermans (2015)

asserts that for Europe 'the rule of law is not just an *inspiration*, it is also an *aspiration*; a principle that guides both our *internal* and *external* actions; it is *what we are* and *what we want to be*' (p. 2).

Developing the internal–external linkage theme, Timmermans (2015) emphasizes that the 'international dimension of the rule of law' represents a 'crucial element of Europe's self-image, though one that is all too often overlooked' (p. 11) and connects the EU's internal commitment to the rule of law to Europe's ability to lead on the issue vis-à-vis a host of international fora, including the CoE, World Trade Organization, International Court of Justice and the UN (p. 13). A year earlier, referring to the UN Declaration on the Rule of Law (United Nations, 2012), the EU's representative to the UN, similarly announced that the: 'rule of law is of critical importance for the EU's external action', and promised that the Union act zealously to promote it at both the national and international levels.[4]

III. The Rule of Law Amongst the Foundational Values: *Primus inter pares*?

Why has the Commission chosen to frame the crisis exclusively in terms of the rule of law, rather than the other foundational values listed in Article 2 TEU, and why have the remaining institutions tacitly followed? The choice deviates from the discourse that surrounded the 'Haider affair' in 2000 – where the inclusion of a far-right party in the Austrian governing coalition was deemed to be a threat to democracy and human rights in that Member State (Sadurski, 2010) – and was far from ineluctable.

True, since 2010 governments in Hungary and Poland have sought to curtail judicial independence and upset checks and balances by limiting the power of their respective constitutional courts. Similarly, in Romania, in the summer of 2012, executive non-respect of constitutional court judgments amounted to a direct challenge to the rule of law. Yet these measures are part of a broader assault on the 'liberal consensus' achieved amongst the new Member States in the 1990s (Krastev, 2007); an assault that also involved the obliteration of parliamentary checks on executive power, purging of the bureaucracy and their replacement with party cronies, overhaul of electoral systems so as to favour the ruling parties (Fidesz in Hungary and PiS in Poland), censoring of public media, and crackdown on oppositional church and civil society organizations (Kornai, 2015; Dawson and Hanley, 2016; Keleman and Orenstein, 2016).

Indeed, the attack on the rule of law institutions of Hungary and Poland could be understood as instrumental and ancillary to a broader process of democratic backsliding in which not only rule of law, but electoral, regulatory and human rights safeguards are stripped away to build what Hungary's Prime Minister, Viktor Orban, proudly called an 'illiberal nation-state' (Dawson and Hanley, 2016, p. 21).

Evidence of a deeper crisis of liberalism amongst the new Member States extends beyond Hungary and Poland to Bulgaria, Slovakia and even the Czech Republic (Dawson and Hanley, 2016) and was palpable in France with the planned expulsion of approximately a thousand Roma individuals in 2010 (Reding, 2013). Under these circumstances it would have been entirely reasonable, perhaps preferable, for the Commission to

[4] 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).

characterize the democratic U-turns as contrary to essentially all the values enunciated in Article 2 TEU.

The framing of the contemporary crisis in terms of the rule of law, and the rule of law alone, may be understood with reference to four additional explanatory factors that are mutually reinforcing. Cumulatively, these mark a distinct 'rule of law turn' in the thinking of EU policy-elites, a turn that is also identifiable in like-minded international organizations.

Reliance on the rule of law is aided, first, by the inherent elasticity of the concept itself and lack of clear conceptual boundaries between it and other foundational values. This fuzziness permits interpreters of the rule of law to imbue the concept with content that can legitimately be considered better placed within the parameters of its sister notions, 'democracy' and 'human rights'.

By opting to frame democratic backsliding as a rule of law crisis, second, EU institutions reflect awareness of an empirical reality in which what is increasingly missing from many ostensibly democratic regimes, including some EU Member States, are not formal democratic institutions or procedures, but the more elusive (and difficult to create and maintain) qualities that characterize consolidated *liberal* democracies (Diamond, 2015; Freedom House, 2015). As Fukuyama (2015) observes, modern liberal democracies 'combine three basic institutions: the state, rule of law, and democratic accountability' with the democratic leg of the tripod 'much easier to construct than the rule of law or the modern state' (pp. 12–13). By defining the imbroglio as a rule of law crisis, rather than broader democratic backsliding, the Commission and Parliament in particular, provide a diagnosis of the current malaise which is at once more circumscribed, nuanced and focused on the non-procedural dimensions of democratic quality.

A third explanatory factor pertains to inter-institutional power dynamics, specifically to the Commission's instrumental effort to legitimate its leadership in developing a new pre-Article 7 mechanism and doing so in a manner that would be palatable to the remaining institutions, especially the Council. As Kochenov and Pech (this issue) demonstrate, the new Framework is anchored in the fundamental EU legal axiom that it is the Commission, and the Commission alone, which is the 'guardian of the Treaties' and as such responsible for Member State compliance with both the binding corpus of EU law and the foundational values listed in Article 2 TEU. The legalistic tone of the initiative is compounded by the Commission's care to strictly base each principle of the rule of law it enumerates on the jurisprudence of the Court of Justice (Commission of the European Communities, 2014b) as well as treaty provisions (Commission of the European Communities, 2014a).

Framing the new mechanism in terms of the rule of law, in other words, could be understood as an exercise in bureaucratic politics, where legalistic language is deliberately chosen in an attempt to de-politicize the issue and so strengthen inter-institutional bargaining in favour of the Commission. In this sense, the Commission's framing of both the crisis and remedy in terms of the rule of law *stricto sensu* is reminiscent of its use of delegated legislation where the Commission seeks to eschew politicization (Bergström *et al*., 2007) or where it anticipates gridlock in the Council or the Parliament (Junge *et al*., 2015). This is clearly objectionable to the Council (Oliver and Stefanelli, this issue).

Last but not least, the framing of the current crisis in terms of the rule of law, and the acceptance of this framing by all EU institutions enmeshed in it, cannot be understood in isolation from the intense activity of other like-minded international organizations, both regional and global, to define and promote the rule of law as the primary organizational principle of modern, democratic political order. From a neglected and underdeveloped notion a decade ago (Venice Commission, 2011, p. 14), the rule of law has rapidly evolved into the consensus concept of the CoE, OSCE (Organization for Security and Co-operation in Europe), OECD (Organisation for Economic Co-operation and Development) and UN.

The measures that have driven this transformation, and which have preceded the Commission's Framework, include the: CoE, OSCE and UN 'Multilatera Organizations Rule of Law Pledge' (2005); OECD 'Equal Access to Justice and the Rule of Law' report (2005); CoE 'The Principle of the Rule of Law' Resolution (2007) and report (2008); OSCE Helsinki Ministerial Council Decision (2008); Council of Europe 2011; and UN General Assembly Declaration (2012).[5] The Commission itself specifically cites this international influence in its Framework (Commission of the European Communities, 2014a, p. 2; 2014b, p. 2). In this sense, the rule of law turn within the EU needs to be understood as integral to the broader emerging debate as to whether the rule of law can be protected and promoted from above.

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