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LETNIK LXXIX

Perspectives on European Union Law



*Andrej Auersperger Matic\**

## **Two Concepts of the Rule of Law**

### **1. Introduction**

The rule of law—along with democracy and human rights—is today one of the leading notions in international relations and an object of intense public debate in many countries.<sup>1</sup> As a political ideal, it is typically invoked to argue for greater recognition of law and legal institutions in modern society and used as a criterion to distinguish between states in which law plays a prominent role and those in which it does not. As a legal principle, it is incorporated in the constitutions of many countries, is referred to by courts and elaborated in legal doctrine. Its rhetorical power has been strengthened by the worldwide growth of legalism and democratic governance, in particular through the spread of constitutionalism and the flowering of national and international human rights instruments, as well as by the increase in international trade and investment that is often accompanied by calls for legal security and protection of investors' rights. Among legal experts, it has evolved into a talking point, and it is often quoted as a kind of self-evident postulate. Interestingly, the growth of the rule of law rhetoric is taking place even if there is no generally accepted understanding of what it actually is in either political or legal terms.<sup>2</sup> After many years of invocation, its substance remains something of a

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\* PhD (Maastricht University), European Parliament, Member of the Legal Service, External Relations Unit, andrej.matic@europarl.europa.eu. The views expressed by the author are strictly personal and do not engage neither the institutions nor the service for which he works.

<sup>1</sup> E.g. Bingham, *THE RULE OF LAW* (2010); Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006); Kleinfeld, *ADVANCING THE RULE OF LAW ABROAD* (2012); Heckman, Nelson, Cabatingan (ed.), *GLOBAL PERSPECTIVES ON THE RULE OF LAW* (2010); Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004).

<sup>2</sup> Kleinfeld, *ADVANCING THE RULE OF LAW ABROAD* (2012), p. 7.

mystery, posing a challenge for policymakers, legal professionals and academics alike.<sup>3</sup> Unlike human rights, the rule of law is not elaborated in any international instrument, and no existing legal system has attempted to provide a precise list of its requirements. Philosophical conceptions of this idea likewise cover a remarkable array of diverse understandings, ranging from the narrowly technical or legalistic that emphasise certain qualities of legislation, to the more moralistic ones that conflate this concept with human rights or broad principles of social justice.

Numerous works in legal philosophy examine the conceptualisation of the term “the rule of law” and explore its principles on an abstract level.<sup>4</sup> A more contextual approach is taken by authors who analyse it from the perspective of constitutional history or within the framework of constitutional traditions of one or more of the world’s legal systems.<sup>5</sup> At the other end of the spectrum, and concurrently with the increasing popularity of the rule of law phraseology in development policies and international affairs,<sup>6</sup> studies on the rule of law have also become commonplace in social sciences, in particular, economics. In that field, they are typically concerned with issues such as the enforcement of contract rights or the link between law and development.<sup>7</sup> The meaning of the rule of law can also differ considerably depending on the social and geographical environment in which it is used. In the legal traditions of Western democracies, it is usually associated with the relationship between the individual and the state or as a basic tenet underlying the constitutional scheme of government. It is perceived as a complement to democratic decision-making, a limit on the powers of public administration or a guarantee that the rights of individuals will be enforced. It plays a part as an ideal that transcends the uncertainties of electoral politics, especially in times when established notions of civil rights and liberties are challenged with increasing frequency, and the proper level of legal regulation of private business is hotly debated. In post-conflict, transitional and developing countries, on the other hand, the rule of law as an expression is typically used as a proxy for legality in general or as an indicator of observance of rules in society.<sup>8</sup> In this sense, it is often considered as a solution to the problem of widespread lawlessness or other social problems such as corruption. Its absence is regularly highlighted, especially by international organisations and aid agencies, as one of the main reasons for limited progress of such countries on their way to stability, democratisation and economic growth. A broad agreement appears to exist that the rule of law is not “public order” and should

<sup>3</sup> Magen, *The Rule of Law and its promotion abroad: three problems of scope* (2009), pp. 51–52.

<sup>4</sup> E.g. Shapiro (ed.), *THE RULE OF LAW* (1987); Dyzenhaus (ed), *RE-CRAFTING THE RULE OF LAW: THE LIMITS OF LEGAL ORDER* (1999).

<sup>5</sup> Costa, Zolo (ed.), *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* (2007).

<sup>6</sup> E.g. Mockle (ed.), *MONDIALISATION ET ÉTAT DE DROIT* (2002).

<sup>7</sup> E.g. Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006).

<sup>8</sup> E.g. Sajo, *On Old and New Battles: Obstacles to the Rule of Law in Eastern Europe* (1995), p. 97.

not be confused with “rule by law” or invocations of legality that seek to justify political repression or restrictions on personal freedoms on the ground of providing security.<sup>9</sup> But beyond this minimum, definitions and understandings of the rule of law differ markedly even if its overall purpose appears to be intuitively clear.

To facilitate and clarify the contemporary rule of law debate, this article proposes a fundamental distinction between what might be termed classical and institutional interpretations of this concept. It is suggested that under the classical—and among lawyers the most common—view, which was dominant in legal and political theory for most of the twentieth century, the rule of law was understood as a constitutional principle, broadly expressing liberal doctrines on the proper relationship between law, the individual and the modern constitutional state. It was elaborated within the context of national legal systems and dealt mainly with issues arising under public law. In the last few decades, however, we have also witnessed, especially in the international context, the appearance of another, more general and empirical usage of the term, applied mainly to the working of legal institutions. While being broader in scope, references to the rule of law of this kind are characterised by a preoccupation with questions about whether and how law works in practice, not just in relation to the state but also in relations between individuals. This version of the rule of law is notable for the inclusion of considerations relating to private law and the protection of private rights and is often strongly associated with the working of judicial institutions and dispute resolution procedures. Most importantly, however, it is marked by the insistence that legal rules and institutions must not only exist on paper or formally but must also be effective. The institutional view of the rule of law, therefore, supplements the classical view with new elements that highlight institutional objectives in legal and public discourse about the legitimacy of law.

To understand the significance of the change in the conceptualisation of the rule of law that has given rise to the distinctive constitutional and institutional uses of this notion, it is helpful to sketch briefly its historical development and its main assumptions, starting with its origins in the liberal tradition.

## 2. The Classical Concept

Although some authors associate the general idea of a society governed by law to ancient philosophy and in particular with Aristotle,<sup>10</sup> it is probably more accurate to consider that the nucleus of what is now referred to as the rule of law developed with the rise of the modern liberal state, framed by the Enlightenment thinkers and in political terms put into practice by the English, French and American revolutions, followed

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<sup>9</sup> Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004), p. 92; Ginsburg, Moustafa (ed.), *RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES* (2008).

