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Rule of Law, Contesting and Contested

- **ABSTRACT:** *The rule of law movement is a by-product of the post-WWII rebirth of human rights, which turned into a key political issue by the turn of the millennium. By becoming part of the language and blackmailing practice of international politics, it has self-emptied as well. It is an ideal; historically a function of human experience at individual places and times, shaped by local traditions. As a complex of heterogeneous values and principles, its ethos can at best be respected and approached via the never-ending balancing of compromise solutions.*
- **KEYWORDS:** Rechtsstaat, État de droit, democracy, constitutionalism, judicialisation, UN, EU.

1. Post-WWII Rebirth and Transformation into a Catchword

The end of World War II was followed by shocks in politics worldwide and of course, in law. Both victory and defeat questioned the continuability of the uncritical survival of legal positivism and reconsidered the tenet of *Das Recht ist das Recht!*, which had once given the impetus to the easy transition of dictatorial regimes born of the dramatic changes of power between the two world wars. They were forced to rethink the need to ensure the fundamentals of natural law as the basic living conditions of any human society. They reversed the accepted order of the ultimate values in law, prioritising justice over the search for legal certainty, as interwar experience had taught that in the event of total dehumanisation, no legal certainty could be of any value. Last, they breathed life into concepts that had earlier been dispersed on the margins of previous movements and literature, such as human rights and the barely cultivated notions of the rule of law and *Rechtsstaatlichkeit*.

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After the abovementioned cataclysm, human rights first had to be accounted for, and what they were and what kind of legal protection they needed clarified. Even the creation of the United Nations (1945) was an ordeal for the parties drifting towards the Cold War, and the adoption of the Universal Declaration of Human Rights (1949) implied a straightforward multiplayer factional struggle over what and how to name it. Back then, it seemed sufficient to edify a ‘law + rule/state’ conglomerate as the broadest framework for their safeguard so that they would actually be implemented and not forced out by popular rebellion. For this reason, the Declaration had to state that ‘human rights should be protected by the rule of law’² (where the term may have stood for some rule(s) of the law, not the classical rule of law³): ‘Il est essentiel que les droits de l’homme soient protégés par un régime de droit’. (Since the term *État de droit* was translated from German, it never occurred to the drafters that this could have anything to do with the Anglo–American rule of law).

Presumably, in the disorganised turmoil of antinomic thought traditions, the opposition of the Euro-Atlantic West to the Bolshevik East led the former to clarify its own identity and as a political option, embrace the positive-sounding tradition of ‘rule of law’, only to thereby exorcise Muscovite dictatorship. Regardless, it was discussed in Chicago in 1957. A year later, in response, the Soviet bloc produced a socialist legality in Warsaw as its own version, only so that a new synthesis would be summoned in New Delhi within a year that encompassed Asian aspirations. Chicago summed up the Western tradition as the supremacy of law, which the French tradition simply enshrined as *légalité*. In addition, participants could still add further content to it in New Delhi. All this has reportedly been defined, the results of which may perhaps be deduced from the four-page questions and hundreds of answers.⁴ Under such conditions, from the end of World War II to the Soviet atomic bomb threat to the Western world, the notion of the rule of law as a fundamental element of a free society lurked. However, this happened without going beyond idealising what the Atlantic mainstream considered good and desirable in public affairs.⁵

With this, a legally immature term began its triumphant journey. It soon became fertilised in use by politics and political science; was transferred to international

2 https://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, p. 2, resp. https://www.un.org/fr/udhrbook/pdf/udhr_booklet_fr_web.pdf, p. 1.

3 Perhaps due to American universalism, not even Harvard’s excellent Catholic thinker, Glendon, 2004, p. 4 did notice that instead of an early use of the term, it may have simply been an occasional formula used by the drafters.

4 *Rule of Law as Understood...*, 1959 and Katz, Schlesinger, Rheinstein (eds.), 1957, pp. 518–525; then *Le concept de la légalité*, 1961 and Tóth, 1965, pp. 274–278; in the end Marsh (prep.), 1960, particularly pp. 183–186.

5 The American statesman who served as an associate judge of the Supreme Court, then as one of the closest associates to Presidents Roosevelt and Truman, and as the Secretary of State in the end—Byrnes, 1947, p. 314—uses the term ‘a system of collective security that will develop and enforce *the rule of law*’ in the epilogical summary of his remarks on the tasks of the United Nations in a manner standing for a rule of ideal law thought of as an airy desire rather than an elaborate concept.

diplomacy; integrated into the language of the United Nations; and finally, into that of the World Bank and International Monetary Fund, set up as the latter's agencies.⁶ Therefore, it is no coincidence that even the most committed student of the notion of the rule of law can only characterise the turn-of-the-millennium situation by saying, 'One cannot get through a foreign policy debate these days without someone proposing the rule of law as a solution to the world's troubles'.⁷ More striking is that the memory of its Cold War use seems to have been preserved. It was first used as a symbol of the excellence of the West, then as an expression of opposition to the shame of the Bolshevik East,⁸ and finally by the UN international development financial organisations with explicitly blackmailing unilateralism to impose Western legal solutions on the rest of the world.⁹

This has already resulted in unspecified but rhetorical overuse, and the term has been inflated and wasted in international diplomacy and in the practice of the European Union, especially after its expansion by including countries of Central and Eastern Europe.¹⁰ This increase can be inferred from the growth that made the term a buzzword, as seen in its text frequency and use in book titles:¹¹

word	e-occurrence
<i>rule of law</i>	105.000.000
<i>Rechtsstaat</i>	4.000.000
<i>État de droit</i>	6.500.000
<i>jogállam</i> [=Rechtsstaat]	500.000
<i>joguralom</i> [=rule of law]	150.000

6 In the e-world, 'rule of law' in company of 'United Nations' occurs 15,000,000 times and 13.300,000 times in company of 'European Union'; with 'World Bank' 6,150,000 times and with 'International Monetary Fund' 1,510,000 times. In German, 'Rechtsstaat' coupled with 'Vereinte Nationen' occurs 113,000 times and with 'Europäische Union' 167,000 times.

7 Carothers, 1998, p. 95.

8 As a leading human rights movement today, the International Commission of Jurists was established with the support of the CIA in West Berlin in 1952 (<https://www.icj.org/>), designed to become a "Cold Warrior against Socialist Legality"; cf. Tolley, 1994, ch. I. It was made as a counterpart of the International Association of Democratic Lawyers established in Paris in 1946 (<https://iadllaw.org/>), with the foundational presidency of the Nobel Peace Prize winner René Cassin (a future drafter of the Universal Declaration of Human Rights), after the latter started documenting US war crimes committed during the Korean War.

9 Cf., e.g., Varga, 2007, pp. 85–96.

10 Cf., e.g., Varga, 2009, pp. 19–28.

11 Its occurrence as a title in the Hungarian language shows a different picture. It was once a current term because the journal *Jogállam* [Rechtsstaat] (1903–1938) used to publish case reports and book series. As a book title, it appears exclusively in Balogh, 1914, and then more recently, in the collection of Takács (ed.), 1995.

books	1944–1959	1960–1975	1976–1991	1992–2007	2008–2020
'Rule of law' in title in English ¹²	32	96	64	544	1120
'Rechtsstaat' in title in German	30	120	180	180	270

Interestingly, the term came to the fore when the two-power world order collapsed by making Central and Eastern Europe a confusing international problem (or trump) anew, reclaiming and regaining the region's old place in the world.¹³

Thus, it has become a fashionably common catchword to express pride for the self and/or contempt for others. This lack of content, the fact that the word has become commonplace, is hitting those struggling for the underlying ideal to be implemented in the Third World,¹⁴ and who must identify the enemy of their cause in those who are cheating with it by punting it as a panacea.¹⁵ Carl Schmitt despised the use of *Rechtsstaat* from the early 1930s, because it can mean the *Recht* and *Staat* separately. Its only trait is that it sounds promising, which when held accountable, makes us free to denigrate any opponent.¹⁶ Alternatively, as widely expressed, 'the phrase "the Rule of Law" has become meaningless thanks to ideological abuse and general overuse. It may well have become just another of those self-congratulatory rhetorical devices that grace the utterances of Anglo-American politicians [...]. No intellectual effort need therefore be wasted on this bit of ruling-class chatter'.¹⁷ However, at the same time, its indefiniteness in content, which sounded as a cry for others, has become an inspiring source of truly exploratory and not infrequently monographic works. These, the absence of a theoretically developed background and established doctrinal structure or dogmatics,¹⁸ have in the name of scholarly analysis often become like a program or creed that ensures good governance to achieve the public good by supplying the adequate quality of legal background with the available institutional procedures and techniques.

