Chapter 1

# The Rule of Law. Conceptual Challenges

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**Abstract**

This Chapter introduces the concept of the rule of law. It outlines the classical approaches to the rule of law, including the formal and substantive dimensions. As the topic has been widely examined, this chapter does not aim to provide a detailed theoretical account but instead offers a basic introduction. It presents a comprehensive theoretical overview, tracing the evolution of the rule of law from its historical origins to its contemporary interpretations within the European framework. The Chapter seeks to demonstrate that, while the formal rule of law lends itself to relatively objective definition, the substantive rule of law introduces a normative and moral element – an aspirational dimension that invites diverse interpretations and inherent ambiguity. Building on this premise, the Chapter shows how the rule of law has become increasingly internationalised and framed as a normative requirement, with major international organisations embedding it as a core legal and political standard. In this context, the Chapter focuses on the systems of the Council of Europe (CE) and the European Union (EU). Examining the legal frameworks and institutional practices of these organisations highlights the critical role of the rule of law in preserving democratic governance and ensuring the accountability of public institutions. In describing this process, the Chapter emphasizes how the moral imperative of the substantive rule of law – particularly the distinction between 'just law' and 'just bad law' – reflects a fundamental distrust of the state. This development has contributed to increasingly complex procedures, heightened legal requirements, and the expansion of institutional frameworks.

**Keywords:** rule of law, Rechtsstaatlichkeit, Etat de droit, Venice Commission, European Union, democracy, national sovereignty, institutional trust

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# 1. Introduction

The concept of the rule of law – and the rule of law itself – shapes our understanding of power, its exercise, and the role of law in governance. Although it is now at the forefront of political debate, it is worth revisiting its origins, tracing its development, and reaffirming its importance as the ultimate normative measure that binds the state and limits the exercise of state power through law.

## *1.1. The Importance of the Rule of Law*

Why is the rule of law important?[1] There exists a longstanding consensus that, in a democracy, state power must operate within defined limits. It is also well established that the rule of law is not, in its origins, a rigid or comprehensive set of detailed requirements, but rather a principle – a normative framework – within which multiple conceptions may coexist and evolve. Over time, however, the rule of law has gained status as a normative requirement,[2] not only because it has been constitutionalised, but also because both national and international institutions have assigned concrete content to it and established mechanisms of accountability.

On the one hand, these requirements reflect the social and political contexts in which they emerged; on the other, they risk being relativized through reinterpretation. The rule of law is often criticised for failing to spread globally as anticipated, for proving ineffective in limiting power, and for falling short of realising the vision of a fairer society. In a recent study, Fernanda Pirie, Professor at the University of Oxford, offers a novel perspective. She asks:

> why should we expect an ethos, let alone systems of accountability to accompany the laws that tell the powerful how to behave? Why are we disappointed when the laws do not, in fact, constrain our rulers? Maybe to assume that they should, that laws were always or ever supposed to be enforced on the most powerful, is to approach the rule of law in the wrong way. What if we accepted that at least some of these laws were only ever supposed to make clear how the powerful will ought to act, not actually to constrain them? (…) Maybe at least some of the standards expressed as laws were supposed to guide rulers who wanted to act well rather than to constrain those who were determined to act badly.[3]

This raises the question of whether debates surrounding the rule of law are, in fact, a particular expression of public frustration with the exercise of power. Does this dissatisfaction risk undermining the very principle without which democracy

1 See more on the concept of the rule of law: Bóka, 2024.
2 Varga, 2019, pp. 11–12, 27–43.
3 Pirie, 2024, p. 137.

cannot function?[4] As the rule of law evolves and its scope expands, it becomes essential to identify those elements that preserve its original purpose – limiting power and advancing justice. This requires examining the rule of law in its historical context and understanding how subsequent developments have built upon its foundational meaning in response to changing societal and political conditions.

### *1.2. Methodological Questions*

The nature, functioning, and limits of public power have been central to philosophical inquiry since antiquity. The rule of law, therefore, has deep historical roots. Nor is the contemplation of law's role in restraining authority exclusive to Europe. However, this Chapter adopts a European focus, particularly on nineteenth-century conceptions of public authority, both because the volume addresses Poland's legal and political system and because modern rule of law theory largely emerged in this period.

Given the complexity of the subject, which can be approached from numerous perspectives, this Chapter focuses on how the rule of law evolved into a normative system imbued with moral considerations about the legitimate exercise of power. It particularly examines how the rule of law became central to post-communist states – commonly referred to as regime-change states – even decades after their political transitions. The Chapter argues that one of the central forces driving the transformation of the rule of law is the growing public distrust of those in power, often coupled with a partial rejection of the democratic model rooted in popular sovereignty. In this context, democratic governance has increasingly been replaced by procedural automatisms, detailed legal regulation, an expansion of oversight institutions, and a reduction in the autonomous exercise of public power.

In support of this thesis, the Chapter reviews the foundational concepts of the rule of law and the three jurisprudential traditions from which they derive: the English 'rule of law', the German *Rechtsstaatlichkeit*, and the French *état de droit.* It is argued that the contemporary emphasis on the substantive rule of law reflects a paradigm shift born of twentieth-century experiences – most notably, the replacement of the *Rechtsstaat* with the *Unrechtsstaat*. This historical context explains the moral turn in legal thought and the present dominance of the substantive conception.

The Chapter then examines the globalisation of the rule of law, focusing on the role of international organisations. The universalisation of human rights has led to the emergence of numerous bodies capable of influencing how individual states understand and apply power. Rather than analysing all such entities, this Chapter concentrates on the United Nations (UN), the Venice Commission, and the European Union (EU).

4 In a formal sense, rule of law can exist without democracy, if the criterion is merely that the exercise of public power is regulated by law, but democracy cannot exist without the rule of law in general. The real question is obviously the nature of the criteria for the rule of law.

Finally, the Chapter explores how trust – or the erosion of it – in public authority has contributed to the development of an increasingly complex and formalised body of rule of law criteria.

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## 2. Historical Background of the Rule of Law

The origins of the rule of law lie in a historical process aimed at gradually limiting the exercise of state power, evolving from arbitrariness and unchecked discretion to legality and liberty. Broadly speaking, the development of the rule of law can be examined through two principal approaches: the philosophical and the historical-legal. The former focuses on the idea itself, while the latter concerns its institutional realisation and the mechanisms designed to constrain power.

