1. The rule of law: origins, prospects and challenges*

The majesty of law is to achieve what centuries of blood and iron were not capable of.1

1.1 INTRODUCTION

The concept of the rule of law, or one should rather say some of the principles underpinning the rule of law, finds its origins in Ancient Greece (between 500 and 300 BCE) where it participated in the 'self-definition of the political community of the City'.2 During that time of great political innovation towards Athenian democracy, the rule of law found its expression in the idea that the law could act as the most efficient and legitimate barrier against the discriminatory and arbitrary power of the ruler.3 Aristotle himself addressed the issue in his masterwork Politics in which he compared the advantages of being ruled by 'the best man or by the best laws'.4 One had nevertheless to wait several

---

* This chapter is partly based on my introduction, together with Jan Wouters, ‘The International Rule of Law: European and Asian Perspectives’ in Jan Wouters and Matthieu Burnay (eds), Special Issue on ‘The International Rule of Law: European and Asian Perspectives’ (2013) 2 Belgian Review of International Law 299.

1 Walter Hallstein, Die Europäische Gemeinschaft, 5th edn (Econ Verlag, 1979), p. 53. In the text: ‘Die Majestät des Rechts soll schaffen, was Blut und Eisen in Jahrhunderten nicht vermochten’.


3 Ibid. 240.

centuries before the rule of law was conceptualized and implemented in the context of domestic legal systems characterized by a high degree of centralization, institutionalization and hierarchization. This is particularly true if we take into account the European tradition of the rule of law and its variants: (1) the English Rule of Law; (2) the German *Rechtsstaat*; and (3) the French *Etat de Droit*. Though these three traditions obviously share common elements, the national context in which they evolved deeply influenced both their content as well as their normative nature and functions. After a thorough introduction to these three traditions of the rule of law, this chapter will explain the challenges (i.e. conceptual weakness, legal pluralism, cultural/regional relativism) as well as the prospects for the emergence of a consensus on the rule of law. It will then elucidate the extent to which the distinction between formal (‘thin’) and substantive (‘thick’) versions of the rule of law can help assess the actual state of the rule of law within a legal system.

1.2 EUROPEAN LEGAL TRADITIONS AND THE RULE OF LAW

1.2.1 English Rule of Law

It is in England that the first written traces can be found of what would later be described as the rule of law. The Magna Carta that was signed in 1215 aimed to contain the power of the monarch by submitting him to the law. It constitutes, in this sense, a very important milestone in the legal and political history of England. The text of the Magna Carta was introduced under the reign of King Henry III and later confirmed by his son King Edward I. Departing from a state in which the arbitrary rule of the monarch was legitimized by law, it stated, for example, in article 39 that ‘no freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land’. While the Magna Carta did not contain any direct reference to the rule of law, it included the seeds of two important dimensions of the rule of law, the primacy and the effectiveness of the law. In the words of the Right

---

Honourable Beverley McLachlin, Chief Justice of Canada, it is the ideas introduced by the Magna Carta, namely, liberty, rule of law and democracy, ‘that have made the Magna Carta one of, if not the most, influential documents of recorded history, spreading its influence beyond Britain’s shores to every part of the world’.7

It is the conflict between the Parliament and the monarchy which provided the institutional, and constitutional, context necessary for the development of the English Rule of Law. After the Magna Carta was signed, a real tension remained for several centuries on the actual meaning of sovereignty and the exercise of power by the sovereign. While it was already acknowledged that the King of England had to respect the law, the King still retained a Royal Prerogative to render justice according to his own idea of the law. It is the proclamation of Parliamentary sovereignty in the 1689 Bill of Rights that made the King truly bound by the law and prevented him from influencing judicial proceedings.8 The Bill of Rights established the Parliament as the main source of rights which should then be protected by the courts. Courts’ decisions, more particularly those emanating from the High Court of Parliament, could therefore no longer be vetoed by the monarch thanks to the principle of Parliamentary sovereignty.9 In line with the thoughts of John Locke, the English Glorious Revolution and its outcomes supported the idea that ‘established standing laws, promulgated and known to the people’ should indeed bind ‘whoever has the legislative or supreme power’ and be truly enforced.10

It is in the nineteenth century that the concept of the rule of law was further articulated by Albert Venn Dicey. A.V. Dicey argued that the English Rule of Law is grounded in the modus of interaction between the common law and parliamentary sovereignty. In his view, parliamentary sovereignty and the common law act as two mutually reinforcing principles of the English legal system.11 In his book Introduction to the


7 Ibid.
9 Ibid. 46.
10 Ibid.
Study of the Law of the Constitution, Dicey recognized three meanings to the rule of law as a ‘fundamental principle of the constitution’:

(i) ‘[t]he absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, [the rule of law] excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government’;

(ii) ‘[e]quality before the law, or the equal subjection of all classes to the ordinary law courts; the rule of law excludes the idea of any exemption of officials or others from the duty of obedience to the law’;

(iii) ‘[t]he law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts’.  

