**rule of law/法治(Fǎ Zhì)**

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| European Perspective | Hans-Peter Freymann | 17 Feb 2022 |

Hardly any other political idea has gained greater global recognition nor has spread so far in recent decades as the rule of law. Supported by a worldwide campaign that was initiated in the early 1990s by the World Bank and the International Monetary Fund (IMF) to create uniform conditions for successful economic development, practically no country today has not adopted the rule of law; however, this success is only superficial, for in fact, there is no agreement on what is meant by the rule of law. Rather, as a prime example for a “profoundly contested concept”[[1]](#footnote-1), there are numerous, sometimes substantially different meanings associated with the term, so that ultimately every political system can claim to enforce the rule of law, even if its respective forms are highly diverse.

Why is this so? Historically, the rule of law has been a central instrument for limiting sovereignty with the aim of preventing abuse of government power or even tyranny. By binding sovereignty to the law – both in the sense of laws passed by the ruler(s) themselves and in the sense of a higher-ranking law (e.g., natural law, customary law, divine law) that is removed from sovereignty and whose observance is guaranteed by an independent judiciary – the exclusion of arbitrariness and other negative excesses of the state’s exercise of power, which experience has shown can arise from human weakness, should be ideally ensured. The rule of law thus represents the antithesis of the “rule of man”, or as Aristotle puts it: “It is more proper that law should govern than any one of the citizens”[[2]](#footnote-2).

In contrast, a “thin”, formalistic approach to the rule of law prevails in academic discourse, especially in the opinion of Anglo-American commentators. This goes beyond the extreme position, which ultimately associates the rule of law with the demand that all action of sovereignty must be carried out by law (“rule by law”) by linking additional requirements to legislation; however, substantial standards, such as whether a law is just or whether it must respect fundamental rights, are left out.

What distinguishes this approach? The starting point here is a control of behavior made possible by the law, or as *Joseph Raz*, a leading contemporary theorist, puts it: “If the law is to be obeyed, it must be capable of guiding the behavior of its subjects”[[3]](#footnote-3). Derived from this, a law must be legally certain in the broadest sense, i.e., its preconditions and legal consequences must be foreseeable in that it is formulated clearly, free of contradictions, and sufficiently definite; it must be publicly accessible to everyone, have a reasonably lasting effect, be forward-looking, and it must not demand the impossible, i.e., it must be capable of being fulfilled. Furthermore, a law must be universally valid, i.e., it must apply equally to everyone, including the holders of state power, or as A. V. Dicey states: “No man is above the law”[[4]](#footnote-4). In order for law to be more than mere appeal, it also requires a regulatory mechanism that allows its enforcement. In particular, this includes the granting of procedural rights that guarantee everyone easy access to an open and fair trial without bias as well as the establishment of barriers in the exercise of discretion by (public) authorities, each of which are eligible for review and are enforced by an independent judiciary.

Such a retreat to formal criteria of legality ultimately leads to what generally constitutes norm‑setting and norm-following, i.e., norm-theoretical considerations, or as *Benjamin N. Cardozo* rightly describes: “In the end there is nothing distinctive about the formal rule of law as a separate ideal. It is about legal rules”[[5]](#footnote-5). An approach “gutted” in this way detracts from the original goal of the rule of law. Because no demands are made on the content of the legal rules, the question of whether a law is good or bad is left out, as is the consideration of whether higher-ranking law is able to restrict the legislator. Restrictions are imposed on sovereignty only to the extent that it is obliged to act by generally applicable, verifiable rules. Protection against state arbitrariness is limited to the fact that (arbitrary) ad hoc measures are further excluded and political changes of will are integrated into a formal legislative procedure. Nevertheless, this concept has the advantage that, in view of its cultural and political neutrality, it can be adapted to many forms of state and is consequently also suitable for those that do not share Western notions of individual freedom and the guarantee of immutable fundamental/human rights. In this way, a minimum level of legal certainty can be implemented in large parts of the world, which is essential for the functioning of cross-border trade and economic development based on it.[[6]](#footnote-6)