12 As a book title, 'rule of law' became widespread early because the International Commission of Jurists (note 7) preferred to use it as a starting point and contrast in processing conflicting situations, such as in, for example, International Commission of Jurists (ed.), 1957.

13 Even on the seemingly not politically sensitive issue of why and how the notion of the rule of law could reach its period of consummation, we cannot meet with either disinterest or clairvoyance. Despite his Polish roots, Krygier, 2014, pp. 327–346 sees the term coming to the fore in the surfeit of ideologies of the post-Cold War Atlantic and Western European world, while another interpreter—Janse, 2019, pp. 341–348—says it originated from the changing eras of European communality.

14 Humphreys, 2010, pp. 1–26 laments its 'magical, or at least talismanic, role'. Drawing conclusions, Flake, 2000, p. vii states that 'the "Rule of Law" has become a buzzword of today and an oft-prescribed panacea for the myriad challenges of development faced by Asian nations. Yet seldom in such discussions is the concept of the "Rule of Law" carefully defined'. Note that as synonyms for buzzword, expressions like 'hokum' and 'bunk' make it even more accurate to understand what the author may have meant by this wording.

15 E.g. Peerenboom, 2004, p. 33.

16 Schmitt, 1932, p. 19.

17 Shklar, 1987, p. 1.

18 As characterised by Gárdos-Orosz and Szente, 2014, p. 267, in such a complex deficiency, 'the main difficulty is not that there is no widely accepted general definition of the rule of law, but that there is no consensus on its components'.

2. Limitlessness in Today's Use

The first finding jurisprudence can formulate is that the rule of law is a contested concept.¹⁹ Inherently,²⁰ 'the meaning of the concept known as the rule of law is always open to debate'²¹ as it belongs to those notions whose 'nature and meaning are contested and controversial'.²² Or again, 'The rule of law is a flexible and contested concept that can be defined in different ways. [...] Its different definitions mean that the rule of law has no uniform accepted form.'²³ Considering it an undefined and uncertain notion from the beginning,²⁴ a 'mixture of implied promise and convenient vagueness',²⁵ it is 'exceedingly elusive' with 'rampant divergence of understandings'.²⁶ Thus, '[n]o one in the international community is quite sure' (as 'we are never quite sure') what it means at all,²⁷ because 'scholars are not agreed on the desiderata that would define the *Rechtsstaat*'²⁸ and what its scattered generalities may mean without any central thought.²⁹ 'In fact, the only thing that seems to consistently garner agreement within the "Rule of Law" discourse is that there is pervasive disagreement within this discourse'.³⁰ Such characterisations are often formulated not as rejection or destructive criticism, but to justify new investigations in the hope of reaching a consensus some time in the future.

Ronald Dworkin, who was astonishingly bold by basing his theorising on the values of a single time and place, ended his introductory speech at the London meeting of the Venice Commission on the Clarification of the Rule of Law in the European Union, perhaps the last public act of his life, by concluding: 'There is a paradox at the heart of the rule of law. That ideal demands certainty and condemns ambiguity in

19 According to Gallie, 1956, p. 169, those concepts are essentially contested, 'the proper use of which inevitably involve endless disputes'. This issue—Gray, 1977, p. 344 asserts—'cannot be settled by appeal to empirical evidence, linguistic usage, or the canons of logic alone'. Furthermore, Garver, 1978, p. 168 opines that a good answer is excluded from the beginning. Within a few decades, artistic and political categories (with rule of law included) had also been categorised as such. Cf. Waldron, 2002, pp. 137–164 and Collier, Hidalgo, Maciuceanu, 2006, pp. 211–246.

20 See Bárd, Carrera, Guild, Kochenov, 2016, p. 80, who claim that 'defining it in the best possible way cannot cancel the nature of the rule of law, which is an essentially contested concept'.

21 Zimmermann, 2017, p. 10.

22 Allan, 1998.

23 Lautenbach, 2013, p. 19.

24 E.g. Ajani, 2003, pp. 3–18; Costa, 2007, p. 74; Fallon, 2007, pp. 1 and 6; Mattei and Nader, 2008, p. 10; Rodriguez, McCubbins, Weingast, 2010, pp. 1455–1494. As officially perhaps understated—House of Lords, 2007, p. 12, para. 24—, 'the rule of law remains a complex and in some respects uncertain concept'.

Selznick, 2005, p. 29.

25 Kirchheimer, 1996, 244.

26 Tamanaha, 2004, p. 3 adds that it is like wishing for good: 'Everyone is for it, but have contrasting convictions about what it is'.

27 Bouloukos and Dakin, 2001, p. 145 as well as Fletcher, 1966, p. 12.

28 Borneman, 2007, p. 4.

29 Higgins, 2007 states this, referring mainly to UN documents.

30 Hamara, 2013, p. 12.

the law. But that is great uncertainty and alleged ambiguity in the ideal itself. Firm adherents are locked in great disagreement about what the rule of law really is'.³¹ This is because it does not have an own object, and is largely an 'umbrella' or 'container' concept³² used as an indicator when describing the law, the state, politics, or the general situation to disclose in respect of a given legal order that what is in is actually secure as regulated or in contrast, absent compared to its agreed minimum. However, this almost free capacity makes it a 'rhetorical balloon' that can be increasingly inflated and made almost unlimited. Here, as scholars claim,³³ the more it says, the less it is worth.

Thus, it is not simply that we can understand a certain object in multiple ways, but that we mean different objects in different ways although we call them by one name as if talking about a single object. As a result, there is a cacophony of naming and understanding. Regarding American constitutional law, Harvard's expert explores its comprehensibility from various perspectives and a plethora of variations of each perspective.³⁴ Another author distinguishes between at least four approaches that differ in subject matter and have different characteristics. According to him, 'One could [...] define the rule of law in terms of the values which that institution is designed to serve, such as human dignity or individual fulfilment through the full development of one's capacities; or in terms of the several principles whereby those institutions are to be safeguarded, such as the rule that a legal basis must be shown for every government action interfering with the rights of the citizen; or in terms of the institutions, such as the courts, the bar, the parliaments and the police who are responsible for doing the safeguarding, in their own distinctive ways; or, finally, in terms of the procedures which those institutions use for that purpose, such as public hearings, jury trial, habeas corpus and the like'.³⁵ In light of this multitude,³⁶ we may have the impression that the term was a kind of *desideratum*, a set of desirable standards backed by a complete edifice of theses and criteria on the state-organised legal regime of society, based on a given social philosophy, and elaborated to the depths doctrinally. This is not the case—if not perhaps for some minds exclusively, for private use only, and with no obligatory institutionalisation or valid measurement standards.