<sup>10</sup> Shklar, *Political Theory and the Rule of Law* (1987), pp. 1–3.

by the spread of liberal political regimes around the world.<sup>11</sup> It was the rise of modern liberalism that laid the foundations of a social order in which the relations between the individual and the state are legally defined, and it is from that point onward that one can really speak of law-based societies. The crucial relation that defines the constitutional understanding of the rule of law—the relation between law and individual freedom—is accordingly the central tenet of liberal thinking on how to reconcile individual rights with the necessity to provide social order and government, explained at length in the canonical texts of liberal thought. Locke, for example, famously wrote that

“Freedom of Men under Government is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it; a Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man”.<sup>12</sup>

This is how the rule of law is often described even today, as the rule of laws as opposed to the rule of men. However, to ensure that law actually “rules” in social life, the modern state must be organised according to principles that allow legal instruments and institutions rather than individuals to regulate and control public power and private conduct. This is why political ideas recognising the essential role that law plays in protecting freedom and institutional arrangements that make that possible—such as the separation of powers, constitutional government, judicial review of legislation and the listing of basic rights in fundamental legal texts—are part of a long-standing Western liberal tradition and its emphasis on the legality of state action. The “rule of law” as an expression, however, only appeared in nineteenth-century constitutional thought in Europe. According to Costa, the common threads in the conceptualisation of this idea were the link between law and power, the possible legalisation of power and the numerous strategies used to control power by law.<sup>13</sup> Although it has always expressed a common “anti-voluntaristic” stance in different legal systems, its main objective has been developed in different shapes, by judge-made law in Great Britain and with “advanced constitutional engineering” on the continent.<sup>14</sup> The practical dimension of the rule of law is evident especially in the fact that the solution offered to the problem of controlling power was to resort to judicial decision-making.<sup>15</sup>

<sup>11</sup> Shapiro (ed.), *THE RULE OF LAW* (1987), p. 1.

<sup>12</sup> Locke, *SECOND TREATISE OF CIVIL GOVERNMENT*, 4, 22 (1980).

<sup>13</sup> Costa, *The rule of law: a historical introduction* (2007), p. 134.

<sup>14</sup> *Ibid.*, p. 135.

<sup>15</sup> *Ibid.*, p. 137.

## 2.1. *Theoretical Exploration*

In England, the concept of the rule of law was first popularised by Albert Venn Dicey, a law professor at Oxford University, who devoted a significant part of his famous 1885 treatise entitled *An Introduction to the study of the Law of the Constitution* to an elaboration of certain salient features of English common law and, even more importantly, British constitutional arrangements.<sup>16</sup> These features, Dicey argued, express an overarching idea that he called “the rule of law”, which protects personal liberty and indicates deeply held beliefs about the limits of governmental power. The first principle states “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in ordinary legal manner before the ordinary courts of the land”.<sup>17</sup> The principle combines the ideals of legal foreseeability and due process, which can be contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary or discretionary powers. Secondly, the rule of law implies that “no man is above the law”, so that “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals”.<sup>18</sup> This principle underlines the importance of equality before the law and, in particular, the use of general courts to deal with all kinds of legal cases, including those relating to public officials.<sup>19</sup>

The third—and the most interesting—component principle of the rule of law was formulated more indirectly. Speaking of the predominance of the “legal spirit”, which he considered to be a special attribute of English institutions, Dicey noted that general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are in England “the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts”.<sup>20</sup> The rule of law may accordingly be used as a formula for expressing the fact that in England the rules “which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals”.<sup>21</sup> This observation implies that legal security does not come from having a written constitution, but rather from being able to go to the courts to remedy any breach of rights and liberties. The rule of law, in Dicey’s view, is not satisfied with “vertical” notions of legality or compliance with certain principles such as equality, but rather with a “horizontal” system of effective judicial remedies and the existence of powerful independent courts. From the very beginning, therefore, the doc-

<sup>16</sup> Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1982), pp. 107–108.

<sup>17</sup> *Ibid.*, p. 110.

<sup>18</sup> *Ibid.*, p. 114.

<sup>19</sup> Santoro, *The Rule of Law and the »Liberties of the English«: The Interpretation of Albert Venn Dicey* (2007), p. 165.

<sup>20</sup> Dicey, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1982), p. 115.

<sup>21</sup> *Ibid.*, p. 121.



trine of the rule of law, even if formulated in a public law context, has had a procedural dimension and emphasised judicial protection as an essential aspect of a legitimate legal order. Dicey's theory accordingly contains the "seeds, perhaps, of a political philosophy capable of generating important conclusions about the standards of justice and fairness which government may be expected to meet".<sup>22</sup>

Continental variants of the rule law trace their origins to the German concept of *Rechtsstaat*—or "law-based state"—developed in the nineteenth century by German legal theorists who wanted to formulate liberal political demands regarding the structure of the state in opposition to the absolutist regime or the "police state".<sup>23</sup> The idea was not without controversy, with differences between liberal and conservative interpretations offered by different authors.<sup>24</sup> One of important early liberal defenders was, for example, Karl Theodor Welcker, who distinguished the *Rechtsstaat* from a despotic or theocratic state by pointing out that its guiding principle is reason, and argued on that basis for constitutional rule and free speech.<sup>25</sup> In general, the theory of the *Rechtsstaat* was developed as a claim that actions of state authorities should be based on legal rules, that regulation by formal law should be required especially for state action relevant for individual freedom and property rights and that all administrative actions should be subject to judicial review. The concept of *Rechtsstaat* has however also been criticised, notably by positivist thinkers like Hans Kelsen, whose theory on the identity of the state and law renders such a concept nonsensical. According to Kelsen, state power can be "distinguished from other power relationships by the fact that it is legally regulated",<sup>26</sup> and because the state should be understood as a legal order, every state is by definition a *Rechtsstaat*. The French legal philosopher Michel Troper defended a similar view, pointing to the contradictory nature of the idea of a law-based state.<sup>27</sup>

The idea that legal institutions can be conceptually encapsulated with specific constraints as regards their structure and working methods based on the very concept of law also became popular among twentieth-century political thinkers. Friedrich Hayek, to take the most famous example, used the rule of law in his political philosophy and sought to demonstrate that law as such required the respect of basic liberal principles. Recognising that economic issues depend on the institutional context, Hayek used the rule of law as a general description of the differences between authoritarianism and freedom, arguing in favour of a minimal state and against executive discretion. In his view,

<sup>22</sup> Allan, *LAW, LIBERTY, AND JUSTICE* (1993), p. 46.

<sup>23</sup> Heuschling, *ÉTAT DE DROIT, RECHTSSTAAT, RULE OF LAW* (2002), pp. 36–43; Šarčević, *DER RECHTSSTAAT* (1996).

<sup>24</sup> Gozzi, *Rechtsstaat and Individual Rights in German Constitutional History* (2007), pp. 237–259.

<sup>25</sup> Welcker, *DIE LETZTEN GRÜNDE VON RECHT, STAAT UND STRAFE* (1964).

<sup>26</sup> Kelsen, *PURE THEORY OF LAW* (1967), p. 289.

<sup>27</sup> Troper, *LA THÉORIE DU DROIT, LE DROIT, L'ÉTAT* (2001).