This Chapter adopts the latter perspective. The philosophical significance of the rule of law is, however, aptly summarised by Jeremy Waldron's glossary in the *Stanford Encyclopaedia of Philosophy*, where he highlights the major thinkers who shaped the concept:

> The Rule of Law has been an important ideal in our political tradition for millennia, and it is impossible to grasp and evaluate modern understandings of it without fathoming that historical heritage. The heritage of argument about the Rule of Law begins with Aristotle (c. 350 BC); it proceeds with medieval theorists like Sir John Fortescue (1471), who sought to distinguish lawful from despotic forms of kingship; it goes on through the early modern period in the work of John Locke (1689), James Harrington (1656), and (oddly enough) Niccolò Machiavelli (1517); in the European Enlightenment in the writings of Montesquieu (1748) and others; in American constitutionalism in *The Federalist Papers* and (and even more forcefully) in the writings of the Federalists' opponents; and, in the modern era, in Britain in the writings of A. V. Dicey (1885), F.A. Hayek (1944, 1960, and 1973), Michael Oakeshott (1983), Joseph Raz (1977), and John Finnis (1980), and in America in the writings of Lon Fuller (1964), Ronald Dworkin (1985), and John Rawls (1971).[5]

On the institutional side, essential components of the rule of law include the principle that no one – not even the monarch – is above the law. This notion is reflected in early legal charters such as the Magna Carta of 1215 and similar documents that emerged across Europe. The tradition of natural law also reinforced the idea that power is limited and that individuals, made in the image of God, are entitled to certain inalienable rights.

5 Waldron, 2023.

A major historical development was the emergence of parliament – not only the idea of parliamentary sovereignty, wherein power derives from the people and is exercised by elected representatives, but also the principle that the executive is accountable to the legislature. If the government fails to act in accordance with the will of parliament, it may be lawfully removed.

Equally significant is the role of the courts. It is no longer a lord, king, or vassal who arbitrarily decides the fate of individuals, but an independent and impartial judiciary bound solely by law.

Parallel to these developments, certain fundamental rights gradually emerged – such as *habeas corpus*, freedom of expression for representatives, the right to property, equality, and eventually additional generations of fundamental rights.

As the ultimate safeguard against the abuse of power, the doctrine of checks and balances took shape. This mechanism entails not only legal limitations on power but also institutional oversight, contributing incrementally to the transition from authoritarianism to liberty.

These developments laid the foundation for the modern conception of the rule of law, which, by the end of the nineteenth century and alongside the maturing of civil law systems, had crystallised around principles such as legal equality, the supremacy of law over tyranny, and the resolution of disputes by an independent judiciary. In such a system, society is governed by law rather than by individuals or arbitrary decisions.

Yet, this historical evolution – which unfolded in a broadly similar fashion across European states – also gave rise to differing expectations and institutional outcomes. Accordingly, a traditional distinction is drawn between the English, French, and German conceptions of the rule of law.

### *2.1. The English Rule of Law*

> The English Rule of Law is governed primarily by a strong emphasis on legal pragmatism and the recognition of the judge's central role in the making of common law. On the one hand, the English Rule of Law clearly departs from a purely formal or normative perspective on the rule of law.

The focus is on the expectation that the rules should be based on purposes and reasons which are open to public debate, thus the focus is on both of the parliamentary sovereignty and the judge's law-making function (the stare decisis doctrine).[6]

6 Burnay, 2018, pp. 12–15.

Dicey[7] articulated three distinctive features of the rule of law: the absence of arbitrary or discretionary power on the part of government;[8] the subjection of all individuals to the ordinary law administered by ordinary courts;[9] and the derivation of constitutional principles and individual rights from judicial decisions.[10] This version of the rule of law, in its allocation of governmental powers, implicitly favours the dominance of the judiciary. At the same time, it places strong emphasis on procedural safeguards, including the right to a fair trial and due process of law. Another foundational element is the belief in natural law and reason as guiding principles of legal authority.[11]

### *2.2. The German Rechtsstaat*

The German conception of the rule of law (*Rechtsstaatlichkeit* or *Rechtsstaatprinzip*) is grounded in the principle of individual liberty. Although Robert von Mohl emphasised the importance of the state as an institution that organises and promotes social coexistence – arguing that the purpose of the state may vary depending on its form – his conception of the *Rechtsstaat* centres on organising coexistence in such a

7 Dicey, 1915.

8 'We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary Courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint'. Dicey, 1915, p. 147.

9 'We mean in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. In England the idea of legal equality, or of the universal subjection of all classes to one law administered by the ordinary Courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the Courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority'. Dicey, 1915, p. 149.

10 'We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution'. Dicey, 1915, p. 150

11 Harvey, 1961, pp. 493–499.

way that each member of society can freely and fully exercise their faculties.[12] At the core of *Rechtsstaat* theory lies the notion of the *Staat der Vernunft* (state of reason), which is based on moral law and aims to foster peaceful coexistence. It is not merely a theory of legality, but a form of constitutionalism that seeks to realise 'public reason', thereby grounding both the normative foundations and the legitimacy of the legal system.[13]

According to von Mohl, the rights afforded to participants in a *Rechtsstaat* include equality before the law, the freedom to pursue life goals not prohibited by law, equal participation in public affairs, personal liberty, freedom of expression, freedom of worship, movement, and association.[14]

Later, however, the concept 'lost its liberal-political impetus and, instead, was reduced to mean mere formal legal protection in civil and administrative matters'.[15]

While both the English and German traditions seek to limit state power, the former focuses on the judiciary, while the latter emphasises the law itself.

> The *Rechtsstaatlichkeit* (…) strives to achieve its goals through comprehensive and cross-the-board regulations issued by the force of the state authority. It attaches guarantee to each aspect that it wishes to protect through this regulation. Its overall conception of law postulates that we subject ourselves to the authority of a text; this accounts for the axiomatic ideal and logical pattern of legal thinking, rooted in the ideal according to which mental operation in law is basically a sequence of logical submission and, in the form of normative syllogism, also the sequence of a series of deductive conclusions. Conversely the Rule of Law rests on the principle of all covering justiciability, and all it institutionalises is the right to contact a judicial forum for a definitive legal verdict via due process in any case that may have legal relevance.[16]

12 '*Je nach der allgemeinen Lebensansicht des Volkes müssen denn natürlich auch die Einrichtungen getroffen seyn, welche das Leben ordnen und fördern sollen. Unter diesen Einrichtungen ist aber die umfassendste und wichtigste der Staat, d. h. die Ordnung des Zusammenlebens des Volkes auf einem bestimmten Gebiete und unter einer höchsten Gewalt. Zwischen dem Zwecke des Lebens nach der herrschenden Volksansicht, und zwischen dem Zwecke des Gesammtlebens dieses Volkes kann nicht nur kein innerer oder äußerer Widerspruch stattfinden, sondern es müssen die beiden Zwecke auch völlig dieselben seyn. (…)*
*Hienach läßt sich denn nun die Grundfrage aller Staatswissenschaften: was der richtige Staatszweck sey? dahin beantworten, daß es nicht blos Einen solchen richtigen Staatszweck giebt, sondern so viele verschiedene, an und für sich gleich richtige, als verschiedene Staatsgattungen bestehen. (…)*
*Ein Rechtsstaat kann also keinen andern Zweck haben, als den: das Zusammenleben des Volkes so zu ordnen, daß jedes Mitglied desselben in der möglichst freien und allseitigen Uebung und Benützung seiner sämmtlichen Kräfte unterstützt und gefördert werde*'. von Mohl, 1966, pp. 11–16.