Today, we are in turmoil, because the term can simultaneously mean nothing and anything, everything or anything. We are discussing a word that has long since become empty with its arbitrarily adaptable meaning-bearing capacity and inflated overuse, formed in response to conflicts of interest. It has no standardised meaning within the law; consequently, it has no legally assertable or defensible criterial functionality. It is political mud wrestling with millions of teammates in the world's thousands of political think tanks as well as scholarly and media workshops. In fact, any of us can enrich it with whatever we want. In addition, it has no dogmatics, and thus

31 Dworkin, 2012, p. 11.

32 E.g. Bedner, 2010, pp. 48–74 and Belton, 2005, p. 6.

33 Frändberg, 1996, pp. 22–23 and Frändberg, 2014, p. 31.

34 Fallon, 2007.

35 Walker, 1988, p. 9.

36 Cf. as well Møller and Akaaning, 2014 and Yakushik, 2018, pp. 72–84.

no solid structure, support frame, or boundaries. Why should its expandability know any limitation? The theoretical literature commonly notes that ‘It is very difficult to talk about the “Rule of Law”. There are almost as many conceptions of the “Rule of Law” as there are people defending it’,³⁷ as all kinds of authors ‘use the term as a catch-all slogan for every desirable policy one might wish to see enacted’.³⁸ As an expert on the issue, one of New York’s leading philosophical authorities paints as a *tableaux vivant*: ‘Open any newspaper and you will see the “Rule of Law” cited and deployed—usually as a matter of reproach, occasionally as an affirmative aspiration, almost always as a benchmark of political legitimacy’.³⁹

The analysis reveals not only the uncertainty surrounding the concept, but also the extent to which the product that takes incessantly changing shapes amid historical contingencies is variable and environment-dependent, because it develops differently according to culture, tradition, and local conditions.⁴⁰ Thus, the rule of law is primarily and foremost a historical category. It is based on a wide variety of historical experiences that differ by nation and age, which define or condition its *hic et nunc* particularity. Consequently, as ‘a product of historical development [...], the rule of law [...] cannot be seen in isolation from the constitutional theories and traditions [...as it...] is closely tied to the historical and institutional setting in which the rule of law has come to development’.⁴¹ ‘What it rules out, what it allows, what it depends on, and indeed what it is, are all matters of disagreement that stem from differences between political and legal histories and traditions, and reflect dilemmas and choices that recur in different forms and weights in many such histories and traditions’.⁴² We can generalise from these, but as the best-known French expert on the issue points out, then out of context, only an empty shell—*une coquille vide*—remains as the end-product.⁴³

With this, we return to the specific problems of various national and other developments and to aspirations that inspire a solution, including their shoreless ambitions. However, what develops in this arbitrary and dispersed way locks down the chance of any orderly—or any—conceptuality, as the shape it takes will be a flow of continuous rearrangements. Moreover, ‘The idea of the rule of law is characterised by its programmatic character, which means that it cannot be exclusively identified with one or another specific legal concept, but rather comprises a whole set of principles that govern the morality of the exercise of public authority in a society at a particular time of its history’.⁴⁴ As a result, uncertainty characterises not only the term as a whole, but also, in addition to its internal context, each of its elements separately, since each will be the product of the characteristics of a given historical development, that is, the

37 Taiwo, 1999, p. 154.

38 Bellamy, 2007, p. 54.

39 Waldron, 2008, p. 1.

40 E.g. May, 2014.

41 Lautenbach, 2013, pp. 35 and 210.

42 Krygier, 2015, p. 780.

43 Chevallier, 2003, p. 52.

44 Grote, 2010, p. 175.

diversity determined by place and time. However, as the analysis continues, behind the disguised commonality of its wording is again the case of multiple concepts. The notion of the rule of law is from the outset ‘elusive and controversial [...] there is an “embeddedness” of this term with specific national historical diversities of a political, institutional, legal and imaginary nature. [...] This requirement of vagueness plays strongly against any Quichotean attempts to turn the rule of law into a shopping list of elements’.⁴⁵ Putting its building blocks together, the complete picture of an infinitely complex jigsaw puzzle emerges: elements with meaning and validity drawn from their historical *hic et nunc* formations, which in a given place and time, are stacked in an international space while preserving their generational local values to form a concept that can be widely shared and accepted in a given culture. Characteristically, when a Harvard constitutionalist analysed the components of how many innumerable perspectives can be identified only in legal practice in the US, with each of them having separate although equally defensible versions of the rule of law, he could do so simply by flinging them into the floating cloud of relativity, because each user is used to expecting to create his/her own version for his/her own use.⁴⁶ Because, he continues,⁴⁷ ‘It is a mistake to think of particular criteria as necessary in all contexts for the rule of law. Rather, we should recognize that the strands of the Rule of Law are complexly interwoven, and we should begin to consider which values or criteria are presumptively primary under which conditions’.

3. Roots and Development in Various Legal Cultures

Our age is characterised by a new ideocracy after the Christian mediaeval desire for spiritual brilliance. By surpassing both the historical past and human experience, it wants to see today’s revolutionary thoughts (concerning our gender, skin colour, sexuality, growing up in a family, living as a nation, and so on), hoped to be world-shattering after the practice of millennia, as a latent but now discovered eternal quality of the universal human. The ideas that sparked the French Revolution also lead us back to our classical Greek predecessors, sometimes directly to the earliest traces of intellectual archaeology. However, we know that although ‘human rights’ were already mentioned—for example, in protest against the genocidal murder of natives in Latin America by a Spanish Dominican centuries ago—⁴⁸ today’s movement is not rooted in this but comes from the Enlightenment and post-World War II conscience test, and to a smaller extent, as the aftermath of the 1968 uprisings. Equally obvious is that the

45 Bárd, Carrera, Guild, Kochenov, 2016, pp. 79, 80 and 80.

46 Similar to case law, where the judge will draw the *stare decisis* from what he can learn from precedents he has considered to serve as a rule for his pending decision, but without publicly stating it.

47 Fallon, 2007, p. 6.

48 Bartolomé de las Casas was the first in 1552 to mention ‘las reglas de los derechos humanos’. Las Casas, 1971 and Corres, 2014; cf. also Pennington, 2018, pp. 98–115.

complexity of today's notion of the rule of law dates to the 19th century as a concept born mainly of German and English development.

The idea took shape largely because of the confrontation with feudal arbitrariness, specifically, with the omnipotence of the absolutist state. The recently deceased nestor of Italian jurisprudence called this a reversal, a rights-orientation surpassing the ethos of obligations by the advent of the age of individualism.⁴⁹ Its background was clearly formulated by the American revolutionary Thomas Peine in 1776: 'In absolute governments the King is law, so in free countries the law ought to be King'.⁵⁰ The notions maturing the root ideas of the rule of law can also be traced to classical Greek and Roman antiquity, and to early modern movements. However, it may be sufficient to recall the turn of the 18th and 19th centuries when the enlightened Prussian ruler had already included in the draft *Allgemeines Landrecht* that 'The laws and ordinances of the state may not restrict the natural freedom and rights of citizens more than the common end purpose requires'. To clarify further, the contemporary textbook added: 'All rights of the regent are to be regarded only as a means by which the state purpose is to be brought about'.⁵¹

The English version was moulded by Dicey, the father of British constitutionalism, who summarised his book-wide explanation in a few sentences. Accordingly, 'The rule of law [...] remains a distinctive characteristic of the English constitution. In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law; every man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm, and each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded'.⁵² Its requirements, summed up in three theses, are the generalised principle of *nulla poena sine lege*, the right to bring any action before an independent court, and the recognition of the quasi-natural law grounds⁵³ of rights. Behind this, he saw on one hand, that an unwritten constitution with the affirmative seal of centuries is more difficult to move than any written charter, and on the other, the power of public opinion. The doctrine of the separation of the branches of state power, however, is known for him only in the case-law autonomy of the judiciary,⁵⁴ but hardly applies to the relation between the legislature and executive.⁵⁵ In addition, he entrusts the functions of constitutional control to the skill of the functioning of English parliamentarism for many

49 Bobbio, 1990, pp. ix and 58.

50 Peine, 1776.

51 *Entwurf eines Allgemeinen Gesetzbuchs für die Preußischen Staaten* von 1791, Einleitung § 79 as well as Gönner, 1804, p. 418.

52 Dicey, 1915, p. lv.

53 Although topically expanded, this is discussed by Opałek, 1999, pp. 91–98 as a system of claims formulated in the name of humanity by natural law.