“nothing distinguishes more clearly a free country from a country under arbitrary government than the observance in the former of the great principle known as the Rule of Law”.<sup>28</sup> Echoing the liberal view on the relation between law and freedom, he took the rule of law to mean that government is in all its actions “bound by rules fixed and announced beforehand”, so that within the known rules of the game, the individual is free to pursue his personal ends. In his view, a political order based on the rule of law is characterised by formal rules, written impartially, with equality before the law and with the universal application of the law. In his later work, Hayek claimed that the rise of state power in the twentieth century had changed the role of law and removed many guarantees of individual liberty that the rule of law was designed to ensure. In this context, he defined the rule of law as “a doctrine about what the law ought to be, a meta-legal doctrine or a political ideal”.<sup>29</sup>

In contrast with broad statements that characterise political philosophy, views of the rule of law developed by legal theorists have taken a more cautious approach to its definition, taking account of the fact that it is difficult to deduce specific political values from the structure of law as such. The dominant group of views on the rule of law in the Anglo-American tradition accordingly consists of “formal” theories that focus on procedural requirements of good law-making but do not pronounce themselves on the content of law.<sup>30</sup> Among these, the theory proposed by Lon L. Fuller has gained special prominence. Fuller considered the rule of law as an expression of the qualities that are characteristic of a good legal system, based on the “inner morality” of law.<sup>31</sup> These qualities include generality (rules of conduct are widely applicable), publicity (the public can learn about the rules to be observed), prospective effect (retroactive change is not permitted), clarity (rules can be understood), consistency (laws must not be contradictory), possibility (rules should not require action that cannot be undertaken), stability (rules should not change too frequently) and congruence (consistency between the stated rules and their actual administration). The rule of law is then the state of affairs, which can be said to exist when every one of these principles of legality is satisfied above some threshold level.<sup>32</sup> In terms of scope, Fuller’s list contains several prescriptions for good law-making practice and says little about either the content of the rules themselves or the legal process. Nevertheless, his account of the rule of law is “value-laden”, a complex of both what is and what ought to exist in a legal system.<sup>33</sup>

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<sup>28</sup> Hayek, *ROAD TO SERFDOM* (2007), p. 112.

<sup>29</sup> Hayek, *THE CONSTITUTION OF LIBERTY* (1960), p. 206.

<sup>30</sup> Craig, *Formal and substantive conceptions of the rule of law: an analytical framework* (1997), pp. 467–487.

<sup>31</sup> Fuller, *THE MORALITY OF LAW* (1964).

<sup>32</sup> Kramer, *OBJECTIVITY AND THE RULE OF LAW* (2007), p. 142.

<sup>33</sup> Summers, *LON L. FULLER* (1984), p. 26.

A more restrictive approach was defended by English positivist thinker Joseph Raz, who started from the premise that the rule of law means literally what it says, which is that “people should obey the law and be ruled by it”.<sup>34</sup> The corollary of this premise is that law must be such that people will be able to be guided by it, and for this reason, the rule of law implies certain basic principles. Thus, a legal system must provide that laws are prospective, open and clear; stable and not changed too frequently; and adopted following clear rules and procedures.<sup>35</sup> Moreover, the independence of the judiciary must be guaranteed, as must the principles of “natural justice”, which refers to requirements of fair judicial procedure and includes open and fair hearing and the absence of bias.<sup>36</sup> Finally, Raz added that courts should have the power of review over how the other principles are implemented, that they should be easily accessible and that the discretion of law enforcement and crime prevention agencies “should not be allowed to pervert the law”.<sup>37</sup> The list proposed by Raz is wider than the one proposed by Fuller, and it includes some institutional conditions, such as an independent judiciary and judicial review, access to courts as well as a broad prohibition of “undue discretion” in crime prevention. However, institutional conditions of this kind appear to be instrumental to the objective of achieving observance of legal rules. Raz emphasised that law, in general, is valued because it stabilises social relationships and because it provides a safe basis for individual planning. This latter aspect is the main concern of the rule of law, which simply calls for law to allow individuals to orient their behaviour and minimise the dangers related to the exercise of discretionary power. Under this view, in stark contrast to the one advocated by Hayek, the rule of law protects human dignity in the sense that it respects humans as being able to plan their actions, but does not as such prevent government interference and is, in fact, compatible with violations of human rights.

The formal approach has been criticised by theorists who consider the rule of law as implying at least some constraints on what law can contain.<sup>38</sup> Among the best-known contemporary theories following this view is the one expounded by Ronald Dworkin, who defended a theory that places emphasis on the protection of “moral and political” rights. His qualification is broad, referring to the rule of law as “a coherent and uncompromised vision of fairness and justice”.<sup>39</sup> In opposition to the formal conceptions, which he claims are based on a narrow “rule-book” understanding of the law, Dworkin has claimed that the rule of law “assumes that citizens have moral rights and duties

<sup>34</sup> Raz, *THE AUTHORITY OF LAW* (2009), p. 212.

<sup>35</sup> *Ibid.*, pp. 214–215.

<sup>36</sup> *Ibid.*, p. 217.

<sup>37</sup> *Ibid.*, p. 218.

<sup>38</sup> Craig, *Formal and substantive conceptions of the rule of law: an analytical framework* (1997), p. 477.

<sup>39</sup> Dworkin, *A MATTER OF PRINCIPLE* (1985), p. 2.

with respect to one another, and political rights against the state as a whole”.<sup>40</sup> It insists that these moral and political rights be recognised in positive law, so that they may be enforced upon the demand of individual citizens through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is, therefore, an ideal of rule by an accurate public conception of individual rights, which in his theory are seen as “trumps over some background justification for political decisions that states the goal of the community as a whole”.<sup>41</sup> Because the centrepiece of his theory is the protection through law of rights to “moral and political independence” of individuals,<sup>42</sup> Dworkin does not accord a special role to judicial institutions or their effective operation. His understanding of the judicial process is rather an ancillary one, in the limited sense that rights must be enforceable at the request of individuals, not only against the state but also against other individuals. This understanding of the rule of law is, therefore, primarily an interpretive one, based on the idea that the legal system must enforce certain moral and political rights and must be available for claims presented by individuals so that the outcome is substantive justice.

By contrast, procedural aspects of law play a prominent part in the critique of the formal view of the rule of law by Jeremy Waldron, who recognises that the rule of law is one of the most essential political ideals of our time and understands it as a normative ideal that arises out of the understanding of law.<sup>43</sup> The concepts of “law” and the “rule of law” are in his view interrelated, so that by positing several defining characteristics of law, one also defines the most prominent requirements of the rule of law. Three out of five characteristics or features of a positivist account of law that he identifies—systematicity, the existence of general norms and the existence of courts—are in his view intimately connected with the idea of the rule of law.<sup>44</sup> Legal systems may be evaluated and categorised in terms of either law or the rule of law, except that in the first case, there is a breach of some minimum threshold, while a reproach in terms of the rule of law represents “continuing upward pressure” for a legal system to do better.

Following this starting point, Waldron distinguishes between the conceptions of the rule of law that emphasise legal certainty, predictability and determinacy of the norms that are upheld in society on one hand, and a separate current of thought in the rule of law tradition that emphasises procedural issues, which is most common in political and public use. He notes that complaints relating to the rule of law are typically that governments have “interfered with the operation of the courts, compromised the independence of the judiciary, or made decisions affecting people’s interests or liberties in a

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<sup>40</sup> Ibid.

<sup>41</sup> Dworkin, *Rights as Trumps* (1984), p. 153.

<sup>42</sup> Ibid., p. 162.

<sup>43</sup> Waldron, *The Concept and the Rule of Law* (2008), p. 59.