13 Burnay, 2018, p. 34.

14 von Mohl, 1995, pp. 34–36.

15 Mecke, 2019, p. 34.

16 Varga, 2021, p. 16.

### *2.3. The French État de Droit*

The French conception of the rule of law, the *État de Droit* emerged partly in opposition to the German *Rechtsstaat*, which French jurists criticised for empowering bureaucracy at the expense of parliament. In contrast to the German emphasis on normative reasoning, the French tradition focused on legality – understood as the subordination of administrative acts to statutory law. The core idea was that legal norms should constrain the administration and protect civil liberties, while also restraining excessive democratic participation and legitimising administrative actions taken by the state. In this model, the law functions as both a shield for the citizen and a tool for regulating executive power.

French legal thought has historically been wary of expanding judicial power – stemming from fears of a 'government by the judiciary' rooted in experiences preceding the French Revolution. Consequently, the *État de Droit* tradition has consistently resisted proposals to enhance the judiciary's role in relation to the executive and administrative authorities.[17] While the English Rule of Law

> was the consequence of an attempt to give a formalized interpretation of the engagement of the common law with modern ideas of constitutionalism, and the German concept of *Rechtsstaat* evolved from the tensions between authoritarianism and liberalism in governmental practice. But the French concept was explicitly introduced by French jurists as a normative principle to highlight perceived deficiencies in post-revolutionary governing arrangements.[18]

It should be noted that, despite its theoretical significance, the term *État de Droit* does not appear in French constitutional texts or in the constitutional jurisprudence as a binding legal norm. Furthermore, unlike in the German tradition, French constitutional scholars and judges have not generally adopted natural law theory as the cultural basis for legal reasoning.[19]

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## 3. The Substantive Rule of Law and Its Post-War Evolution

The first major conceptual shift occurred with the emergence of the substantive rule of law, which evolved in parallel with the of universalization of human rights. This conception infused the rule of law with moral expectations, aiming to ensure

17 Burnay, 2018, pp. 19–22.
18 Loughlin, 2010, p. 322.
19 Heuschling, 2021, pp. 84–85.

that the exercise of power – including legislation and law enforcement – is not determined by law alone but also by intrinsic normative standards.[20]

This approach accepts that the state acts only through legal forms (the principle of legality) but recognises that legality alone does not prevent the enactment of repressive laws. The doctrine therefore seeks a secondary principle that can provide additional protection. Several solutions have been proposed. One approach relies on complex legislative procedures, grounded in a balance of powers, to prevent the passage of oppressive laws by enabling institutional resistance through the interplay of competing interests. Another trusts in democratic mechanisms to fulfil this function. The most prevalent solution, however, involves subordinating legislation to higher principles – typically through constitutional review. One such approach is based on *super-regulatory* principles, which are those enshrined in the Constitution by the original framers. These principles are considered part of positive law and can be amended through constitutional procedure. Under this view, the constitutional judge's discretion is limited to ensuring procedural compliance, while the legislature retains the power to redefine the guiding principles. A more robust interpretation holds that supra-legislative principles are not reducible to positive law and do not derive their authority from written instruments. Such principles would be binding on the state even if unwritten, thereby granting judges greater interpretive discretion.[21]

The substantive rule of law encompasses the requirements of the formal rule of law – independent and impartial adjudication, human rights protection, legal equality, pluralism, separation of powers, democracy, and democratic legitimacy.[22] An alternative formulation defines these criteria to include a hierarchical legal system led by a constitution, a constitutionally regulated law-making process, legal clarity regarding the scope of legislation, the prohibition of retroactivity, the guarantee of fundamental rights, the subordination of public authorities to the law, legal certainty, administrative adjudication, and constitutional review.[23]

What distinguishes the substantive rule of law from its predecessors is its moral foundation. It goes beyond formal legality to assess whether laws are 'good' or 'bad', placing the court at the centre of the evaluation. Courts are thus expected to resolve legal questions according to the most justifiable moral theory. The ideal law should thus express and enforce moral rights. What makes this requirement elusive, however, is that definitions of 'law' vary widely, and the incorporation of morality into legal reasoning implies that the rule of law becomes inseparable from specific theories of justice. As a result, some critics argue – often for political purposes – that the rule of law cannot be precisely defined.

20 Győrfi and Jakab, 2009, pp. 158–159.
21 Hamon and Troper, 2015, pp. 77–79.
22 Tóth, 2021, pp. 690–691.
23 Tamás, 2005, p. 229.

The essence of this concept is also reflected in the theory of Kaarlo Tuori, who, as a member of the Venice Commission, has had considerable influence on its approach. Tuori structured law into three layers: the surface layer, legal culture, and deep culture. His model simultaneously considers formal law, judicial practice, legal scholarship, general legal doctrines and principles – including constitutional culture – and the deep structures that form the enduring foundations of the legal system. He regards the *Rechtsstaat* as one of the elements embedded deeply within this structure.[24]

A focus on just law thus implies a profound understanding of both the legal system and the functioning of the state. The expectation that law should be just and uphold the fundamental human rights of all members of society distinguishes a government under the rule of law from one operating merely under rule by law. Justice, in principle, implies universal justice, which presupposes a broad consensus on the nature of substantive justice. However, in practice, such consensus has not materialised, which is why international law and human rights instruments have emerged as benchmarks. These instruments reflect principles widely accepted as representing the fundamental rights of all human beings.[25]

In conclusion, the primary value of the rule of law, as developed through this evolution, lies in the state's enactment of laws that are just for society and in the exercise of power in accordance with this principle. The law applies equally to all; individuals know what they are entitled to, what is prohibited, and what consequences they may face. They know they are not at the mercy of institutions, and that these institutions exist for their protection. Where rights and freedoms are infringed, institutions exist to defend against unlawful state interference.