54 Or, Jennings, 1941, p. 365 warns that 'The English lawyer usually speaks of the "rule of law" where the American lawyer speaks of "due process of law"'.⁵⁵

55 Wade and Forsyth, 2009, p. 18 reassert that 'There is only a hazy borderline between legislation and administration, and the assumption that they are two fundamentally different forms of power is misleading'. See also Phillips, Jackson, Leopold, 2001, p. 26.

centuries.⁵⁶ Similarly, he records reliance on judicial decisions instead of legislation as an additional safeguard, which because it builds the wisdom of generations atop each other, is in his view the best guarantee of individual freedom and freedom from arbitrariness.⁵⁷

The first mention of the *Rechtsstaat* dates to the turn of the 18th and 19th centuries⁵⁸ when a government's intention to reform was expressed.⁵⁹ Classical political scientists such as Robert von Mohl and Friedrich Julius Stahl were already explicitly seeking to replace the administrative state (*Polizeistaat*) with enlightened changes.⁶⁰ Contrary to the 'rule of law' as worded in English, the Germans could rely on the *Staat*, because unlike the English tradition, the state was a legal concept for them⁶¹ to the extent that the master of the Pure Theory of Law could simply refer to the *Rechtsstaat* as a pleonasm, as the *Staat* was already involved in the notional sphere of *Recht*.⁶² In today's German public law, however, the *Rechtsstaat* is no longer an independent but a substitute notion. The Basic Law uses it only in relation to the territories [*Länder*] that make up the Federal Republic of Germany, and even then does not afford it more of or a different meaning than the itemised requirements of the Basic Law. As the latter states, 'The constitutional order in the *Länder* must conform to the principles of the republican, democratic, and social state governed by the rule of law, within the meaning of this Basic Law'.⁶³ This is tantamount to having no surplus over the law and order defined by the constitution. Consequently, as a surrogate, it is also a pleonasm in constitutional law—whether or not it is suitably used in other contexts and as a synonym in German jurisprudence and doctrine. However, it certainly has one proper message. That is, providing that *Rechtsstaatlichkeit* is expressive of already posited constitutional contents whose quality is part of constitutionalism itself, any idea or demand for its further substantive enrichment is already out of the professional profile of jurists. It cannot but be a direct political intention to amend the constitution.⁶⁴

Compared to the previous ones, the French solution appeared late, as a translation from German, well after the First World War, although the institutional framework for its effective control was found half a century ago. The first wording of what is meant by *État de droit*—'the State is subordinated to a rule of law which is superior

56 Zolo, 2007, p. 9.

57 Hayek, 1982, pp. 55–56 & 85–88.

58 Placidus, 1798; later and in a reactionary sense, Müller, 1809, and in a liberal one Welcker, 1813; Aretin, 1824 ends this early series of using the term.

59 Bockenförde, 1969, pp. 53–54.

60 Mohl, 1832, p. 8 and Stahl, 1878, p. 137.

61 MacCormick, 1984, p. 65.

62 Kelsen, 1992, p. 314, reasserted by Troper, 1993, pp. 51–63, upon which the Belgian legal historian Caenegem, 1991, p. 185 can only dryly remark that here, 'the problems [...] start with the very word'.

63 *Grundgesetz* (1949), Article 28 (1).

64 Koetter, 2013.

to itself that it does not create and that it cannot violate⁶⁵—expresses Rousseau’s live effect on *la culte de la loi*,⁶⁶ and stemming from that, the tradition of *le droit* and most important, of *la constitution* and the repulsion of the *gouvernement des juges* from pre-revolutionary times.⁶⁷ Interest was lacking for a long time because it had little or no distinct content.⁶⁸ However, Rousseau’s tradition soon triumphed: In a democracy, law can be nothing more than an expression of *la volonté générale*, which has to take statutory form.⁶⁹ The basis, source, and root of this expression is the current constitution. This is complemented and confirmed, sanctioned and checked by the establishment of the Constitutional Council (1971) and by the indisputability of its official wording, declaring, ‘The law as voted expresses the general will in so far as and to the extent it respects the Constitution’.⁷⁰

What is expressed by these three legal traditions? First, we see the paradox that although due to random word usage, all three are historically marked by words that do not express what they say. Moreover, all three contradict the internal logic of language, since ‘rule’ stands here for either ‘*regula*’ or ‘authority’.⁷¹ ‘Rule of law’ is not the sum of ‘rule’ and ‘law’, just as the *Rechtsstaat* is not summed up from *Recht* and *Staat*.⁷² Regarding the third variation, an official clarification of the concept by the Council of Europe defines the content of *État de droit* not by either of the former terms, but as the primacy of the law [*la prééminence du droit*], noting that this concept is rarely used in the law itself. At most, it occasionally appears in professional literature only.⁷³

Overall, the different roots of background thinking are clearly visible in the world map of laws. In the English development, Parliament, the king, and the judiciary had separate, sometimes conflicting, places. Although Parliament drafted the law, the precedent used in court practice is considered law. Therefore, the desire for the rule of law has meant not simply submission to the law, but extended justiciability, that is, the availability of courts to judge any conflict. In the German development, legislation has always defined the law, so progress has been made by subordinating the ruling power and thus the state to it. Finally, the French version, though a mirror translation from German, focuses not on the state, but as the culmination of Rousseau’s *volonté générale* expressed in legislated form, in the imperativeness that any operation of the state is constitutional. However, the variety of approaches seems to converge in the need for the chance of ending conflicts by judgement from an independent body. On the

65 Duguit, 1923, ch. VI, § 88: ‘L’État de droit’, p. 547; somewhat differently, cf. also Malberg, 1920–1922.

66 Burdeau, 1939, p. 9.

67 Zolo, 2007, p. 14.

68 Dyevre, 2010.

69 Rousseau, 1762, vol. II, ch. 6, para. 6.

70 Décision n° 85-197 DC du 23 août 1985 in <https://www.conseil-constitutionnel.fr/decision/1985/85197DC.htm>, para. 27.

71 According to <https://www.etymonline.com/word/rule>, both meanings are known from the beginning of the 13th century.

72 Flores, 2013, pp. 77–101.

73 Jurgens, 2007, B-5 resp. Appendix I, I-b.

Anglo–American side, this is justiciability for both power representatives and individuals, and on the German–French side, this is guaranteed by a separate body entitled to review the constitutionality of the acts by which the state is operated.

At a basic level, therefore, although considered that in its origin, the underlying ideal may have been conceived by the English in the judiciary, while the French and German may have been inspired by their written constitution,⁷⁴ there is some commonality. Specifically, for a good century in England, Dicey voiced the basic expression of both pertinent claims.

One is the availability of state rules that are formally capable of operating and enforcing law and order, as well as the law's normative force binding both the state and its population, that is, the primacy of law ensuring both address subordination. Nobel Prize-winner economist von Hayek gave a classic summary of this at the end of the Second World War: 'Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced before-hand, rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge'.⁷⁵ The past Chief Justice of England used a similar tone: 'The core of the existing principle is [...] that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts'.⁷⁶

The other is justiciability, that is, the availability of an independent decision-making forum for practically all possible cases and conflicts. In Germany, there is clear reference to judicial review, since the current content of the *Rechtsstaat* is provided for by the Constitution and its protection ensured by the *Verfassungsgerichtshof* in reviewing the constitution. In France, the discursive path led straight from the *contrat social* to *la volonté générale*, to its embodiment in *la constitution*, and consequently, from the need for *constitutionnalité* to effectively controlling it by the *Conseil constitutionnel*.⁷⁷

Assuredly, 'The first necessary and inescapable desideratum of the rule of law is an independent judiciary'.⁷⁸ Currently, this is accepted and widespread not only in the United States, but also in Western Europe and elsewhere. Thus, the real issue is no longer the fact of it,⁷⁹ but of how to find and determine the extent of adequate control. This is

74 Wennerström, 2007, pp. 60–61.

75 Hayek, 1994, p. 80.

76 Bingham, 2007, p. 69.

77 Interestingly, we arrive at the same result if we approach it from a negative side, starting from the reason the ideology of the rule of law leaves Asia insensitive. Hager, 2000, p. 2 answers that it would be a foreign imposition upon them, being 'a reflection of the American bent for legalism and litigiousness'.