<sup>44</sup> Ibid., p. 44.

way that denies them their day in court”.<sup>45</sup> Moreover, he points out that “no conception of law will be adequate if it fails to accord a central role to institutions like courts, and to their distinctive procedures and practices, such as legal argumentation”.<sup>46</sup> In his view, conceptual accounts of law that only emphasise rules and say nothing more about legal institutions are too casual in their understanding of what a legal system is. Waldron’s interpretation of the rule of law is therefore distinctly procedural, but unlike those of Fuller or Raz, focused on legal institutions rather than legislative practices.

## 2.2. *Constitutional applications*

The extensive treatment accorded to the rule of law in English and American literature contrasts curiously with the fact that in the English-speaking world, this phrase is primarily a legal and political expression, commonly used in political discourse, legal theory<sup>47</sup> or in court decisions,<sup>48</sup> but does not appear as such in constitutional or other legal instruments of importance and is not a formally binding legal principle. This lack of formal legal status can be contrasted with the situation on the European continent, where concepts drawn from the German *Rechtsstaat* gradually came to form a part of constitutional law and are referred to in many national constitutions. During the twentieth century and notably after the Second World War, the concept of *Rechtsstaat* became a preeminent legal principle expressing the ideas relating to democratic constitutional principles, basic rights (*Grundrechte*) and social justice. In Germany, the *Rechtsstaat* became a legally binding constitutional principle of cardinal importance, incorporated into the German Basic Law (*Grundgesetz*).<sup>49</sup> While the German Federal Constitutional Court has never provided a general definition of the *Rechtsstaat* principle, it has produced a case law in which the principle is applied on a case-by-case basis.<sup>50</sup> German theory and subsequent constitutional incorporation of the *Rechtsstaat* have been highly influential in other parts of the European continent, notably in Southern Europe (as *stato di diritto* in Italy and *Estado de derecho* in Spain) and—after the fall of the Berlin wall—in Eastern Europe, where most post-communist constitutions adopted it as a fundamental legal principle (for example as *pravna država* in Slovenia and Croatia, *právní stát* in the Czech Republic or *jogállam* in Hungary).

<sup>45</sup> Ibid., p. 55.

<sup>46</sup> Ibid.

<sup>47</sup> E.g. Shapiro (ed.), *THE RULE OF LAW* (1987); Lord Woolf, *The judiciary of England and Wales and the rule of law* (2006) p. 613.

<sup>48</sup> Fallon, “The Rule of Law” as a Concept in Constitutional Discourse, p. 24.

<sup>49</sup> Kunig, *DAS RECHTSTAATSPRINZIP* (1986).

<sup>50</sup> Von Münch, Kunig (ed.), *GRUNDGESETZ KOMMENTAR* (2012), Band 1, comments on Article 20; Dreier (ed.), *GRUNDGESETZ KOMMENTAR* (2006), comments on Article 20.

French constitutionalism has been something of an exception to this trend because of the strong parliamentary tradition in France, even if the concept of the rule of law was well known since the early twentieth century.<sup>51</sup> The term *État de droit*, a direct translation from the German *Rechtsstaat*, was used by early twentieth-century legal theorists such as Leon Duguit to argue for constitutional limits to state power.<sup>52</sup> Another contemporary, the positivist thinker Raymond Carré de Malberg, famously distinguished the concept of *État de droit* from a legalistic understanding of *État légal* on the theory that the former subjects its power to the authority of law.<sup>53</sup> Academic acceptance of this idea, however, had no impact on formal constitutional texts. The 1958 French constitution does not use the notion of *État de droit* and the *Conseil constitutionnel* has also refrained from referring to it in its case law. Nevertheless, in contemporary French legal culture, the concept of the *État de droit* is regularly used in legal doctrine to denote the state based on principles of higher order that differs from *État légal* understood in the sense of a state based on legislative supremacy.<sup>54</sup>

The rule of law and its counterparts, such as the *Rechtsstaat* have also been taken over in many international treaties and documents. On the international level, countless declarations now refer to the rule of law as a matter of course. The 2000 Millennium Declaration<sup>55</sup> of the United Nations General Assembly, for instance, refers to it in three places, and the General Assembly has also adopted many resolutions on the subject.<sup>56</sup> The concept is however most visible in the treaties that have laid the groundwork for European political and legal integration and the practice of European institutions. Article 3 of the Statute of the Council of Europe<sup>57</sup> declares that “Every member of the Council of Europe must accept the principles of the rule of law”, while the Preamble to the European Convention on Human Rights refers to Europe’s “common heritage of political traditions, ideals, freedom and the rule of law”. Similarly, Article 2 of the Treaty on the European Union<sup>58</sup> cites the rule of law among the values on which the European Union is founded and emphasises that these values are “common to the Member States”, as does the Charter of Fundamental Rights of the European Union in its Preamble.<sup>59</sup> A frequent reference to the rule of law as a concept of constitutional significance can also be

<sup>51</sup> Heuschling, *ÉTAT DE DROIT, RECHTSSTAAT, RULE OF LAW* (2002), pp. 376–431.

<sup>52</sup> Duguit, *MANUEL DE DROIT CONSTITUTIONNEL* (2007).

<sup>53</sup> Raymong, *CONTRIBUTION À LA THÉORIE GÉNÉRALE DE L’ÉTAT* (1962), pp. 488–493.

<sup>54</sup> Louis Favoreu and others, *DROIT CONSTITUTIONNEL* (2016), pp. 30, 92.

<sup>55</sup> General Assembly of United Nations, *United Nations Millennium Declaration* (2000).

<sup>56</sup> General Assembly of United Nations, *The rule of law at the national and international levels* (2006).

<sup>57</sup> Statute of the Council of Europe ETS No 1.

<sup>58</sup> Treaty on European Union (TEU), OJ C 326/13 (2012).

<sup>59</sup> Charter of Fundamental Rights of the European Union, OJ C 389/83.

found in the case law of the Court of Justice of the European Union ever since the latter declared, in the *Les Verts* case, that “the European Economic Community is a community based on the rule of law, inasmuch as neither its members states nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty”.<sup>60</sup> This principle has been reiterated on numerous occasions. A prominent example is the *Kadi* case, where the Court of Justice referred to the rule of law in connection with the requirement of judicial review of sanctions against individuals imposed by the United Nations Security Council.<sup>61</sup> The themes of due legal process, judicial review and subordination of political authority to constitutional principle figured prominently in that decision.

From its modest and mainly declaratory beginnings in the case law of the Court of Justice and the texts of the founding treaties, the rule of law over time has been transformed into a fundamental postulate of the European Union that can have practical consequences. Its status is notably reflected in the possibility, under Article 7 TEU, of sanctioning a member state in case of a breach of the values of the European Union, including the rule of law. This “nuclear option” is supposed to be used where the actions of a member state can be said to constitute a systemic or flagrant violation of those values. In a 2014 communication, the European Commission proposed as a framework for the application of Article 7 TEU and outlined a basic understanding of the rule of law for that purpose.<sup>62</sup> The Commission admitted that the “precise content of the principles and standards stemming from the rule of law may vary at national level”, but it nevertheless identified a “core meaning” which was said to be constituted by principles that 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”.<sup>63</sup> The Commission elaborated its view by pointing to the need to ensure confidence in the legal systems of the member states, especially as regards their judicial systems.<sup>64</sup>

In terms of substance, one might infer a generalised constitutional meaning of the rule of law in Europe from a document of the so-called Venice Commission, a special advisory body within the Council of Europe, which has published an official report on the subject stating that “a consensus can now be found for the necessary elements of the

<sup>60</sup> Case 294/83 *Partie Ecologiste ‘Les Verts’ v European Parliament* ECLI:EU:C:1986:166, para 23.