In agreement with Dicey’s understanding of the rule of law, the English tradition appears to be very different from the continental traditions of the French Etat de Droit and the German Rechtsstaat. 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 English Rule of Law is in this vein not primarily founded on the reliance on existing formal rules nor on the application of pre-existing abstract rules that would find their sources in natural law. The English Rule of Law is rather about the experience of a legal system, which in the words of P.S. Atiyah, ‘requires not just that we have rules, and that government is bound by rules, but also that these rules should be based on purposes and reasons which are open to public debate’. This argument reminds us of the close connection between the rule of law and the ideal of democracy: Noberto Bobbio emphasized accordingly that ‘democracy is the rule of

---

12 Ibid. 202–3.
law *par excellence*.\(^{15}\) In that context, parliamentary sovereignty continues to be an important aspect of the English Rule of Law.\(^{16}\) On the other hand, the English Rule of Law recognizes a central role to the judge’s law-making function. The *stare decisis* doctrine is indeed at the very heart of the English legal system: the doctrine of binding precedent identifies case law as a binding source of law that contributes to both the creation and improvement of law.\(^{17}\) The independence of the judiciary constitutes therefore a central feature of the English Rule of Law.\(^{18}\)

In contrast to the English Rule of Law, the origins of the other European traditions of the rule of law are more recent and are not primarily characterized by their pragmatism. It is in Germany that the continental tradition of the rule of law first appeared with the development of the *Rechtsstaat* doctrine in the nineteenth century. France then followed with the progressive articulation of the *Etat de Droit* principle that emerged in reaction to the very normative conception of the *Rechtsstaat*. In spite of their close terminology, the German *Rechtsstaat* and the French *Etat de Droit* are two *sui generis* rule of law traditions whose substance and normativity have been largely conditioned by the contexts in which they developed.

1.2.2 German *Rechtsstaat*

The German *Rechtsstaat* (legal state) is a philosophical and theoretical concept that was developed in Prussia in reaction to the *Polizeistaat* (police state) of the nineteenth century. The highly normative identity of


the *Rechtsstaat* can be understood as a reaction to the existing arbitrariness and violence in both the private and public spheres.\(^{19}\) It does not therefore come as a surprise that the philosophical and theoretical origins of the *Rechtsstaat* can be found in Kant’s reflection on justice and rights:

> [A]ll Kant’s efforts tend to replace the state of nature by a judicial state where war will be replaced by procedure and victory by an arbitral decision. Kant is, in his most profound intimacy and genius, the man of law.\(^{20}\)

In Kant’s view, the primary function of the law is to guarantee every individual ‘a maximum sphere of external freedom’ that is a freedom vis-à-vis other individuals and the state.\(^ {21}\) In that context, the law aims to limit the power of the state in the sense that the state should only benefit from the executive power ‘under law’.\(^ {22}\) It is this liberal foundation that provided the basis for the very normative approach to the *Rechtsstaat* developed by legal theorists such as Robert von Mohl, Friedrich Stahl and Rudolf Gneist. Within the *Rechtsstaat* theory, the state is based upon a *Staat der Vernunft* (state of reason) understood as ‘the moral principles, as they emerged from the tradition of moral law and as they emerged from the tradition of moral legal theory, materialised in the living-together and for the living together of the people’.\(^ {23}\) As a morally-loaded model, the *Rechtsstaat* doctrine clearly goes beyond legality and engenders a form of constitutionalism that aims to realize the public reason. The *Rechtsstaat* has significant ethical implications that should provide

---


\(^{22}\) Ronald Atkinson, ‘Kant’s Moral and Political Rigorism’ in Howard Williams (ed.), *Essays on Kant’s Political Philosophy* (University of Wales Press, 1992), p. 239.

for both the normative foundations and legitimacy of the legal system. In
the words of René Foqué:

\[N\]o liberty without the state, and no state without ethics institutionalized in
the form of standards of law. Therein lies the essence of the highly ethically
charged German principle of the \textit{Rechtsstaat}\textsuperscript{24}

It is against these substantive and normative foundations that legal
positivist thinking as developed in the work of Hans Kelsen elaborated a
very harsh critique on the \textit{Rechtsstaat} theory. In essence, Hans Kelsen
considered that the very wording of the \textit{Rechtsstaat} is a ‘pleonasm’\textsuperscript{25} in
the sense that ‘every state is a \textit{Rechtsstaat}\textsuperscript{26} Kelsen’s critique towards
the \textit{Rechtsstaat} did not only pertain to the terminology used; Kelsen also
directly criticized the normative foundations of the \textit{Rechtsstaat} when he
emphasized that the validity of law could not be presumed from
pre-determined values:\textsuperscript{27}