78 Sellers, 2016, p. 10.

79 Or, as the Prime Minister of Slovenia explained in an open letter to the President of the European Council on 17 November 2020—<https://www.gov.si/assets/PV/November-2020/Letter-of-PM-Janez-Jansa-to-the-PEUCO-Charles-Michel.pdf>—'By definition, "the rule of law" means that disputes are decided by an independent court and not by a political majority in any other institution'.

merely (we would say: again) the need for balance, namely that justiciability—which is used to gain increasing ground at the expense of various democratic representative institutions, that is, of further restrictions on popular sovereignty—shall not degenerate into juristocracy or judgeocracy, or perhaps the finality of the constitutionalisation of rights and judicialisation of politics.⁸⁰

The dilemma in *scientia iuris* has been over for more than half a century, whether or not there are more layers added to the notion of rule of law beyond *one*, the availability of duly posited law, and *two*, the state's subordination to it, and in addition to *three*, justiciability. Only if the question arises at all—sharing the view that 'the rule of law is a multifaceted and layered concept'⁸¹—the distinction between their strata is usually made between formal and substantive, or in the English language culture, thick and thin.

It is easy now to recall my visits to Oxford, when in the first half of the 1990s I was able to talk to perhaps the most influential leaders of both directions in physical proximity to one another, namely Joseph Raz, who narrowed the concept to formalism, and Ronald Dworkin, who needed it to be saturated with extra content. The former correctly argued that this concept is not about what is good (e.g. the public good, with the political and legal conditions thereof, including their desirable order and institutionalisation), since then it would be redundant. Moreover, such a demand would presuppose 'propounding a complete social philosophy'.⁸² This view is fairly general,⁸³ including the British Supreme Justice's professional creed at the turn of the millennium: 'Law should be accessible, clear and predictable; Questions of legal right and liability should be decided by application of the law; The law of the land should apply equally to all, except when objective difference requires differentiation; Public officials should exercise their powers in good faith, and not exceed their powers; The law must protect fundamental rights; A method should be provided, at reasonable cost, to resolve civil disputes; Adjudicative procedures must be provided by the state should be fair; The rule of law requires the state to comply with its obligations in international law'.⁸⁴ Notwithstanding, current liberalism still proclaims itself as the mainstream. As it advertises, the rule of law is not a 'rule-book', but a 'right-book',⁸⁵ which it attempts to fill with content taken from the fields of either human rights or judicialisation.⁸⁶

Thus, the intentions of 'improvement' may emerge, and various previously proposed resolutions, no matter how exaggerated, uninterruptedly exceed one another in

80 Cf. Varga, 2019, pp. 192–214.

81 Lautenbach, 2013, p. 211.

82 Raz, 1979, p. 211.

83 See, as a classic in developing the internal technological minimal needs of law, Fuller, 1964; and in outlining another ideal, Bobbio, 1971, pp. 243–249; or MacCormick, 1984; Summers, 1988, pp. 154–161 and Summers, 1993, pp. 127–142; and last, the original classic in reducing rule of law to 'rule of rules', Scalia, 1989, pp. 1175–1188. Cf. Atienza, 1989, pp. 385–403; Borneman, 2007, pp. 40–41; Heydon, 2011, pp. 19–22; and Ekins, 2011, pp. 165–166.

84 Bingham, 2007.

85 Dworkin, 1978, pp. 259–287, reasserted by Craig, 1997, p. 479.

86 Jurgens, 2007, Appendix I, I-c-3.

an unceasing priority competition. This must lead to the free mixing of any desire with anything else, and ultimately, albeit with the intention of saying everything, proceed to the stage of saying nothing.⁸⁷ ‘Sacrificing too many social goals on the altar of the rule of law—asserts Oxford’s authority—may make the law barren and empty’.⁸⁸ The other limiting position? ‘Elided with justice, rule of law becomes an empty vessel into which each person pours his or her hopes for a better tomorrow’.⁸⁹ However, as is usually the case, as soon as a flood⁹⁰ or the free dreaming of the arrival of a new golden age is indeed to begin,⁹¹ the temptation of the gluttonous sphere always reappears: kneading itself until it bursts. This is because ‘the “catalogue of rights” is constantly open to inflation by means of anomic accumulation through successive “generations” of rights or normative interpolations arising out of mere factual circumstances’.⁹²

In addition, even the infinite path to the inclusion of a full social policy is in advance paved by accidental considerations, because as soon as any part of the rule of law project encounters sympathy, the surplus act of providing both an easy environment for it and the conditions for the community to live it becomes the express duty of the state to produce them in due time. This is because only the words are abstract—warns an author. However, the rights we propose to substantiate the words are no longer abstract entities: they are from this moment life pieces. Therefore, ‘Any theory that understands rights outside the context of the community that gives them life will be blind to the meaning that those rights have and to implementing them in ways that can be effectively integrated into the everyday lives of people’.⁹³ Consequently, any effort to make it a reality must now include ‘not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational, and cultural conditions under which his legitimate aspirations and dignity may be realised’.⁹⁴

The idea of the rule of law naturally appears in international law as well, in its globalising development in the company of human rights as a quasi-religious supplement. The terrain is twofold. In today’s cult, the issue of the need for and attempt at implementation of any kind of ‘rule of law’ appears in the workings of international organisations and international jurisprudence, while rule of law demands for the domestic law of states are most often also mediated by international organisations.

87 E.g. Sellers, 2016.

88 Raz, 1979, p. 229. Or, as quasi officially reasserted by Craig, 2007, p. 100, ‘if the rule of law is taken to encompass the necessity for “good laws” [...] then the concept ceases to have an independent function’.

89 Peerenboom ‘Varieties of Rule of Law’ (2004), 1 and 13.

90 According to Carothers, 2006, p. 4, the rule of law should ‘enshrine and up-hold the political and civil liberties that have gained status as universal human rights over the last half-century’.

91 E.g. Selznick, 1999, pp. 21–38 and Bedner, 2010, pp. 71–72.

92 Danilo Zolo, 2007, pp. 38.

93 Stewart, 2004, p. 7.

94 *Declaration of Delhi* (1959) <https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf>. Subsequent interpretation—Lautenbach, 2013, p. 23—links the expectation of genuine implementation to an earlier commitment to involved values.

The applicability of the rule of law to the domain of international law, and to its actors and acts, may be an interesting topic, since such an extension is in principle fully justified. Moreover, the search for the common root idea of the rule of law in justiciability also seems structurally conceivable in the international arena.⁹⁵ However, as sovereign states are the subject carriers of international law, it is difficult in general to imagine an appellate or arbitral forum capable of judging the stand of the rule of law concerned and of the global powers in particular, because the judiciary is part of what any rule of law control must address. However, if this is the case—because logically, anything else would not be conceivable—we must also rethink our answers to the English, German, and French versions. In principle, this objection applies to all domestic regimes.

It is clear from the English development that there may have been a creative antagonism between possible royal tyranny and a court that has always been considered independent, a division that may have had another bipolar version in Germany with the duality of the legislature and the executive powers. In both Germany and France, it may have taken decades (even after the need for *Rechtsstaatlichkeit* or *État de droit* was highlighted) to find the path to the special judicial control of constitutionality. According to this tenet, the applicability of the rule of law to a domestic state may long have been incomplete and partial from the outset, since it was only after a long time that a formula could be found for one branch or function of the state to be played off against another.

In the expansion of the concept, it is not singular states but international organisations and intellectuals as individual authors that excel. In the international arena, for example, the Secretary-General of the United Nations launched a campaign in honour of the rule of law at the turn of the millennium, with a definition attached to it. In his statement, venerable but devoid of legal force, he crammed into his notion everything he could bring from the various aspects of law and the state. The rule of law—he orated⁹⁶—‘refers to 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. 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.’⁹⁷

95 Lamm, 2010, pp. 297–303 shows strong affirmation regarding the implementation of decisions already made, but strong reservation in respect of the role of states in the decision-making process.

96 Annan, 2004, para. 6.

97 It is noteworthy that by smuggling ‘international human rights norms and standards’ into the proposed requirements, the Secretary-General is also to sanction hardly standardisable indefiniteness. Note that the UN Member States’ individual interests differ from each other, but some may unite in occasional groups for either regional or historical reasons. This may be exemplified by the division between emitting and hosting countries in recent migration trends, singling out those left out from becoming target countries.