<sup>61</sup> Case C-402/05 P *Kadi and Al Barakat International Foundation v Council and Commission* ECLI:EU:C:2008:461, paras 281 and 288.

<sup>62</sup> European Commission, ‘A new EU Framework to strengthen the Rule of Law’ (Communication) COM (2014) 158 final2 (corrigendum).

<sup>63</sup> *Ibid.*, p. 4.

<sup>64</sup> *Ibid.*

rule of law as well as those of the *Rechtsstaat* which are not only formal but also substantial or material”.<sup>65</sup> These are:

- (i) Legality, including a transparent, accountable and democratic process for enacting law,
- (ii) Legal certainty,
- (iii) Prohibition of arbitrariness,
- (iv) Access to justice before independent and impartial courts, including judicial review of administrative acts,
- (v) Respect for human rights and
- (vi) Non-discrimination and equality before the law.<sup>66</sup>

These principles clearly reflect a constitutional character of the rule of law idea in formal contexts, a view supported by legal writers who now describe the concept as

“[T]he normative and institutional framework of the European modern state which, on the basis of an individualistic philosophy [...] entrusts the legal system with the primary task of protecting civil and political rights, thus contrasting, for this purpose, political authorities’ inclination towards arbitrariness and misuse of their powers”.<sup>67</sup>

A similarly value-laden understanding is advocated by Jowell, who sees the rule of law as a “principle of institutional morality inherent in any democracy”.<sup>68</sup> Despite its failings and limits, the concept “compels the view that all power, however legitimately gained, needs, in a democracy worthy of its name, to be exercised in a manner that that is constrained by its underlying values”, with the main contribution of the common law in this respect being the development of the content of the rule of law through judicial review.<sup>69</sup> Perhaps the most renowned of recent definitions is however the one by Bingham, who considered that in a state governed by the rule of law “all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts”.<sup>70</sup> In such a state, the legal system adheres to the principles of accessibility of the law, non-discretionary application of the law, equality before the law, fair and reasonable exercise of power within limits, human rights, means to resolve disputes, fair trial and compliance of the state with obligations in international and national law. It is apparent, therefore, that the predominant legal conceptualisation of the rule of law to-

<sup>65</sup> European Commission on Democracy through Law (Venice Commission), ‘Report on the rule of law’, document CDL-AD(2011)003rev (Council of Europe 2011) 10.

<sup>66</sup> Ibid.

<sup>67</sup> Costa, Zolo (ed.), *THE RULE OF LAW: HISTORY, THEORY AND CRITICISM* (2007), pp. 29–30.

<sup>68</sup> Jowell, *The rule of law and its underlying values* (2007), p. 5.

<sup>69</sup> Ibid., p. 24.

<sup>70</sup> Bingham, *THE RULE OF LAW* (2010), p. 8.



day is constitutional and that it acts mainly as an argument in favour of procedural due process, judicial review and legal certainty.

### 3. The Institutional Concept

The process of democratisation and the progressive building of a market economy in many parts of the world in the last decades of the twentieth century have affirmed the political impetus of the rule of law in the constitutional context, but it has also brought new questions about the appropriate relationship between law and society and the priorities that legal reforms must address in places where legal rules and institutions are weak. Even in economically advanced societies, one can witness, in the last three decades, growing recognition of the crucial role that stable and effective legal institutions—and judicial institutions in particular—play in the protection of legal rights and the corresponding promotion of economic growth and social development.<sup>71</sup> This is why the concept of the rule of law has gradually started to be referred to in a much broader and often in a more pragmatic sense, as a byword for the necessary functional qualities of a given legal system rather than a set of accepted standards protecting against arbitrary state action. It is therefore not surprising that one of the characteristics of the contemporary rule of law discourse is that it appears not only in legal texts but also in political and economic debates, with an understanding of the rule of law that differs considerably from classical constitutional conceptions. The new rule of law paradigm is distinct from antecedents in that the rule of law is now seen as wide in scope, involves factors not included in traditional uses of the term and purports to cover all kinds of legal relations, both public and private. This development is evident both in theory and in practice, in particular in the work of international organisations and institutions that seek to promote legality in view of supporting social development and economic growth.

#### 3.1. *New Conceptualisations*

The conceptual widening of the rule of law has been noted by authors who define the rule of law as a “tenet according to which law imposes limits on the exercise of power by government and private interests”.<sup>72</sup> The rule of law, therefore, does not only impose legal restraints on government officials, but also maintains order and coordinates behaviour and transactions among citizens. In this perspective, it is pointed out that the purpose of law is manifold and that it provides multiple benefits to society.<sup>73</sup> It not only

<sup>71</sup> E.g. Order in the jungle – Economics and the Rule of Law, URL: <https://www.economist.com/briefing/2008/03/13/order-in-the-jungle>.

<sup>72</sup> Tamanaha, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* (2004), p. 137.

<sup>73</sup> *Ibid.*

ensures freedom but also provides increased certainty, limited discretion of government officials, the keeping of peace in society, economic development and the provision of justice for individuals.<sup>74</sup> A comprehensive conceptual framework relating to this kind of thinking about the rule of law has been proposed in a study by Trebilcock and Daniels, who start from the premise that the rule of law is a “universal social good tied inextricably to development”.<sup>75</sup> Trebilcock and Daniels reject the linking of the rule of law to any particular political organisation, economic philosophy or legal culture. They also do not think that the rule of law is obedience to rules or based on concrete substantive principles. Rather, they focus on institutional structures responsible for administering the law, based on a set of procedural values, which are divided into “process values” (such as predictability), “institutional values” (such as independence) and “legitimacy values”.<sup>76</sup> On this basis they define a set of institutions which constitute the essential elements of the rule of law—such as the judiciary, police, prosecution, correctional institutions and tax administration—and elaborate a set of “structural conditions” reflective of these core values. In this conception of the rule of law, primacy is given to key legal institutions, whose good or bad functioning is a criterion to determine whether the rule of law exists or not.

Among legal theorists, Kennedy has proposed a definition consistent with this perspective by arguing that the notion of the rule of law requires

“[T]hat there be justiciable legal restraints on what one private party can do to another, and on what executive officers can do to private parties; That judges understand themselves to be enjoined to enforce these restraints independently of the views of the executive and the legislature, and of political parties; That judges understand themselves to be bound by a norm of interpretive fidelity to the body of legal materials that are relevant to whatever dispute is before them.”<sup>77</sup>

According to Kennedy, who expressly characterises his definition as “procedural” or “institutional”, rights of citizens under the rule of law are “logical corollaries of justiciable restraints on private and public action”.<sup>78</sup> The salient point is the intuitively logical link between the significance of private law relations among persons in modern society and the procedural dimension of the legitimacy of law, which is supported by institutional qualities like independence or impartiality.

In the European context, an important contribution to this debate, based on an institutional conceptualisation of the rule of law, has recently been made by von Bogdandy and Ioannidis, who claim that “[t]here is only rule of law if the law is generally and widely

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<sup>74</sup> Ibid.