The norms enacted by the legal authority, imposing obligations and conferring
rights upon the legal subjects are neither true nor false, but only valid or
invalid; just as facts are neither true nor false, but only existent or nonexistent,
and only statements about facts can be true or false.\textsuperscript{28}

The inherent relativism of Kelsen’s reflection pertains to the distinction
between the ‘is’ and the ‘ought to be’: ‘It wants to discover only what is
in the law; not what ought to be’.\textsuperscript{29}

The positivist approach nevertheless faced its own limitations and was
therefore strongly condemned in the aftermath of the Second World War.
The experience of the \textit{Unrechtsstaat} and systemic denials of the norma-
tive character of the \textit{Rechtsstaat} under Nazi Germany demonstrated the
danger inherent to a purely formalistic understanding of the \textit{Rechtsstaat}.
It is indeed pure legal formalism that had enabled and legitimized, to a
certain extent, the emergence of the National Socialist Party. In the words

\textsuperscript{24} Foqué, \textit{The Rule of Law}, n. 13 above, at 5.
\textsuperscript{25} Hans Kelsen, \textit{Reine Rechtslehre}, 2nd edn (reprint) (Österreichische
\textsuperscript{26} \textit{Ibid}.
\textsuperscript{27} Clemens Jabloner, ‘Hans Kelsen’ in Arthur J. Jacobson and Bernhard
Schlink (eds), \textit{Weimar: A Jurisprudence of Crisis} (University of California Press,
2000), p. 73.
\textsuperscript{28} Hans Kelsen, \textit{Pure Theory of Law} (translation from the 2nd (Revised and
Enlarged) German edn by Max Knight, Lawbook Exchange Ltd, 2002), p. 73.
\textsuperscript{29} Jabloner, ‘Hans Kelsen’, n. 27 above, at 77.
of Gustav Radbruch, ‘[P]ositivism in fact, with its conviction “law is law (Gesetz ist Gesetz)”, made the German judiciary defenceless in the face of laws with arbitrary and criminal content’.  

In fact, according to that view, it was legal positivism that led German officials to consider as being legal rules and principles that had nothing to do with the law.  

The defeat of the Nazi regime and the acknowledged failure of legal positivism led to a revival of the more liberal perspective on the Rechtsstaat. It is in that spirit that Post-Second World War Germany included in the Basic Law the supra-constitutional value of human dignity (article 1(1)) that cannot be amended in any way (article 79).  

Human dignity and individual liberties are therefore recognized as pre-existing human rights that the state should not protect as determined/objective values but rather as sui generis liberties. It therefore does not come as a surprise that Post-Second World War Germany has developed a very strong faith in constitutionalism and judicial control of constitutionality. In this respect, the growing role played by the Federal Constitutional Court has contributed to the ‘judicialization’ of German politics to the point where the Court has now become ‘the ultimate guardian of both democracy and the rule of law’ within Germany. This activism of the German Constitutional Court is still occurring nowadays, as best

---

31 Wayne Morrison, Criminology, Civilisation and the New World Order (Routledge, 2006), p. 64.  
32 Article 1 of the German Basic Law reads as follows: ‘(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world. (3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law’. Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification no. 100-1, as last amended by the Act of 11 July 2012, Federal Law Gazette I, p. 1478.  
exemplified by the role played by the Court in the process of European integration through the constitutional review of European legal acts.\textsuperscript{36}

1.2.3 **French Etat de Droit**

In the French legal tradition, the overarching idea to constrain state power through law finds its origins in the 1789 Revolution that put an end to centuries of monarchic power within France. The Third Constitution of France, that is the Declaration of the Rights of Man and the Citizen, accordingly introduced the values of legality (article 5), equality before the law (article 6), due process (article 7), fairness and separation of power (article 16). The effectiveness of the legal order was furthermore presented within the Declaration as a precondition for the existence of a constitutional regime (Preamble).\textsuperscript{37} The rule of law conception that underpinned these revolutionary ideas was that the judge and the administration both have to abide by the law that is the outcome of the legislative work.\textsuperscript{38}

The concept of *Etat de Droit* is a direct translation of the German *Rechtsstaat*. Apart from the parallel in the terminology used, the French *Etat de Droit* is in fact quite distinct from its German counterpart. More precisely, the theoretical thinking on the *Etat de Droit* in the late nineteenth century should even be seen as a reaction against the very definition of the *Rechtsstaat*. The reason for the vigorous French critique against the *Rechtsstaat* can partly be found in the national context, in which French intellectual circles retained some strong anti-German feelings following the 1870 defeat.\textsuperscript{39} The French doctrine clearly rejected the *Rechtsstaat* doctrine because it perceived it as an instrument to legitimize the German political regime that accorded a stronger role to the bureaucracy than to Parliament.\textsuperscript{40} To understand the fundamental ideas behind the French critique of the German *Rechtsstaat*, it is

\textsuperscript{36} Mehrdad Payandeh, ‘Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship Between the German Constitutional Court and the EU Court of Justice’ (2011) 48 *Common Market Law Review* 9, at 9.