In contrast, the contemporary definitions issued by the World Bank⁹⁸ and Organization for Economic Co-operation and Development⁹⁹ are formal, reminiscent of Fuller's quasi legal-technological requirements of a rule's efficiency¹⁰⁰ formulated nearly four decades earlier. Last, not even the Venice Commission of the European Union, dedicated to 'democracy through law' clarifies the enigma of the rule of law beyond the former either in the general outline or when detailing the fundamentals.¹⁰¹

Regarding the European Union's perception of the rule of law,¹⁰² initially, the EU position seems reassuring, both by its clauses in the Treaty and its judicial decision-making practice. Its court exhaustively determined the basis of the EU mandatory rules and availabilities of judicial review, as a Luxembourg decision ascertained three and a half decades ago that 'the European Economic Community is a Community based on the rule of law, inasmuch as neither its member 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. In particular [...], the treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions'.¹⁰³ The same reassuring effect may have been somewhat reinforced by the bipolarity of the construction and operation of European law, analogous to the solar and planetary systems, the true state of which at any time cannot be but the result of their mutual play.¹⁰⁴ Moreover,

98 'The rule of law prevails where (1) the government itself is bound by the law; (2) every person in society is treated equally under the law; (3) the human dignity of each individual is recognized and protected by law; and (4) justice is accessible to all. The rule of law requires transparent legislation, fair laws, predictable enforcement, and accountable governments to maintain order, promote private sector growth, fight poverty, and have legitimacy'. World Bank, 2004, pp. 2–3.

99 '[T]he rule of law is composed of the following separate fundamental elements, which must advance together: (1) The existence of basic rules and values that a people share and by which they agree to be bound (constitutionalism). This can apply as much to an unwritten as to a written constitution. (2) The law must govern the government. (3) An independent and impartial judiciary interprets the law. (4) Those who administer the law act consistently, without unfair discrimination. (5) The law is transparent and accessible to all, especially the vulnerable in most need of its protection. (6) Application of the law is efficient and timely. (7) The law protects rights, especially human rights. (8) The law can be changed by an established process that is itself transparent, accountable and democratic'. *Equal Access to Justice and the Rule of Law* OECD Development Assistance Committee (DAC) Mainstreaming Conflict Prevention (2005), quoted by European Commission, 2011, para. 27, p. 7.

100 Fuller, 1964. For the interpretation of its requirements—which are regardless of any morality, purely efficiency-oriented (i.e. instrumental and as such, purely technological) preconditions see Varga, 1970, pp. 449–450; cf. also Lyons, 1984, p. 77.

101 '(1) Accessibility of the law (that it be intelligible, clear and predictable); (2) Questions of legal right should be normally decided by law and not discretion; (3) Equality before the law; (4) Power must be exercised lawfully, fairly and reasonably; (5) Human rights must be protected; (6) Means must be provided to resolve disputes without undue cost or delay; (7) Trials must be fair, and (8) Compliance by the state with its obligations in international law as well as in national law'. European Commission, 2011, para. 37, then para. 41, 60, and also 15–16.

102 For an overview, see Pech, 2009.

103 E.C.J., April 23, 1986, *Les Verts v. Parliament*, 294/83, Rec. 1339, § 23.

104 Varga, 2012.

the analysis of the EU case law has led to a reassuring conclusion according to which in the possible simultaneous co-effect of centrifugality and centripetality, the bilateral cooperation of the EU centre(s) with any given member state is preferable to positional confrontation in the long run, prospecting ‘most success if it is built upon existing national rule of law traditions’.¹⁰⁵

Finally, the fact that some states in Central and Eastern Europe define themselves as rule of law formations in their constitutions, and that their constitutional courts may have ruled by propagating their understanding of the term ‘rule of law’ in a manner the population resent,¹⁰⁶ is relevant in the present context only as an illustration that the notion of the rule of law is powerless. The power of the rule of law can only rely on its overall societal support, owing to the society having experienced its blessings—in the manner that Dicey located its final strength in public opinion. Alternatively, formulated reversely, ‘if [the ideal of the rule of law] is represented as an impracticable and even undesirable ideal and people cease to strive for its realization, it will rapidly disappear. Such a society will quickly relapse into a state of arbitrary tyranny’.¹⁰⁷

4. The Genuine Content

It is difficult to think of something that we know almost nothing about. It is hard to talk about something we want. The nonsense of such an enterprise becomes absurd when we try to qualify something in this way. Qualification would presuppose that we are holding a standard before us, and by measuring our subject, we will find out whether it meets it. However, if the standard is arbitrary, then our measurement will also be arbitrary—a false measurement, since it hardly expresses more than our like or dislike. No matter how normal such a procedure may be, something similar has been going on in the European Union for a long time. In this Union—that is, to those nations grown in undisturbed peace and prospered hopefully in wisdom since World War II—we joined with a sincere heart and sense of legitimate historical return after the fall of the dictatorship imposed upon. As an echo of the former and as a whip, this is also happening in

105 Lautenbach, 2013, p. 217. Note that it is questionable who, and on whose behalf, can judge or override the sovereign in matters of domestic law and rule of law in matters belonging to the preservation of constitutional identity. In a criticism of the latter, Rosenfeld, 2012, *Abstract* opines that “‘Constitutional identity’ is an essentially contested concept as there is no agreement over what it means or refers to’. It is only characterisable by ‘an incurable lack of determinacy, which inevitably results in arbitrariness in its use [...]. [Its] practical use [...] is poised to weaken, if not undermine tout court, the process of European integration’. Cf. Fabbrini and Sajó, 2019, pp. 457–473 and Drinóczy, 2020, pp. 105–130 as well.

106 Cf., Varga, 1995 and Varga, 2008.

107 Hayek, 1960, p. 205. As expressed by Reynolds, 1989, p. 7, ‘If people do not expect the rule of law and insist on it when officials move to compromise its effect, it is soon corrupted and replaced by rule of will’. This also includes recognising that the artificial meaning attributed to law cannot far precede what common sense suggests, because—as Pildes, 1996, p. 2058 claims—‘laws will be self-defeating when they undermine social norms whose maintenance turns out to be necessary to make those very laws effective’.

Hungary: a hostile, embarrassing, openly blackmailing quarrel, and an immeasurable yardstick for all loudmouths everywhere—as if there were some hidden knowledge of the subject beyond what the mood of the word may suggest to the user.

When we let exact science speak, what may be its message has definite meaning in any language, because it is based on observation, verified connections, and precise definitions. Would it be different in law? Where anything we say is not a description or intellectual reflection, but prescription and formal expectation, a normative standard binding and secured by state coercion?

However, in this case, the question is now about the subject itself. What is often substituted, partly intertwined with other concepts, and sometimes downright redundant? In today's German public law, as mentioned, the 'rule of law' is nothing more than the guaranteed implementation into practice of the itemised requirements of the Basic Law. This is almost a pun on the term, similar to what is happening with human rights, where outsiders besiege the gates of the law by claiming their alleged 'human rights' (tacitly engaging everyone else in tolerating and perhaps also funding their alleged need). However, as soon as they will have succeeded, it will be indifferent in the law's normative sea why and how admission has taken place.¹⁰⁸

The content of this object is not something that *is*, but what it *should be*, that is, not a simple mirror of something existing or prevailing, but a desire, an ideal.¹⁰⁹ Alternatively, this kind of perfection its confessors can only strive towards, since reaching it is impossible from the outset, and thus, only approaching it is possible.¹¹⁰

Now, back to our basic question: What are we talking about? In short, this is a set of rights and duties with values in the background, which are guaranteed to everyone as a chance vis-à-vis both the state power and any human fellow. Considering that it contains a variety of requirements, it is impossible to meet them simultaneously and with the same completeness and depth, as their competing support would lead to the extinction of the other. Thus, in any situation, consideration and balance with compromise are necessary for the relative totality of the requirements of the rule of law to be optimally approached and fulfilled.¹¹¹

Thus, only provided we could use the concept as a benchmark, answering it would not be a simple 'yes' or 'no' even if considering it within a given section of time, culture, or tradition. Actually, it would presuppose a lengthy presentation, and a number

108 Cf. Varga, 2013a, pp. 1–15.

109 E.g. Oakeshott, 1983, p. 178. It is 'a legal ideal' for Lautenbach, 2013, pp. 23 & 210 and 'an aspirational ideal, pointing the way toward a more just world' for Peerenboom, 2004, pp. 1 & 13.