<sup>75</sup> Trebilcock, Daniels, *RULE OF LAW REFORM AND DEVELOPMENT: CHARTING THE FRAGILE PATH OF PROGRESS* (2008), p. 29.

<sup>76</sup> Ibid.

<sup>77</sup> Kennedy, *A CRITIQUE OF ADJUDICATION* (1997), p. 13.

<sup>78</sup> Ibid.

observed and is effective in actually guiding the conduct of persons, both in their official capacities (if they have them) and as private persons”.<sup>79</sup> This is, in their view, the “generally agreed core, minimum element of the rule of law, whatever else it might additionally require”.<sup>80</sup> On this basis, the authors develop the concept of “systemic deficiencies” in the rule of law, which focuses on “persistent, cross-sector institutional weaknesses, rather than government heavy-handedness”,<sup>81</sup> pointing to insufficiencies in the administrative and judicial systems of certain European countries in this regard. In particular, they cite breakdowns in public order, corruption, excessively lengthy judicial proceedings, non-execution of judgments, organised crime and administrative insufficiencies in Greece, Italy, Romania and Bulgaria as examples of such systemic deficiencies.<sup>82</sup>

In addition to these developments in legal studies, the use of the rule of law in the institutional sense has also become frequent in social sciences and in particular economics, with many studies routinely referring to it without actually providing a definition. The focus on institutions, including formal rules of law, and their role in improving economic performance is, in fact, the foundation of an entire branch of economic theory, known as “new institutional economics”, often associated with the Nobel prize winner Douglass C North.<sup>83</sup> Many economic studies and publications today refer to the rule of law as a matter of routine, especially in tracking the relationship between institutional conditions and economic growth.<sup>84</sup> In this context, the rule of law is typically related to economic rights, notably property rights, contract rights and enforcement.<sup>85</sup> Economic perspectives do not neglect the individual rights aspect of the rule of law, because the protection of economic interests through law presupposes basic legal certainty and personal safety. However, they tend to associate its meaning with the extent to which various legal rules and systems manage to regulate behaviour and consequently induce or hinder economic development. Indeed, there appears to be an emerging consensus that “institutions” are a vital ingredient of encouraging economic growth, and that law and legal institutions have a key role in this regard.<sup>86</sup>

<sup>79</sup> Von Bogdandy, Ioannidis, *Systemic Deficiency in the Rule of Law: What It Is, What Has Been Done, What Can Be Done* (2014), p. 63.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*, p. 61.

<sup>82</sup> *Ibid.*, pp. 76–81.

<sup>83</sup> North, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE* (1990).

<sup>84</sup> E.g. Cross, *Law and Economic Growth* (2002), p. 1737; Rigobon, Rodrik, *Rule of Law, Democracy, Openness, and Income: Estimating the Interrelationships* (2005), p. 533.

<sup>85</sup> E.g. Dam, *THE LAW-GROWTH NEXUS: THE RULE OF LAW AND ECONOMIC DEVELOPMENT* (2006), p. 13; Cross, *Law and Economic Growth* (2002), p. 1742.

<sup>86</sup> Ulen, *The Role of Law in Economic Growth and Development* (2011) p. 211.

### 3.2. *International Development*

Over the last three decades, the discourse of international development has embraced the idea of the rule of law wholeheartedly, as a universally recognisable ideal intended to address broadly the many problems of low trust and disorder in transitional and developing societies.<sup>87</sup> A 2004 report of the United Nations Secretary-General, for instance, defined the rule of law as

“[A] principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”<sup>88</sup>

The principle requires “measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency”.<sup>89</sup> The definition is broad and imprecise, so it might rather be seen as a wish list of political objectives such as accountability or fairness rather than a legal postulate. The definition covers the accountability of both public and private actors, emphasising legality and the observance of law in general. It *inter alia* serves as the basis for many activities of the United Nations and its bodies, which, according to a 2011 report, provide rule of law assistance in over 150 member states spanning every region of the world.<sup>90</sup> These activities take place in all contexts, including development, fragility, conflict and peacebuilding. They are coordinated and supported by various bodies such as the “Rule of Law Coordination and Resource Group”, established in 2006, which seeks to ensure coordination and coherence among the many United Nations entities engaged in the rule of law activities, develop system-wide strategies, and the “Rule of Law Unit”, a department of experts dedicated to this issue.<sup>91</sup>

A more instrumental understanding of the rule of law was developed by the World Bank, as one of the international organisations most active in development and related

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<sup>87</sup> Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006), pp. 3–13; Humphreys, *THEATRE OF THE RULE OF LAW* (2010), pp. 3–14.

<sup>88</sup> United Nations, Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004), UN Doc S/2004/616, para 6.

<sup>89</sup> *Ibid.*

<sup>90</sup> United Nations, Report of the Secretary-General – *Uniting our strengths: Enhancing United Nations support for the rule of law* (2006), UN doc A/61/636–S/2006/980, p. 3; United Nations, Report of the Secretary-General – *Strengthening and coordinating United Nations rule of law activities* (2011) UN doc A/66/133, p. 3.

<sup>91</sup> United Nations, Report of the Secretary-General – *Uniting our strengths: Enhancing United Nations support for the rule of law* (2008), UN doc A/63/226.

policy work worldwide. Over the years, the World Bank became known for its technical approach to the shaping of the rule of law debate, which arose in the context of the need to deal with institutional problems in the process of providing loans for economic development. The World Bank accordingly began to engage in issues concerning “governance” in borrowing countries, notably by looking at the role of law in the protection of rights, on the assumption that the existence of functioning legal institutions is one of the most important factors contributing to growth. The World Bank thus began to use the concept of “the rule of law”, which it interpreted in light of its overall objective of promoting social and economic development.<sup>92</sup> In 1994 its General Counsel, Ibrahim Shihata, wrote an influential paper in which he distinguished the rule of law from political decision-making by defining it as a “system based on abstract rules which are actually applied and on functioning institutions which ensure the appropriate application of such rules”<sup>93</sup> and noting that economic reforms cannot be effective in the absence of a “system” which translates them into workable rules and makes sure they are complied with. In his view, such a system assumes that:

“a) there is a set of rules which are known in advance, b) such rules are actually in force, c) mechanisms exist to ensure the proper application of the rules and to allow for departure from them as needed according to established procedures, d) conflicts in the application of the rules can be resolved through binding decisions of an independent judicial or arbitral body and e) there are known procedures for amending the rules when they no longer serve their purpose.”<sup>94</sup>

This understanding of the rule of law is remarkable for its technical character and the lack of any reference to substantive values. Its aim appears to be primarily to improve the working of the law in the pursuit of economic development, and its main preoccupation is accordingly the existence and enforcement of rules, including mechanisms of dispute resolution. The World Bank’s understanding of the rule of law became more nuanced and specific after 2000, when it was defined to include the requirements of transparent legislation, fair laws, predictable enforcement and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy.<sup>95</sup> The definition thus became less technical, but the focus on the functional qualities of the legal system has remained.<sup>96</sup> The emphasis is now on the link between the rule of law, economic growth and the reduction of poverty, and in terms of substance, the definition expressly

<sup>92</sup> Santos, *The World Bank’s Uses of “Rule of Law” Promises in Economic Development* (2006).