According to European understanding, however, such a formal concept of the rule of law is insufficient. Even an extension of formal legality, which *Jürgen Habermas* advocated forby demanding democratic legitimation of the legislator “...” does not do justice to this; a democratic formation of will promises majority approval for a law, but this alone is not suitable to prevent “bad” regulations; therefore, in addition to the formal and democratic requirements, an additional substantive anchoring is needed, such as the one inherent in the “thicker”, substantive theoretical approaches to the rule of law. This concerns first and foremost the safeguarding of one of the most important achievements of liberal societies: the guarantee of individual rights (of freedom). The *Council of Europe* formulates this approach, now predominant in Europe, as follows: “The rule of law ... is one of the three fundamental principles ... together with pluralist democracy and respect for the human rights; these three principles are closely interconnected: preserving and promoting human rights, democracy, and the rule of law is nowadays even seen as a single objective ... there can be ... no rule of law without democracy and respect for human rights ...”[[7]](#footnote-7). The rule of law in the sense of the formal rule of law thus forms an inseparable “triumvirs” together with a democratic community and the guarantee of individual rights.

With this link to democracy on the one hand and respect for individual human rights on the other, the self-understanding of the rule of law expands. It also serves to guarantee fundamental procedural rights or “judicial human rights” such as the right of access to justice, the right to be heard, the criminal law principles of “non bis in idem”, and the presumption of innocence, or the right to a fair trial[[8]](#footnote-8), among other rights. Within the framework of European integration and cooperation – as it has become manifest in the European Union and the Council of Europe together with the European Court of Human Rights which became responsible for the interpretation of the European Convention on Human Rights in the period after the Second World War – there is an increasing merging of the Anglo-Saxon rule of law, which is traditionally more oriented towards process and form, an continental European understanding, which, following the German “Rechtsstaat” and/or the French “État de Droit”, integrates the protection of (basic) fundamental rights in this respect[[9]](#footnote-9). The ECHR in particular tends to link the protection of human rights with the rule of law: “A state based on the rule of law has the duty to employ the necessary measures to uphold the law on its territory and to ensure the security of all as well as the enjoyment of human rights”[[10]](#footnote-10). The term “human rights: generally stands for pre-positive law, i.e., law which is not subject to (simple) legislation, either because it is laid down in a constitution or because of traditionally developed common law. Since higher-ranking law becomes the standard and at the same time the limit of state action, such a law can only be effective when it does not contradict this higher-ranking law.

Understood in this way, the rule of law is based on three central pillars from a European perspective: In addition to the formal requirements of legality (principle of legality) and due process mentioned above, the third pillar in the form of the “independent and impartial judiciary” plays a central role in determining the permissible content of the law and the enforcement of the law. It is incumbent upon the determination of the proportionality (“reasonableness”) of positive law to higher-ranking law, meaning that it must both interpret the content of existing laws and determine the limits of higher‑ranking law. This gives the judge de facto the last word in determining the legal boundaries. At the same time, there is an unmistakable danger that political guidelines will be determined by the judiciary, who are also human and therefore fallible (“rule by men”), instead of the sovereignty. It is therefore essential to establish the judiciary in as objective a manner as possible. For this, it is essential to let it work independently of any (political) influence (independence of the judiciary), which cannot be achieved without the independence of the judiciary in the concert of the individual state powers (separation of powers) and which also requires the personal independence of the individual judges within the judiciary. On the other hand, the impartiality and objectivity of judicial decisions must be ensured by appropriate barriers to access, a high, traditionally anchored professional ethic, and a reasonable system of instances.

Even if the implementation of the rule of law in Europe is by no means uniform and there are differences between common law and the law of continental Europe in particular, primarily constitutional, legal systems, the common history of the European peoples, and the consistently accepted central idea of limiting state arbitrariness through the equality of all before the law reveal a more far-reaching common understanding of the rule of law even beyond pronouncements at transnational and international level. Even the supposed difference between common law and the rule of law proves, on closer examination, to be less clear than is generally assumed[[11]](#footnote-11), for here as there, pre-constitutional law is presumed to be the standard, not only of jurisprudence but also of political action. Where a constitution– unlike in Germany, France, Italy, etc. – is lacking, common law, understood as customary and judicial law, provides the appropriate standard. This also applies to the English parliament, which, unlike its continental European counterparts, is legally unbound due to the lack of a constitutional court, but which due to its overriding social importance to is de facto bound by common law to such an extent that fundamental deviations seem certain to result in fundamental criticism and early voting out. [[12]](#footnote-12)