110 According to Hayek, 1960, p. 205, 'many of the applications of the rule of law are also ideals which we can hope to approach very closely but can never fully realize'.

111 It is a fundamental tenet of jurisprudence—Varga, 2002, pp. 219–232—that everything in law is relative and cannot have but a position ascribed to it by the law or its doctrine, or a function assigned to it by the conventions prevailing in the given society. This is why the president of the Supreme Court of Israel could uphold—Barak, 2015, pp. 6 and 119—that everything in law is 'dependent upon historical, cultural, religious, social and political contexts', condensed in such principles 'in state of constant conflict [...and which...] must be balanced'.

of cases analysed with balanced arguments and counter-arguments.¹¹² Therefore, we cannot speak of any sharp distinction between simple realisation and non-realisation, or of a more or less successful attempt at approximation in some kind of continuum,¹¹³ or gradualness among intermediate states of the process. This is because the balance of the practice or the state of any given legal arrangement does not lie in semi-stages between the extreme points of a definite ‘yes’ or ‘no’, but in the impossibility of reaching a resolute answer. Therefore, we need to know that in real-world concrete situations it is compromise characterisations and not complete sets of features attributed to this concept¹¹⁴ that are to be met. Essentially, what matters is the kind of compromise in the search between different notional directions, contents, and mutually extinguishing messages made, or simply, what is their ethos and value-orientation? This is what cannot be answered in a short way.¹¹⁵

Increasingly, the content itself is most often mixed and freely expandable. The main part of the notion of the rule of law is undoubtedly the proper formality and observance of the law, which is often supplemented with substantive content. Thus, it is filled with overarching core values blending in with democracy, distribution of power, human rights, and the like.¹¹⁶ Therefore, the development of the German tradition, *Rechtsstaat* and *Rechtsstaatlichkeit*, came eerily close to the doctrine on the forms of the state [*Staatsformenlehre*] in continental Europe, almost as a developmental part thereof.¹¹⁷ However, the more generalised it is, the more it loses its distinctiveness from others, and thus the meaning of its use.

112 In these circumstances, should we consider it an honour that out of a population of 520 million, the European Union entrusted a Dutch person with no learned profession (cf. https://en.wikipedia.org/wiki/Judith_Sargentini) to judge Hungary regarding her rule of law?

113 Gowder, 2016, p. 26 writes that ‘The rule of law is a continuum, not a binary: states can satisfy it to a greater or lesser extent’.

114 Also practically nearly to all concepts, except those schematically projected to be found geometry and mathematics, for example.

115 As the German Constitutional Court has decreed, any situation can only be judged by considering all circumstances: ‘dieser Verfassungsgrundsatz bedarf vielmehr der Konkretisierung je nach den sachlichen Gegebenheiten, wobei fundamentale Elemente des Rechtsstaates und die Rechtsstaatlichkeit im ganzen gewahrt bleiben müssen’. 1BVL14/76 [Urteil vom 21.06.1977] & <https://openjur.de/u/60105.html>, para. 193.

116 The Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990) stipulated in para. 3 that ‘democracy is an inherent element of the rule of law’. https://www2.ohchr.org/english/law/compilation_democracy/csce.htm, with Jurgens, 2007, para. B/5 adding human rights to these two components, thereby producing a ‘trinity of three concepts’. This is why Chesterman, 2008, p. 361 explicitly admitted that ‘the rule of law sometimes plays as a Trojan horse to import other political goals such as democracy, human rights, and specific economic policies’. Moreover, resembling the colonial era, promoting the rule of law can easily turn into an act of imposing one’s own law, involving ‘a fairly complete vision of what society is and how it should look’, which is also to be borrowed by the target country. Humphreys, 2010, xx, exposed by Humphreys, 2012, 475–510.

117 E.g. Tiedemann, 2014, pp. 170–192. It is no coincidence that at a time preceding the overwhelming rule of law boom in the West, socialist literature in Hungary—Sztodolnik, 1963, pp. 143–163; Péteri, 1973, pp. 309–316; Takács, 1986, pp. 521–530; Ficzer, 1988, pp. 105–111—treated the issue as one of the developmental aspects of the doctrine of the state [*Staatslehre*].

What does it cover? This is an ideal conception in the civilisational self-ennoblement of man on the terrain of what we project to and expect from our law and its practice. This is thought to be based on the state in Germany, concretised as case law by the judiciary in England, with emphasis on the constitution in France, and developed from their original—primitive—stands into forms according to what and how countries, peoples, and cultures learn from each other in random encounters. Its name stems from the time it was first described, and understood. Once some nations gain hegemonic position, they are induced to proclaim their own version extended to a universal pattern for mankind.

The idea of the rule of law is not a type of constructed abstraction. It has never been or has become anything other than what has been shaped through value-sensitive responses to challenges posed to the laws and cultures of the countries concerned: this way in England, and that way in the Netherlands and Italy. While it may have been polished through cultural contacts and may have become more common under a common name, it remained only a demand or signpost: a medium for the collection of possibilities and paths of the civilisational self-ennoblement of the nations that demand it, and not an inventory or a complete catalogue of items.¹¹⁸

In addition, the concept has evolved in recent times in the swamp fight that characterises today's political moves. It is used in the legal literature as part of an over-abundant vocabulary. Mostly, it is a group marker expressing civilisatory progress. It could not have been used for anything else or more demanding, as it has never become an operational term in law. Perhaps this is an important word? Spanning 20th-century Germany, it is mentioned three times only among the one thousand most important historical documents, and never with any emphasis.¹¹⁹ After the defeat of the Third Reich, the Basic Law of Bonn uses the word, but only to name the constitutional order of *Länder* and with no independent meaning: only those requirements already arranged in the Basic Law are assigned to it. This is why a constitutional court had to be established as the protector of *Rechtsstaatlichkeit*, the essence of which is already inherent in what is called constitutionality.

In post-World War II advancement, it played and continued to play a sublime role. The disgraceful blackmail via rule of law mantra serves to expand power. In our brave new peaceful world, owing to the prohibition of war, only occupying economic space and acquiring dominance through the capital market can come to the fore. Therefore, it will be launched worldwide to have a unified, transparent, and secure legal environment for international economic transactions, a common regime that can be mastered by easy routine. The best is to replicate one's own arrangement. Thus far, various acceleration and modernisation programs are spreading worldwide, especially to neglected

118 For Chesterman, 2008, p. 361, this 'political ideal' should be seen 'as a means rather than an end, as serving a function rather than defining a status'. It is astonishing that this recognition has only been formulated by a single author and as relating to the use of the notion in the international arena.

119 Altrichter (ed.), 2020.

landscapes. Moreover, even scholarship is helping this dissemination, developing a genuine theoretical trend to prove its interest-driven lies, saying there is a correlation between the rule of law and level of economic development and performance.¹²⁰ That tested in transnational economic relations continues in international politics.