<sup>93</sup> Shihata, *THE WORLD BANK LEGAL PAPERS* (2000), p. 272.

<sup>94</sup> *Ibid.*, p. 273.

<sup>95</sup> The World Bank, Legal Vice Presidency, ‘Initiatives in Legal and Judicial Reform’ (World Bank 2002) 3.

<sup>96</sup> The World Bank, Legal Vice Presidency, ‘Legal and Judicial Reform: Strategic Directions’ (World Bank 2003) 1.

associates the rule of law with meaningful and enforceable laws, enforceable contracts, basic security and access to justice.<sup>97</sup>

A broad and mainly instrumental understanding of the rule of law of this kind is also typical of international organisations and other actors that seek to promote legality and institutional development, both in developed and developing countries.<sup>98</sup> The most important case in point are the frequent uses of the rule of law in the course of legal development projects conducted by international organisations, governments and non-governmental entities, such as the United States Agency for International Development (USAID), the Swiss Agency for Development and Cooperation (SDC), the British Department for International Development (DFID), the World Bank, the International Monetary Fund (IMF), the Organization for Security and Co-operation in Europe (OSCE) or the Open Society Institute. These organisations typically seek to advance several goals in their activities related to law and justice, with the common objective usually named as “strengthening the rule of law” in some form.<sup>99</sup> Experts in the field have, however, complained that organisations involved in the rule of law efforts do not have a clear idea about what they mean exactly by that phrase, and as a consequence, what it is that they want to achieve and how.<sup>100</sup> Indeed, referring to the rule of law in the context of development has become something of an “orthodoxy”, often based on “myths” about Western legal systems rather than clear models.<sup>101</sup>

According to OSCE, for instance, the “rule of law is not merely a formal legality but justice based on the recognition and full acceptance of the supreme value of the human personality and guaranteed by institutions providing a framework for its fullest expression”, with democracy being its inherent element.<sup>102</sup> The United States Agency for International Development, which carries out development projects on behalf of the United States government, considers the rule of law to be one of five elements that comprise democracy, the other four being consensus, competition, inclusion, and good governance.<sup>103</sup> In its view, the rule of law “usually refers to a state in which citizens, corporations, and the state itself obey the law, and the laws are derived from democratic

<sup>97</sup> The World Bank, Legal Vice Presidency, ‘Legal and Judicial Reform: Observations, Experiences, and Approach of the Legal Vice Presidency’ (World Bank 2002) 1-2.

<sup>98</sup> Magen, Morlino, Hybrid regimes, the rule of law, and external influence on domestic change (2009).

<sup>99</sup> Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006), pp. 3–28.

<sup>100</sup> *Ibid.*, p. 19.

<sup>101</sup> Upham, *Mythmaking in the Rule-of-Law Orthodoxy*, (2006).

<sup>102</sup> Organization for Security and Co-operation in Europe, ‘Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE’ (1990), para 2.

<sup>103</sup> United States Agency for International Development, ‘Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework’ (2008) 5.

consensus”.<sup>104</sup> The Department for International Development, responsible for development aid in the United Kingdom, notes in a 2014 document that “the rule of law is the underlying framework that underpins open and fair societies and economies, where citizens, businesses and civil society can prosper”.<sup>105</sup> It advances five main ends, including the demand that “public authority is bound by and accountable before pre-existing, clear, and known laws”, that citizens are “treated equally before the law”, that “human rights are protected”, that “citizens can access efficient and predictable dispute resolution mechanisms”, and that “law and order are prevalent”.<sup>106</sup> Emphasising the institutional aspect, the document warns that the rule of law is not just about the law but also about the institutions that determine who has access to power, rights and resources.<sup>107</sup> The Swiss Agency for Development and Co-operation (SDC) similarly bases its work on a 1998 issues paper providing a conceptual and historical explanation of the rule of law, defined in broad terms as including respect for human rights, administrative reform, legal and judicial reform and decentralisation.<sup>108</sup>

Statements and definitions like these remain relatively open in meaning, but one can nevertheless detect an emphasis on legal institutions, rights enforcement and effectiveness of law as the main themes of the rule of law promotion. A guidance document of the European Commission makes a rather clear connection in this respect, stating that “rule of law programmes have usually taken as their starting point an assessment of state justice sector institutions, and on this basis remedies have been developed as to how institutional weaknesses could be addressed to ensure that the rule of law is upheld.”<sup>109</sup> This impression is corroborated by analyses of international development activities which have found that the lists of actions typically undertaken in the framework of the rule of law agenda mainly include actions related to the institutions of justice, such as the training of judges or lawyers, building of prisons and courthouses, establishment of management and administration systems for judiciaries, the establishment of or support to law faculties and lawyers’ associations, drafting of new laws, encouragement of states to ratify international treaties, training of the police force, assistance in public information campaigns regarding rights, the establishment of small claims courts, public interest litigation, legal aid schemes and support to informal justice systems.<sup>110</sup> Carothers has

<sup>104</sup> *Ibid.*, p. 5.

<sup>105</sup> United Kingdom Department for International Development, ‘Policy Approach to Rule of Law’ (2014) 2.

<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> Swiss Agency for Development and Cooperation, ‘The Rule of Law Concept: Significance in Development Co-operation’ (1998).

<sup>109</sup> European Commission, ‘Support to Justice and the Rule of Law’ (2012).

<sup>110</sup> Hague Institute for the Internationalisation of Law, ‘Rule of Law Inventory Report, Academic Part’ (Discussion Paper for the High Level Expert Meeting on the Rule of Law of 20<sup>th</sup> April 2007).

accordingly observed that reformers and consultants working in international legal development tend to “translate the rule of law into an institutional checklist, with primary emphasis on the judiciary, to the extent that the terms judicial reform and rule-of-law reform are often used interchangeably”.<sup>111</sup>

Much of contemporary thinking about the rule of law is therefore based on an understanding of that notion that is rather distinct from its classical expositions in legal and political theory and the constitutional traditions of Western democracies. Although it has many variations, the institutional view of the rule of law supplements the classical view with new elements that highlight institutional objectives.<sup>112</sup> Significantly, the obligation to respect basic legal obligations is extended to private actors, so the scope of the concept is enlarged to cover private law relationships. It also appears that the institutional rule of law is not primarily concerned with the relations between individual and the state or personal rights and freedoms, but rather points to the need for the legal system to ensure the existence of procedures to sanction illegal conduct, with the central role played by judicial institutions. Most importantly, the new rule of law places a clear emphasis on the actual operation and availability of legal institutions, or the effectiveness of law in general, as the test of its existence. The new trend in the rule of law phraseology thus evidences an important shift in the understanding of this concept, revealing a desire to reshape legal and public debate about what is essential for the legitimacy of law.