The rule of law has thus transformed the conception of the state and its mode of operation. It is worth noting that this transformation was truly realised only after the Second World War, when the freedoms associated with the rule of law began to take tangible form.

The post-war period brought an expansion of the concept, prompted by the realisation that the mere recognition of rights and the establishment of institutions was insufficient. Law, as a tool, can be used for almost any purpose, and institutions often fail to function as originally intended.

The substantive conception of the rule of law developed in response to both existing and emerging challenges, resulting in a more expansive doctrine supported by an increasingly diverse toolbox. In Western countries, this process unfolded gradually, shaped by historical experience, specific challenges, and national characteristics.

This multi-layered development led to increasingly detailed regulations concerning both the equal protection of rights and the limitation of power. Consequently, more institutions were established to defend rights and supervise state bodies. Legal rules concerning the accountability of power holders became more

24 Sunnqvist, 2023, pp. 12–13.
25 Stein, 2019, pp. 188, 195–196.

precise and complex. Rights protection mechanisms proliferated, both at national and international levels. Legislation is no longer the exclusive domain of parliament and government. A growing number of autonomous legislators have emerged, transparency in the legislative process has become a normative expectation, and greater public participation is now regarded as essential to legitimacy.

This evolution means that the people no longer exercise power solely through elected representatives or referenda. Rather, public participation itself has become a vital source of legitimacy for decision-making.

## 4. International Standards and Requirements

The development of the rule of law has thus acquired not only a moral dimension but also the form of an international, objective standard. In this context, the role of international institutions as interpretative – and increasingly regulatory – entities has grown in importance.

One foundation of this evolution is the universality of human rights, encompassing both horizontal and vertical, formal and substantive dimensions.[26] The other is the growing desire for common, global standards – standards that were gradually adopted and promoted by emerging international institutions.

This period marked a revival of the rule of law. From the 1990s onwards, the concept was increasingly invoked as a global solution to systemic problems, resulting in a wave of rule of law reform initiatives. These efforts were largely driven by the recognition that many states were

> struggling with poorly performing institutions, citizens' low regard for governments, and the challenges of going beyond mere democratic processes to genuinely democratic values and practices. (…) For states grappling with democratic consolidation, fortifying usually weak rule of law appears to be a way of pushing patronage-ridden government institutions to better performance, reining in elected but still only haphazardly law-abiding politicians, and curbing the continued violation of human rights that has characterized many new democracies. For backsliding systems, strengthening the rule of law seems an appending bulwark against creeping authoritarianism and the ever-present threat of a sabotage of constitutional order.[27]

26 Arnold, 2013, pp. 1–2. However, it should also be noted, that 'to include all human rights in the rule of law would blur the difference between the rule of law and human rights, when they are distinct ideas', thus there is also a debate present which human rights (other than the fair trial which is consensually included to the list) should be considered as part of the rule of law principle.

27 Carothers, 1998, pp. 95, 98.

In parallel, there emerged a belief that rule of law reforms in so-called developing countries were essential for stability and for establishing norms conducive to investment and sustainable economic growth.[28]

Consequently, UN bodies began referencing the rule of law with increasing frequency from the 1990s onward. McCorquodale compiled numerous examples of this trend, noting, for instance, that the restoration or establishment of the rule of law was frequently included among the objectives of UN peacekeeping missions. The Security Council invoked the concept in discussions on good governance and justice; in fact, the phrase 'rule of law' appeared in at least 69 Security Council resolutions between 1998 and 2006. References to the rule of law also feature prominently in the policies and reports of international financial institutions, such as the World Bank, particularly in relation to contract enforcement, the police, and the judiciary. Promoting the rule of law has also become an integral component of the UN Sustainable Development Goals.[29]

This phenomenon intensified in Europe following the democratic transitions in Eastern European countries. The regime changes necessitated the creation of institutions capable of operating within democratic frameworks, including those necessary for the rule of law. This process also formed part of the preparations for accession to the EU, which provided a normative and institutional framework for reform. As a result, these states became central participants in the discourse on the rule of law.

One key initiative was the Phare programme, designed to support countries in transition on their path toward EU membership. As part of this initiative, a 600-page volume titled 'Reinforcement of the Rule of Law'[30] was published in 2002. The book offered an overview of the judiciary, the status and role of public prosecutors, court procedures, and enforcement mechanisms across several countries – Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovak Republic, and Slovenia.

While the project did not address the entire scope of the rule of law, it was significant in scale. More importantly, its title and intent reflect the underlying assumption: that the rule of law in these countries required strengthening as a precondition for integration into the European legal and political order.

It should be noted, however, that the process of strengthening the rule of law – particularly through the importation of legal institutions and democratic practices – was not rooted in an understanding of society as a dynamic phenomenon. Although efforts elements of established legal systems in the post-socialist states, the socio-economic context, distinct social functions, and differing institutional objectives were either overlooked or, in hindsight, given insufficient consideration.[31] Too much

28 Upham, 2002, p. 7.

29 McCorquodale, 2016, pp. 285–286.

30 Reinforcement of the rule of law. Final report on the First Part of the Project. Phare Horizontal Programme on Justice and Home Affairs, August, 2002.

31 See e.g. Péteri, 2010, pp. 108–110.

emphasis was arguably placed on positive law, with inadequate regard for social realities. Legal institutions and democratic practices function most effectively when deeply institutionalised, yet Eastern European societies 'had their own ways, their own rationales'. When the Soviet system collapsed, it was assumed that democracy, the market economy, and the rule of law represented the victorious model to be adopted. However, these values were not deeply embedded within the institutional or cultural fabric of the societies in which they were introduced.[32]

### *4.1. The United Nations Rule of Law Indicators*

Within the UN system, no conceptual consensus has ever been reached regarding the rule of law – neither between the policy and operational branches, nor among member states, who have never agreed upon a single definition. Nonetheless, the UN has consistently promoted the substantive dimensions of the rule of law within states.[33] Over time, an increasing number of UN documents have centred on the rule of law,[34] highlighting themes such as accountability, fairness, separation of powers, equality before the law, and the importance of rebuilding justice.[35] These documents present the rule of law as fundamental to the three pillars[36] of the UN: peace and security, human rights, and development. They emphasise the universal commitment to promoting the rule of law and the pivotal role of judicial mechanism in doing so.[37] Operational frameworks have also been developed to guide UN Rule of Law initiatives, including mechanisms for monitoring, evaluation, and coordination.[38]

In 2011, the UN adopted the Rule of Law Indicators, establishing a framework for measuring progress in this domain and paving the way for efforts to evaluate and rank rule of law performance. The rationale behind the indicators rests on the positive assumption that indicators are indirect measures of elements that, taken together, can be used repeatedly and over time to assess progress towards specific goals and objectives. They often have the dual role of spurring reform and holding agencies and individuals accountable for their past performance.