In vain does life refute, as interest is stronger. These two gigantic organisations are currently doing this to feature their most spectacular deficits with respect to democracy and the rule of law. After all, the literature on the United Nations and European Union shows that they refrain from accepting external influences. With their institutional structure and strength set in, they focus on protecting their own game of power from any counter-arguability in law. From the beginning, they rigidify and petrify their own law making by securing it from any provocation to change. Regarding the EU, by ‘shield[ing] its law from potential internal and external contestation, [t]his is precisely the opposite of what the classical understanding of the Rule of Law would imply’.¹²¹

Thus, let us expand theoretically what we have simply named the rule of law so far. Its character, direction, and ontological nature were illuminated three decades ago by an Oxford celebrity invited by the recent graduates of Bibó College,¹²² who paradoxically called his audience to listen to common sense instead of scholarly books on the rule of law. For, he claimed, in their books, every nation of every age articulates idealisms filtered through their own hard-won experiences. Well, while knowing others is undoubtedly a respectable undertaking, every nation must first cope with its own task—the torturous question of how to deal with its own challenges so as not only to succeed in its cause, but also to serve its civilisational self-ennoblement. With our demand for the rule of law, we want a moral rise to be more humane and civilised, through and owing to it. We do not want a mystic mandarin above us who as in the first decade of our constitutional judiciary, may turn a symbolic hammer over our heads, making it impossible for us to meet national strategic priorities by falling victim to important matters of national progress. In short, therefore, as he explained, no claim to the rule of law can serve as a collective suicide pact.¹²³ Not only have we become clear in

120 The World Bank, 2004, p. 2 postulates ‘the rule of law as a sine qua non of development’, followed by among others, Dam, 2006, Haggard, MacIntyre, Tiede, 2008, pp. 205–234, and Gowder, 2016, p. 3. Mere coincidence is observed by Matsuo, 2005, pp. 59–70 and Haggard and Tiede, 2011, pp. 673–685. Anything of direct interdependence is refuted by Ozpolat, Guven, Ozsoy, Bahar, 2016, pp. 107–117. As to further positions, Nedzel, 2014, p. 289 remarks that “Englishness” [...] has traditionally provided greater stability, greater protection for liberty, and incentives for economic development’. According to a particular position, Asia is keen to enter the path to achieving economic development but without adopting its corollary, the rule of law, which is viewed there as an alien construct threatening their identity. Clarke, 1998, pp. 28–44, and similarly Hager, 2000, pp. 2–5, Oshimura, 2000, p. 141, and Hong, 2000, p. 149.

121 Kochenov, 2015, p. 74; Lietzmann, 2004, pp. 19–30; for an overview, see Hegedős, 2020, pp. 19–21.

122 <https://bibo.elte.hu/> was the workshop of those students of law in Budapest who founded the political party governing Hungary from 1998 to 2002, and with a two-thirds majority, from 2010 presumably to 2022, involving the early law-graduate elite.

123 For detail on John Finnis’ message, see Varga, 2019, p. 198 and note 28.

this way, but it is also the Supreme Court of Israel, which as a state that takes its national strategic agenda seriously, does not forget the lessons of this.¹²⁴

Consequently, the experience of a given place and time, its specific particularity, works in any of the variations to the rule of law. Once it is peculiar, it cannot be declared to have become universal, as anyone would try. What may be generalised from this is only the result of learning and interaction. Although we are learning to become somewhat more, the result will only be a newer, more advanced form of particularity.

It follows from this logic that when I fight for the rule of law, I assume an idea or the conventionalised core of something, which I contend is lacking. However, all monographs, textbooks, and kinds of practical guidance begin with the sober statement that nothing like this is available, only a handful of authorial opinions. From references to existing law and from the vast rule of law literature, it may be hoped that a common message will ultimately be unravelled. Think of what kind of magically tricky problem solving this insecurity assumes in a combat situation in the deadly moments of a battle from an operations commander who can only remember the nightmare when law professors used to teach him at the military academy. What is he expected to do? Should he, who lives the profession of military commands with 'yes' or 'no' answers, now chew on lists compiled here and there from a number of legal documents and self-honouring stands taken by authors whose works he had to toil through during his academic studies? Now, facing the dangerous moments of battle noise, he is expected to make a compass out of these himself, one he will be able to justify even when the smooth-faced headquarters of law may examine for years what he was forced to command in situations where each moment varied. This picture is absurd, but realistic. This is exactly what military law is about.¹²⁵ Its latest handbook also provides no template solution. In the field of the rule of law, any briefing can be a benefit 'rather as a starting place and a supplement for other materials and, crucially, individual thought', for 'the difficulty may well be in knowing *what* to read, rather than in finding *something* to read'.¹²⁶ One cannot hope any added message from the NATO-accredited international centre of rule of law at the Hague. 'Unfortunately, there is no common definition of the Rule of Law. Many IOs, NGOs, governments, lawyers and judges associations, policy think-tanks,

124 Barely a decade ago, Judge Asher Grunis declared—High Court of Israel (11 January 2012); cf., among others, <https://www.jurist.org/commentary/2012/02/jbareen-zaher-israel-citizenship/>—that 'Human rights do not prescribe national suicide'. Mitchell, 2012 writes, 'if Israel's commitment to human rights clashed with policies that seemed necessary for the preservation of its current identity, Israel could permissibly abrogate its rights commitments by enacting discriminatory policies'. Exactly the lack of such awareness in Hungary has made me wonder whether we are still a nation that can stand up for herself, or are we already lethargically tired of our difficult twentieth century. Cf. Varga, 2015, p. 62.

125 In the field of military law, the quest for rule of law first appeared at the turn of the millennium. This is evident in the fact that the US Department of the Army, 1994 ignores it, but the US Department of the Army, 2003 stresses its importance. For an overview, cf. Lewis, 2010, pp. 155–200.

126 Bowman and Child (eds.) (2015), p. vi.

and private foundations are engaged in promoting the Rule of Law and most of them view Rule of Law in different ways'.¹²⁷

Perhaps not as drastically, but this is happening every day in the EU witches' kitchens of Brussels, Luxembourg, and Strasbourg, as well as in Venice.¹²⁸

Generalising the situation, we could also say that everyone has some Jolly Jokers in their hands, and none of them will tell you in advance how much their card is worth. Maybe even they do not know. However, each will receive exactly as much of his card as he will announce when he strikes it.

For nearly a century and a half, it has been a familiar lesson from sociology and other social sciences that overdoing anything can turn into the opposite. As a classic example, the extreme pursuit of rationality can lead to irrationality and over-regulation to collapse ending in anarchy.¹²⁹ It is no coincidence, therefore, that such unbridled over-cultivation of the notion of the rule of law leads to burnout and exhaustion from within. In addition to those who expect world redemption from the cult of the rule of law, an increasing number— particularly from the United States—swear with bitterness that this once-hopeful concept has become a mere shell, a rhetorical chatter.

Law offers a special example to demonstrate how anything can be called anything, and as long as the legal effect of this designation lasts, this is undoubtedly so in the normative order. Let us remember that Roman law already 'knew' in what order members of a family died in a boat sunk at sea at any unknown place and time (of course, only in terms of inheritance). In classical Jewish law, a woman is sometimes a man, and vice versa, and the dog and cat might become equally substitutable in Islamic law. Of course, the legislator could have the power at any time to really determine—which has never been done anywhere—the criterion by reference to which a state can be called to account in the name of the rule of law. Either there is a definition of those facts that constitute a case of the rule of law, but in the latter alternative, we remain at the amorphousness of a *Mädchen für alles*. On the other hand, once defined, it would be a subject, that is, a posited position in law. For its writing into the law would *eo ipso* transubstantiate it—in the manner we exemplified by human rights, transforming in nature when acknowledged by the law.

In conclusion, it would be a mistake to assume a different conception of the rule of law behind the conflict of opinions between Brussels and Budapest. All we can see is that as a fake card player, one party plays Jolly Joker with cards without definite value, and so there is actually no card game, and the other only warns of this as not an insignificant circumstance. Clearly, when the latter assumed the values of the *rule of*

127 *Civil-Military Cooperation Centre of Excellence* (The Hague) in <https://www.cimic-coe.org/branches/cic/cimic-innovation/advanced-cultural-competence-aac/rule-of-law/> (2012).

128 Or, 'In the context of the Convention, the rule of law is a multifaceted and layered concept. Yet, it is possible to distil a core contents of the rule of law from the case law, based on the frequency and consistency of the argumentations that are linked to the rule of law and the results that are obtained when the Court has interpreted the Convention in line with the rule of law'. Lautenbach, 2013, p. 211.

129 Cf., e.g. Schlag, 1998 and as a Harvard case study reviewed, Varga, 2013b, pp. 63–77.

law, État de Droit, and Rechtsstaat when she joined, it was done so by tacitly accepting their understanding at the time, which no one could regard or mistake as an ever-at-please-refillable blank frame. Agreeing today that I will not war from now on, it will no longer mean tomorrow that I will also pass on my family and property. A new situation could only arise if States Parties had both the intention and legal option to prescribe qualities that could now be held accountable with a degree of accuracy that could be ascertained as a European Union definition of the facts that constitute what the rule of law is. With this, a yardstick could be created, and a measurement could be possible and available, which regardless of the name, would be a different object from the one we have just tried to outline.

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