#### 4. Conclusion

The concept of the rule of law is important for legal theory and practice because it conveys the aspirations and ideals related to law and justice to legal professionals and the general public, and as such, it can be a potent source of arguments and criticisms of any legal system and its institutions. As Fuller has pointed out, the idea of the rule of law is at once descriptive and normative and at once positivistic and naturalistic. On the one hand, it suggests that certain principles and procedures are immanent to law and are recognised as such in the context of existing legal arrangements. On the other hand, it is assumed an ideal that is never reached, so that existing legal systems, as a rule, deviate from its requirements. The rule of law thus appears to lie on the crossroads of law and politics, premised on a conflation of the structure of law and political value judgment. This can probably explain why originally, in the works of authors like Dicey or Hayek, it had a strong political content, as a kind of natural law philosophy in the field of modern public law and democratic development. It sought to define, to use Hayek’s terms, “meta-legal” principles that should serve as the basis of any modern legal system.<sup>113</sup> Further

<sup>111</sup> Carothers (ed.), *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (2006), p. 15.

<sup>112</sup> E.g. Palombella, *The rule of law as an institutional ideal* (2010), p. 3.

<sup>113</sup> Hayek, *THE CONSTITUTION OF LIBERTY* (1960), p. 206.



theoretical developments followed this orientation with a more legalistic interpretation, focusing on general criteria of legitimacy of law that—with the notable exception of Waldron—mainly accorded an ancillary role to justice and procedure. A similar focus on public law and rights is indeed apparent in nearly all practical applications of the rule of law concept in the existing constitutional and transnational legal systems in Europe.

This, however, seems to be changing. With the increased recognition of the social importance of law and the link between law and development, the progressively more complex personal and economic interactions and the creation of new regulatory regimes, the meaning of the rule of law has, especially in the international context, evolved in the direction of institutional standards that should be respected by all legal systems. The noticeable nuances in emphasis between the classical and contemporary versions of the rule of law—the extension from public to private law concerns, the critical role of judicial institutions, and the change in the overall justification from moral considerations opposing undue state action to pragmatic concerns about the functioning of effective legal institutions—form the basis of the new interpretation of the rule of law. This development is understandable if we consider the economic and political context in which contemporary legal systems operate. In industrialised societies, it is private law rights—those relating to private life, working conditions, neighbourhood relations, property entitlements or business practices, reflected in areas such as labour, environmental, civil and business law—that are of concern to most people when they think of law in everyday life, so, naturally, the rule of law ideal should be associated with their protection. Legal certainty that the rule of law is deemed to provide is also of essence to economic operators who must rely on predictable rules to make economic decisions possible, which is instrumental in the promotion of economic growth. The extension of the scope of the rule of law to private actors is especially convincing if we take into account that economic actors now have considerable power to influence social relations, a power that can perhaps even be compared—in terms of impact on individuals' rights—to the role of public authorities in past centuries. Most importantly, private law—for instance through the mechanisms of contract and property law—actually reflects the fundamental values of dignity and autonomy in the same sense as public law.<sup>114</sup> Thus, private law and the rule of law “are not strangers”, but rather embody the same values and protect against the same ills, namely arbitrariness of human conduct.<sup>115</sup>

New perspectives on the rule of law emphasise the enforcement of rights and the availability of legal remedies as key criteria of legitimacy, which makes perfect sense. It is no coincidence that the rule of law as an expression is often understood—at least implicitly—in terms of the legal process and the working of judicial institutions, either directly, in references to “accessible justice” or “functioning of the judiciary”, or through

<sup>114</sup> Lucy, *The Rule of Law and Private Law* (2014), p. 62.

<sup>115</sup> *Ibid.*, p. 66.

more indirect terms, as “enforcement of contract and property rights”. The resolution of civil disputes, involving issues such as simple debt collection, enforcement of contracts or protection of property claims, forms the oldest and perhaps the most visible feature of a legal system, and in many ways, it is the state of these simple proceedings that can serve as the litmus test for any rule of law analysis. The fact that the complex rules of civil and business relations of modern society are ultimately enforced by courts only adds weight to that argument. It can thus be said that the effectiveness of law and the effectiveness of justice are rightly the *Leitmotiv* of the contemporary rule of law discourse. The search for adequate institutional solutions for the pressing problem of judicial effectiveness can therefore also proceed by invoking the rule of law as a fundamental principle that also covers and applies to questions of institutional competence.

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ZBORNIK ZNANSTVENIH RAZPRAV

LXXIX. LETNIK, 2019, PERSPEKTIVE PRAVA EVROPSKE UNIJE, STRANI 9–34

*Andrej Auersperger Matic*

## **Dve razumevanji vladavine prava**

Vladavina prava je danes eden od ključnih pojmov v mednarodnih odnosih in predmet ostrih javnih polemik v številnih državah. Gre za pravni in politični ideal, s katerim običajno zagovarjamo večje priznanje prava in pravnih ustanov v moderni družbi. Do tega razvoja prihaja ne glede na dejstvo, da je tako v pravnem kot tudi političnem smislu vsebina tega pojma izrazito nejasna in se lahko zelo razlikuje glede na kontekst. Za boljše razumevanje dilem pri interpretacijah vladavine prava avtor predlaga razlikovanje med tradicionalnim pojmovanjem, ki mu lahko rečemo ustavno, in novejšim pojmovanjem, ki bi ga lahko najlažje označili kot institucionalno. Klasično pojmovanje vladavine prava jo razume predvsem kot ustavno načelo, ki na splošno izraža liberalne poglede na primerno razmerje med pravom, posameznikom in moderno ustavno državo. V zadnjih nekaj desetletjih pa smo zlasti v mednarodnem kontekstu priča tudi nastanku drugačnega, splošnejšega in empiričnega razumevanja tega izraza, predvsem v povezavi delovanjem pravnih institucij. Sklicevanje na to vrsto vladavine zaznamujejo vprašanja o tem, ali pravo deluje v praksi, ne le med posameznikom in državo, temveč tudi v razmerjih med posamezniki. Ta različica vladavine prava se pogosto povezuje z delovanjem pravosodja in s postopki za reševanje sporov. Institucionalni pogled na vladavino prava lahko zato koristno dopolni klasične poglede z vidiki, ki poudarjajo institucionalne cilje v javnem diskurzu o legitimnosti prava.

**Ključne besede:** vladavina prava, ustavna načela, teorija prava, mednarodne organizacije, učinkovitost pravosodja.

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ZBORNIK ZNANSTVENIH RAZPRAV

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*Andrej Auersperger Matic***Two Concepts of the Rule of Law**

The rule of law is today one of the leading notions in international relations and an object of intense public debate in many countries. As a legal and political ideal, it is invoked to argue for greater recognition of law and legal institutions in modern society. This is happening even if there is no generally accepted understanding of what it actually is in either political or legal terms, and its meaning can differ considerably depending on the social and geographical environment. To facilitate the contemporary rule of law debate, this article proposes a primary distinction between what might be termed classical and institutional interpretations of this concept. It is suggested that under the classical view, the rule of law is understood as a constitutional principle, broadly expressing liberal doctrines on the proper relationship between law, the individual and the modern constitutional state. In the last few decades, however, we have also witnessed, especially in the international context, the appearance of another, more general and empirical usage of the term, applied mainly in relation to the working of legal institutions. References to the rule of law of this kind are characterised by questions about whether and how law works in practice, not just in relation to the state but also in relations between individuals. This version of the rule of law is often strongly associated with the working of judicial institutions and dispute resolution procedures. The institutional view of the rule of law therefore helpfully supplements the classical view with new elements that highlight institutional objectives in legal and public discourse about the legitimacy of law.

**Keywords:** rule of law, constitutional principles, legal theory, international organisations, effectiveness of justice.