The framework comprises 135 indicators, grouped under three institutions: the police (41 indicators), the judiciary (51 indicators), and the prison system (43 indicators). For each institution, indicators are organised into thematic categories corresponding to four key dimensions: performance, integrity, transparency and accountability, treatment of vulnerable groups, and capacity. For example, in the case of the judiciary,

32 Lazovic, 2024.
33 Birkenkötter, 2024.
34 For the complete system of the UN and the Rule of Law, see: Rule of Law, 2025.
35 The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2004/616).
36 The Three Pillars, no date.
37 Declaration of the High-Level Meeting on the Rule of Law at the National and International Levels (A/RES/67/1).
38 Strengthening and Coordinating United Nations Rule of Law Activities (A/68/213); Secretary-General's Report on Strengthening and Coordinating Rule of Law Activities (A/74/139).

the performance dimension includes public confidence, access to justice, and procedural efficiency. The integrity, transparency and accountability dimension encompasses judicial independence and transparency. The capacity dimension addresses material and human resources, as well as administrative and managerial capabilities. The treatment of vulnerable groups dimension is acknowledged but not broken down in the same manner. The implementation guide provides the full list of indicators, survey instruments, sampling methodologies, and technical instructions.[39]

The use of indicators is a well-established method in social science research. An indicator is typically defined as a specific, observable measure of a more abstract concept, often employed in evidence-based decision-making where direct measurement is unavailable. Indicators have the advantage of rendering complex phenomena measurable and, in principle, objectively assessable. However, they are also 'prone to abuse by governments and other international and local actors', frequently suffering from poorly defined targets, inadequate proxies, and insufficient contextualisation.[40] Although widely used in the field of human rights monitoring, indicators have also been subject to criticism. As Merry observed, there exists a persistent tension between human rights principles and audit culture.[41] Another challenge lies in the use of abstract concepts to explain other abstract concepts, with meanings shaped largely by those conducting the measurement. In this process,

> international civil servants play an increasingly important role in shaping what is perceived as 'UN activities', (…) through executive interpretation, i.e. imbuing vague concepts and notions with more concrete definitions and normative claims; and through interfacing, i.e. connecting various other actors – experts, non-governmental organizations, eminent persons and individuals – with member states. Often, both of these mechanisms go hand-in-hand.[42]

### *4.2. The Venice Commission's Role in Rule of Law Oversight*

Although the Venice Commission has traditionally exercised caution in developing formalised standards,[43] it adopted its Rule of Law Checklist at its 106th Plenary Session in 2016.[44] The reasons for its adoption included: (a) the need for universal adherence to and implementation of the rule of law at both national and international levels; (b) recognition that the rule of law has become a dominant organisational model in modern constitutional law and international governance; (c) acknowledgement of its formal proclamation as a basic principle by the UN and its consistent inclusion in the political documents of the CE, as well as in numerous Conventions

39 The United Nations Rule of Law Indicators. Implementation Guide and Project Tools, pp. 1, 4.
40 Botero, Pinzon-Rondon and Pratt, 2016, pp. 51–52.
41 Merry, 2011, p. 87.
42 Birkenkötter, 2023, p. 453.
43 Bartole, 2000, p. 353.
44 CDL-AD(2016)007, see also Venice Commission of the Council of Europe, 2016.

and Recommendations; (d) the engagement of various Council of Europe bodies – such as the European Court of Human Rights (ECHR), the European Commission for the Efficiency of Justice (CEPEJ), the Consultative Council of Judges of Europe (CCJE), the Group of States against Corruption (GRECO), the Monitoring Committee of the Parliamentary Assembly, the Commissioner for Human Rights, and the Venice Commission itself – in promoting and reinforcing the rule of law.

Since its 2011 report,[45] the Venice Commission has recognised the plurality of definitions of the rule of law and the role of legal traditions in shaping diverse interpretations and applications. In response, the Commission has sought to identify common elements across these varied perspectives. These shared principles include a system of certain and foreseeable law, where everyone has the right to be treated by all decision-makers with dignity, equality and rationality and in accordance with the laws, and to have the opportunity to challenge decisions before independent and impartial courts through fair procedures.

At the same time, the Commission warned of the risks inherent in an overly formalistic conception of the rule of law.

Its report compares this conceptual complexity with the German theory of the substantive rule of law and concludes that a consensus may be reached among differing legal traditions.[46] It identified six core elements: (1) legality, including a transparent, accountable, and democratic legislative process; (2) legal certainty; (3) the prohibition of arbitrariness; (4) access to justice before independent and impartial courts, including judicial review of administrative acts; (5) respect for human rights; and (6) non-discrimination and equality before the law.

During the following years, the Venice Commission further developed its interpretation of the rule of law and established its checklist. However, it also emphasised that full realisation of the rule of law remains an ongoing task, even within well-established democracies. Thus, the checklist is neither exhaustive nor final.

The checklist divides the requirements of the rule of law into two categories. On the one hand are the core elements – already included in the previous report and traditionally recognised as rule of law criteria – namely: legality, legal certainty, prevention of abuse of power, equality before the law and non-discrimination, and access to justice. On the other hand are the more advanced requirements, which respond to particular contemporary challenges to the rule of law, such as corruption, conflicts of interest, and the collection of data and surveillance. Within these, the checklist distinguishes between hard law and soft law obligations.

To compare with the UN checklist, one may consider the requirements relating to the judiciary. The Venice Commission's checklist focuses on judicial independence and impartiality, including the independence of the judiciary as a whole and of individual judges; the impartiality of the judiciary; the autonomy and accountability of the prosecution service; the independence and impartiality of the Bar; the right to

45 CDL-AD(2011)003rev.
46 Varga, 2020, pp. 347–348.

a fair trial; access to courts; the presumption of innocence; and the effectiveness of judicial decisions.

From this brief summary, it is evident that the Venice Commission's requirements are more specific. However, it should also be noted that each requirement is only briefly defined and is supplemented by a list of hard law and soft law sources. As such, the checklist does not offer direct practical guidance but rather points to sources for interpretation, leaving room for case-by-case application – with all the advantages and disadvantages this entails. Furthermore, owing to its global outlook, the soft law sources include legal instruments that have not previously been prominent in Europe.