This in turn presupposes that a functioning democratic system is in place to guarantee a form of “checks and balances”. If, on the other hand, there is no control of sovereignty by means of free, protected elections and/or by means of an independent court system[[13]](#footnote-13), this differently-oriented concept of the rule of law – as already described above – remains rudimentary. In my understanding, this also and especially applies to communitarian forms of society in which, as in China, the orientation towards the welfare of the people occupies the highest authority. [[14]](#footnote-14)

This should not be misunderstood: Even in so-called liberal societies, the rule of law offers no guarantee that state arbitrariness can be permanently prevented. The current discussion about the influence of the media, including so-called social media, on large parts of the population shows that the danger for the pluralistic formation of will – and thus also for the existence of seemingly unchangeable rights – has taken on new dimensions[[15]](#footnote-15); nevertheless, the European interlocking of the rule of law with its foundations of a democratic polity and basic human rights makes the formation of state arbitrariness at the very least more difficult to a reassuring degree.

1. Representative of many: Faundez/Janse/Muller/Peerenboom, Hague Journal on the rule of Law, 2009, p. 1 f. [↑](#footnote-ref-1)
2. In: A Treatise on Government, Book III, Chapter XVI, 1287a, published e.g. http://www.literaturepage.com/read/treatiseongovernment-104.html, accessed 14/9/2021. [↑](#footnote-ref-2)
3. In: The Rule of Law and its Virtue, published in The authority of law: essays on law and morality; 1979 p. 212, 214, online e.g. http://fs2.american.edu/dfagel/www/Philosophers/Raz/Rule%20of%20Law%20and%20its%20Virtue\_%20%20Joseph%20Raz.pdf, accessed 14.9.2021. [↑](#footnote-ref-3)
4. Introduction to the Law of Constitution (1885), p. 114, online at, e.g., https://plato.stanford.edu/entries/rule-of-law/#Dice, accessed 9/14/2021. [↑](#footnote-ref-4)
5. As Brian Z. Tamanaha in On the rule of Law, History, Politics, Theory, Cambridge University Press, 2004, p. 97 with further references. [↑](#footnote-ref-5)
6. On the correlation between rule of law and economic development, e.g. [↑](#footnote-ref-6)
7. The council of Europe and the Rule of Law - An overview, CM (2008) 170 v. 21.11.2008 - http:www.coe.int/cm, p. 4 f. [↑](#footnote-ref-7)
8. For example, *Frithjof Ehm*, The Rule of Law, Concept, Guiding Principle and Framework, CDL-UDT (2010)012. [↑](#footnote-ref-8)
9. The council of Europe and the Rule of Law - An overview , CM (2008) 170 v. 21.11.2008 - http:www.coe.int/cm, p. 76 n. 31 f., 33. [↑](#footnote-ref-9)
10. Lelièvre, 8.11.2007, § 104. [↑](#footnote-ref-10)
11. For example, *MacCormick*, The Rule of Law and the Rule of Law, *Juristenzeitung* 1984, p. 65 et seq. [↑](#footnote-ref-11)
12. Cf. *MacCormick*, The Rule of Law and the Rule of Law, Law Journal 1984, p. 65, 67 fn. 8. [↑](#footnote-ref-12)
13. On judicial independence in China, see for example the essays in *Peerenboom* (Ed.), Judicial Independence in China, Cambridge University Press, 2010. [↑](#footnote-ref-13)
14. On this, for example, *Li*, China and the Rule of Law, in American Affairs, Fall 2019, Vol. III No. 3, online at: https://americanaffairsjournal.org/2019/08/china-and-the-rule-of-law/, accessed 14.9.2021; *Heuser*, What "Rule of Law"? The Traditional Chinese Concept of Good Governance and Challenges of the 21st Century, ZaöRV 2004, 723; also: *Seppänen*, Ideological Conflict and the Rule of Law in Contemporary China - Useful Paradoxes, Cambridge University Press, 2016. [↑](#footnote-ref-14)
15. For example *Lewandowsky et al.,* Technology and Democracy: Understanding the influence of online technologies on political behaviour and decision-making. Publications Office of the European Union 2020, online at https://op.europa.eu/en/publication-detail/-/publication/49b629ee-1805-11eb-b57e-01aa75ed71a1/language-en, accessed on 14.9.2021; cf., also: *Schirch* (Ed.), Social Media Impacts on Conflict and Democracy - The Techtonic Shift, Routledge 2021. [↑](#footnote-ref-15)