The Venice Commission was established to promote mutual understanding and convergence among the legal systems of CE member states, to develop awareness of their differing legal cultures, and to address problems in the functioning of democratic institutions. Over time, the Commission has gained increased authority, and although its opinions are always tailored to the requesting state, the concept of the rule of law it developed has become an internationally accepted doctrine and theoretical paradigm. Its authority stems from the expertise of its members, many of whom are distinguished legal scholars delegated by the participating states.[47]

In the process of internationalizing, centralising, and embedding the rule of law as a normative requirement, the Venice Commission has issued numerous opinions concerning Eastern European states.

In Poland, core issues have included the status of judges and the judiciary (e.g. changes to the National Council of the Judiciary (NCJ) and the Supreme Court (SC)),[48] the Public Prosecutor's Office[49] and the Constitutional Tribunal (CT).[50] During the ongoing 'reversed rule of law' phase, several (including urgent) opinions have addressed reforms introduced by the new parliament, particularly regarding the judiciary and the CT.[51] In Hungary, similar concerns have centred on judicial reforms, including the status of judges, court administration,[52] and the prosecution service.[53] Comparable opinions have been adopted regarding Romania, focusing on the status of the Superior Council of Magistracy, judicial independence, and the appointment of judges.[54] In Bulgaria, the Venice Commission has reviewed the judicial system,[55] constitution-making processes,[56] and, as a regional exception, electoral legislation.[57]

47 Ibid., pp. 347–350.
48 CDL-AD(2017)031, CDL-AD(2020)017.
49 CDL-AD(2017)028.
50 CDL-AD(2016)001, CDL-AD(2016)026.
51 CDL-AD(2024)018, CDL-AD(2024)029, CDL-AD(2024)035.
52 CDL-AD(2012)001, CDL-AD(2012)020, CDL-AD(2013)012, CDL-AD(2019)004, CDL-AD(2021)036.
53 CDL-AD(2012)008.
54 DL-AD(2014)010, CDL-AD(2018)017, CDL-AD(2018)021, CDL-AD(2022)045.
55 CDL-AD(2024)004, CDL-AD(2022)032, CDL-AD(2022)022, CDL-AD(2019)031, CDL-AD(2017)018, CDL-AD(2010)041.
56 CDL-AD(2023)039, CDL-AD(2020)035, CDL-AD(2015)022.
57 CDL-AD(2017)016, CDL-AD(2014)001, CDL-AD(2011)013.

Compared to these countries, Slovakia and Czechia have drawn considerably less attention. In Slovakia, opinions have addressed only disciplinary proceedings against barristers[58] and the appointment of Constitutional Court judges.[59] In Czechia, only reports from conferences and seminars are available over the past two decades.[60]

This overview remains illustrative rather than exhaustive and does not encompass all states central to the resurgence of rule of law discourse following the regime changes of 1989–1990 and the rebuilding of democracy. It should also be borne in mind that the Venice Commission only acts at the request of a state. Therefore, no definitive conclusions should be drawn from the frequency – or absence – of its involvement, as this may simply reflect a state's success (or strategic effort) in avoiding the organisation's scrutiny.

### *4.3. European Union's Rule of Law Mechanisms*

The rule of law is one of the EU's foundational values – applying not only to individual member states but also collectively to the Union as a whole. Although EU institutions initially treated the rule of law in descriptive terms, they have progressively moved towards defining and operationalising it more concretely. The process began in 1993 with the Copenhagen criteria, which established the rule of law as a prerequisite for accession.[61] As noted above, this contributed to the heightened emphasis placed on rule of law compliance by post-socialist transition states – a process that remains ongoing.

The rule of law was also referenced in the preamble of the 1992 Maastricht Treaty and later enshrined in the Treaty on European Union (TEU). However, the Court of Justice of the European Union (CJEU) had already invoked the rule of law in earlier decisions. In its 1979 *Granaria* judgment and its 1986 *Les Verts* ruling, the Court held that loyalty to the EU legal order is a core expression of the rule of law.[62]

It should be stressed, however, that the primary function of the CJEU is not the protection of fundamental rights but the interpretation and enforcement of EU law. Its role is to ensure the effectiveness and primacy of EU law across all member states. Accordingly, the CJEU does not invoke the rule of law in abstract or philosophical terms but rather to secure the primacy of the EU legal order over national systems. The rule of law is also closely tied to the principle of mutual trust, which presupposes a unified constitutional space governed by shared values.[63]

Within the EU legal framework, the Conditionality Regulation is the first legislative act to include a formal definition of the rule of law. It mandates that all public powers act within the constraints set out by law, in accordance with democratic

58 CDL-AD(2021)042.
59 CDL-AD(2017)001, CDL-AD(2014)015.
60 Council of Europe, no date.
61 Sunnquist, 2023, p. 18.
62 Ibid., pp. 18–19.
63 Spielmann, 2021, pp. 4–5, 19.

values and respect for fundamental rights as stipulated in the Charter of Fundamental Rights of the European Union, and under the supervision of independent and impartial courts.

The applicable criteria, interpreted through case law, include: legality, requiring a transparent, accountable, democratic and pluralistic legislative process; legal certainty; the prohibition of arbitrariness in the exercise of executive power; effective judicial protection, including access to justice before independent and impartial courts; and the separation of powers.[64]

The underlying rationale of conditionality lies in utilitarian reasoning: the allocation of certain benefits, especially financial aid, is linked to the implementation of specific policies, reforms, or the fulfilment of concrete conditions. Depending on the outcome, a distinction can be drawn between positive conditionality (reward) and negative or punitive conditionality (withholding rewards or imposing sanctions). Conditionality may also be classified as ex ante or ex post, depending on the point in time at which it is applied. As such, a conditionality mechanism serves as a tool for political and/or economic adjustment. Within the EU, various types of conditionality exist. In the case of rule of law conditionality, the stated purpose is to protect the EU's financial interests. However,

> the political function of the regulation is essentially to build an argumentative bridge between the disbursement of European funding and the commitment to common fundamental values of the EU, in particular the rule of law. This political conditionality is purely punitive and needs permanent monitoring. With this conditionality, domestic policy, normative and constitutional decisions and fundamental political values, which are constitutive for membership in the EU, become conditions for the disbursement of European funding.[65]

One reason for the controversy surrounding this procedure is the combination of legal coercion and political bargaining and homelessness, which may ultimately result in a form of enforced compliance. These concerns underlie, for example, the proposal that

> while the simultaneous threat of sanctions might not be conducive to persuasion, the EU could still try to maintain or create channels of contact that allow for a depoliticized setting and a highly deliberative quality of interactions with the target government.[66]

Indeed, there is a discrepancy between the EU's efforts to exert financial pressure on Member States to uphold the rule of law and the criticisms regarding its selective

64 Sunnquist, 2023, pp. 20–21.
65 Becker, 2024, pp. 1–2, 8.
66 Blauberger and van Hüllen, 2021, p. 14.

application. Nevertheless, the fact that rule of law conditionality can result in the suspension or forfeiture of EU funds renders it a more powerful tool than those previously available to the Union.[67]

The most potent instrument in the EU's hands appears to be the procedure set out in Art. 7 TEU, which provides a mechanism for determining whether a Member State has committed a serious and persistent breach of fundamental EU values, or whether there is a clear risk of such a breach. The mechanism comprises both preventive and sanctioning components, which are distinct and not mutually dependent. The former assesses whether there is a clear risk, while the latter applies only when a serious and persistent breach has already occurred. These are supplemented by the Council's monitoring powers. Although the use of this procedure is rare rather than unprecedented, EU institutions are generally reluctant to invoke it due to political risks, including the possibility of increased popular opposition and democratic backlash.[68]

More significant in practice are the associated monitoring mechanisms. In 2014, the EC adopted the Rule of Law Framework to address systemic threats to the rule of law as a pre-Art. 7 procedure. These procedures enable the Commission to enter into a structured dialogue with the Member State to prevent the escalation of systemic threats to the rule of law. The process consists of three main procedural stages: assessment, recommendation, and follow-up by the Commission. It is a pre-Art. 7 TEU procedure that is regarded as a constructive means of initiating dialogue. While it provides a definition of the rule of law and partially addresses the inherent limitations of Art. 7 TEU, it does not necessarily offer an effective solution to the problems due to the soft and diplomatic nature of the Commission's approach.[69]

In 2020, the Rule of Law Report Mechanism was introduced as a further preventive measure and a means of fostering dialogue. Methodologically, it focuses on significant developments in four pillars: the justice system, the anti-corruption framework, media pluralism, and institutional issues related to checks and balances.[70] Similarly to the conditionality mechanisms, it connects the basic requirement of the rule of law with anti-corruption efforts. From its inception, the Rule of Law Report expanded the EU's anti-corruption toolbox by providing a comprehensive overview of anti-corruption policies across Member States.[71]

### *4.4. Additional Remarks*

Although each of the organisations and aspects presented here represents a dimension of the internationalisation of the rule of law, they are not truly comparable. On the one hand, the European Union and the Venice Commission stand out as

67 Łacnyp, 2021, p. 103.
68 Coli, 2018, pp. 277–278, 295.
69 Kochenov and Pech, 2015, pp. 521, 534, 539.
70 Panov, 2023, p. 82.
71 Stiegel and De Schamp, 2023, p. 345.

regional organisations, in contrast to the UN, which, owing to its global scope, places greater emphasis on various (typically war-torn) conflict regions and is therefore inherently reticent in its approach to European states. On the other hand, the two European bodies employ different methodologies, criteria, objectives, and investigators. The EU's rule of law mechanism and its instruments are political in nature, with criteria rooted in political agreement and, accordingly, reflective of current political conditions This remains the case even where the procedures for preparing the EU's rule of law reports and the Venice Commission's opinions appear similar – such as the process of posing questions, collecting responses, and consulting public authorities and civil society – since the individuals conducting the investigations differ, and the resulting documents reflect these differences. Their consequences also diverge: the EU holds an advantage in that it can enforce its position over time, whereas the Venice Commission exerts influence only indirectly; in its case, implementation of recommendations depends largely on the perceived legitimacy of the organisation and its investigators.

Consequently, scientific conclusions cannot be drawn from comparing their individual positions. Rather, they should be treated separately, as each may exert exclusively political or scientific influence, or a particular combination of both.

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## 5. Trust in Public Institutions and Decision-Makers

In the course of the aforementioned evolution, the focus of rule of law discourse has shifted to emerging states. A question arose: while the substantive model of the rule of law is increasingly accepted as the norm – a normative system with a claim to exclusivity – might alternative paths nonetheless be possible? After all, that which is not a *Rechtsstaat* is not a democracy, and if it is a democracy, it must function in accordance with the requirements of the rule of law.

This principle also underpins the rule of law mechanism of the European Union. The question, therefore, is not merely what principles and standards the rule of law comprises, but what meaning is ascribed to it by those who assert it as a normative standard.

In Western states, various models of the rule of law have developed organically, as von Mohl had already observed. By contrast, in emerging states, a certain formalism prevails. The aim is to reinforce the rule of law through standardised tools derived from Western experience. However, in the absence of organic development or institutional similarity, and within distinct social contexts, a situation has emerged akin to *duo cum faciunt idem, non est idem* – when two do the same thing, it is not the same. As a result, externally imported solutions have not always aligned with the domestic understanding of the rule of law.

This process has led to the greatest expansion of the rule of law concept in this region (as evidenced, for example, by reports of the Venice Commission), along with the realisation of the significance of the rule of law – understood as the necessity of comprehensive legal regulation – but also a concurrent lack of trust in both the law and the institutional system.

Generally, public institutions – the state and its representatives – function not only on the authority granted to them by the people through popular sovereignty, but also on the public's trust in their competence, integrity, and benevolence. Where trust exists, a more favourable view of institutional intentions prevails, encouraging cooperation and thus enabling the state to more readily achieve its goals. These aims typically involve striving for an ideal condition *in* and *for* society.

Trust is a natural phenomenon, a behavioural pattern acquired through socialisation. It is a durable disposition developed early in life, primarily shaped by parents. However, it may also be based on lived experience. Just as perceptions and experience can nurture trust, they can also lead to its breakdown. When public institutions are perceived as fair and effective, trust is strengthened.[72]

Accordingly, trust is relational. It depends on relationships – either direct, through ongoing interaction or indirect, via intermediaries and reputational effects. The deeper and more meaningful a relationship, the more likely trust and trustworthiness are to develop within it. If distrust arises, it tends to manifest incrementally. Trust is inherently moral; although distrust is often viewed negatively, it may at times serve as a protective response rather than a purely rational judgement. The relationship between trust and distrust is asymmetrical: distrust tends to emerge more swiftly.[73]

As Mishler and Rose observed in their 2001 study, trust is critical to democracy because it links citizens to institutions, thereby reinforcing both the legitimacy and effectiveness of democratic governance. Trust is especially vital in newly established regimes, whose predecessors proved unworthy of it. The authors emphasise that both cultural and institutional theories suggest citizens in post-communist societies are likely to exhibit minimal initial trust in democratic institutions. This is because their prior experience compelled them to depend heavily on interpersonal relationships and informal networks to meet their material and emotional needs and shield themselves from an intrusive and repressive state. As their research showed, public responses to new social and political institutions across the 10 post-communist countries studied ranged from scepticism to outright distrust.[74]

Trust or distrust may therefore stem from experience or assumption, whether based on facts or subjectivity. In Eastern European countries, efforts to build trust have been hampered not only by differing patterns of socialisation but also by the socio-economic difficulties of the 1990s and the obstacles to developing democratic

72 Sønderskov and Dinesen, 2016, pp. 180–181.
73 Hardin, 2002, pp. 3–4, 89–90.
74 Mishler and Rose, 2001, pp. 30–31, 39, 41.

institutions. These challenges coincided with the emerging focus on the rule of law, as described above. In this context, internal distrust overlapped with external scepticism, the latter rooted in the perceived need to strengthen the rule of law in these states. This dual distrust continues to shape discourse on the rule of law, revealing a contradiction: while the state and those in power expect trust, citizens expect these same institutions to dispel their distrust.

Strengthening the rule of law aims to ensure a just society and the adoption of 'just laws' whose moral foundation lies in the substantive conception of the rule of law and the broader effort to improve governance and prevent future challenges. Yet, distrust, whether grounded in experience or in well-founded or unfounded assumptions (including those related to the methodological shortcomings of rule of law assessments), gives rise to a demand for highly detailed regulation – even in areas that previously required no such oversight. The requirements of formal legality alone are insufficient. As Bedner argues, procedural compliance cannot guarantee substantively just outcomes. If many perceive the outcomes of legal processes as unjust, the legitimacy of the entire legal system may be endangered.[75]

Even comprehensive legislation with extensive safeguards is insufficient in the absence of trust in its implementation. A presumption of legal abuse persists where there is a lack of confidence in parliament and government. Although members of parliament are the custodians of popular sovereignty, and thus closest to the people in the chain of legitimacy, this distrust extends to them and, by implication, to the institutions they oversee.

This climate of distrust also generates uncertainty about which institution or legal solution may be challenged on rule of law grounds. A salient example is the judiciary: issues such as judicial administration, the selection and appointment of judges and court leaders, the scope of their powers, and even whether case allocation should be done by software rather than humans, have all become rule of law concerns.

Behind the increasing reliance on detailed regulation, the elimination of human discretion, automation and the diminishing space for political participation lies a deeper distrust of the state and those who exercise state power. While these measures are ostensibly aimed at ensuring the rule of law, they are, in fact, driven by a lack of trust in political authority.

The core questions remain: is there trust that power will not be abused? Does the law deserve confidence in its resistance to misuse? Here, too, a discrepancy emerges. New regulations are introduced in an attempt to compensate for the lack of trust in both legal norms and those in power – relying once again on the law itself to provide a solution.

As previously noted, the rule of law evolved organically in established democracies, through gradual development and experimentation. By contrast, Eastern European countries received it as a package of ready-made solutions, bypassing this

75 Bedner, 2010, p. 64.

developmental process and largely ignoring national specificities. The advantage of the process lay in its speed, enabling the rapid establishment of democratic institutional systems. Its disadvantage, however, was the absence of natural progression, self-evidence, trust and experience. In practice, it did not always produce the intended outcomes.

## 6. Conclusions

Today, the concept of the rule of law has become an interpretative principle in its own right – used by both advocates and critics – and even a form of ideological bias. It is employed in a variety of ways, not only by lawyers and politicians. The rule of law is now also a normative concept. The term 'rule of law' appears in the legislation of numerous countries, including constitutions, particularly in states with a history of dictatorship. It functions as a constitutional value category, yet it is not monolithic. It exists in different variants, and its adoption – specifically the preference for one model of implementation – varies across countries. The rule of law is a vision of the state: a general interpretive framework, a deliberately developed structural model shaped by the person and will of the state. This will is a fusion of the public interest and public law.[76]

Conceptions of the rule of law as an inherently moral ideal have often focused on abhorrent legal systems in which officials act out of self-interest, seeking to consolidate their own power and exploit the population. However, to

> ascertain the considerations that in fact motivate evil officials, we would have to undertake a lot of social-scientific research within the legal systems of a wide range of countries. Such a project would undoubtedly involve complex questionnaires and interviews as well as careful observation of the patterns of official decisions and actions.[77]

It is a well-known critique that political rule of law 'investigations' lack sufficient depth. Numerous practical examples have led to disputes over how the rule of law should be interpreted. The issue is not the absence of definable content in the concept, but rather that any requirement or notion which fails to align with the socio-legal and institutional realities of a particular context cannot truly serve its purpose. The focus should therefore lie on ensuring that, as a normative standard, it is applied predictably and within a fair procedural framework.

76 Tamás, 2005, pp. 227–231.
77 Kramer, 2016, pp. 3–4.

This also necessitates a deeper understanding of the context in which these requirements operate. So-called rule of law rankings, for example, overlook this essential dimension. They attempt to compare the incomparable – using legal and institutional indicators, facts, assumptions and perceptions – while ignoring the vastly differing historical and cultural backgrounds of the assessed states. As a result, one country may be labelled a more complete *Rechtsstaat*, another a lesser one, or even an *Unrechtsstaat*. Yet in reality, concepts such as equality do not carry identical meanings across cultures. Moreover, recent developments in South Korea have shown how easily a functioning system of checks and balances may be dismantled with the stroke of a pen. A less frequently discussed challenge to the rule of law is the readiness with which societies abandon it in times of crisis, as well as the increasing tendency to delegate decision-making to ostensibly neutral algorithms. Both trends represent real and significant risks for which no adequate solutions currently exist.

In conclusion, modern democracies and legal cultures are rooted in the pursuit of freedom and the need to constrain arbitrariness and unchecked power. The concept of the rule of law – and the normative criteria it embodies – aims to offer a range of mechanisms to uphold this pursuit. However, in shaping both individual and institutional decision-making processes, we must remain aware of the need to realise the rule of law in ways that respect national specificities, rather than through rigid uniformity. The rule of law must be implemented in accordance with its purpose and through means that are both necessary and proportionate. This awareness should be at the heart of any dialogue on the rule of law. It is through such an approach that trust in state institutions – and in the EU institutions striving for a just society – can be built and sustained.

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