\textsuperscript{39} *Ibid*. 11.

\textsuperscript{40} *Ibid*. 

Matthieu Burnay - 97817888112390
Downloaded from Elgar Online at 06/22/2019 09:12:04AM via free access
important to point to the fact that the German legal doctrine linked the *Rechtsstaat* only to those issues that were relevant to the interactions between the citizens and the state.\(^{41}\) It excluded *de facto* public administration from the judicial order and submitted it to the rules of the administrative order.\(^{42}\) In contrast, the French tradition clearly recognized the legal nature of those acts pertaining to the internal organization of the state.

The clear rejection of the German *Rechtsstaat* by the French doctrine is best exemplified by Raymond Carré de Malberg who opposed the idea of the *Rechtsstaat* with what he defined as the *Etat Legal* (legal state). In contrast with the *Rechtsstaat* that aimed to protect the citizen against the arbitrary power of the bureaucracy, the *Etat Legal* provided that all the acts of the administration should be posterior to the law. R. Carré de Malberg defined the *Etat Legal* as ‘a State in which all the acts of the administrative power presuppose a law to which they are attached and that they aim to execute’.\(^{43}\) Also in contrast with the normative driven definition of the *Rechtsstaat*, he argued that the transcendental values and principles that underpin the creation of the state could not be considered as rules of law: the law should only be understood as those rules enacted by the legislative power.\(^{44}\)

The initial preference for the *Etat Legal* terminology rather than the *Etat de Droit*\(^ {45}\) testifies to the very legalist approach inherent in the French tradition. The French doctrine of the *Etat de Droit* has never been concerned with a search for the liberal foundations behind the formation of the state. The French *Etat de Droit* has rather been influenced by a more legalist thinking that defines the law as an instrument to protect civil liberties while containing the excess of democratic participation, as well as to justify the administrative acts imposed by the state. In the words of René Foqué:

\[^{42}\] Ibid.
\[^{45}\] Two conceptions whose substance is not significantly different according to Marie-Joëlle Redor: Redor, *De L’Etat Legal à L’Etat de Droit*, n. 38 above, at 325.
The value-charged dimension of a commonly supported reason gives way in the French context to a much more clearly expressed legal formalism, which is far less firmly embedded in a concrete concept of society.\footnote{Foqué, \textit{The Rule of Law}, n. 13 above, at 5.}

The French approach to the \textit{Etat de Droit} is, in this vein, strongly influenced by a rationalist thinking \textit{à la} Descartes.\footnote{Ibid.} The state, and the administration of the state power, is perceived and defined as a rational actor whose actions and interactions with the citizens should be justified in light of the existing law.

In that context, the French history of the \textit{Etat de Droit} both in the legal and political sense has largely been about the great mistrust vis-à-vis the judiciary. For a long time, the French legal system has been concerned with the emergence of a ‘gouvernement des juges’ (‘government by the judiciary’). The idea of ‘government by the judiciary’ was first advanced by Edouard Lambert in 1921 when he analysed the judicial control of constitutionality in the United States.\footnote{Edouard Lambert, \textit{Le Gouvernement des Juges et la Lutte Contre la Législation Sociale aux États-Unis} (University of California Libraries, 1921), p. 292.} The fear of a ‘government by the judiciary’ is particularly significant because of the magistrates’ attempt to control the legislative power in the period preceding the French Revolution.\footnote{Michel Figeac, ‘Les Magistrats en Révolte en 1789 ou La Fin du Rêve Politique de la Monarchie des Juges’ (2006) 25 \textit{Histoire, Économie et Société} 385, at 392.} This experience explains why the French tradition of \textit{Etat de Droit} has always been sceptical, not to say suspicious, of the idea to strengthen the role of the judiciary vis-à-vis the power of the state and its administration.\footnote{Blandine Barret-Kriegel, \textit{L’Etat et la Démocratie}, Rapport à François Mitterrand, Président de la République Française (La Documentation Française, 1985), p. 30.} It is the same idea that has also for long prevented the development of mechanisms of judicial control of constitutionality within France. Though the fear of a ‘government by the judiciary’ has become progressively less acute since the commencement of the Fifth Republic,\footnote{Jacques Chevallier, \textit{L’Etat de Droit}, 2nd edn (Clefs Politiques, 1994), p. 94.} one had to wait until the 1970s for the first significant step towards a greater control of constitutionality. During the Fifth Republic, the time...
was again necessary to depart from the primacy of ‘raison d’Etat’ as implemented under the Presidency of General De Gaulle and allow the Etat de Droit to gain a greater influence within the French constitutional system. In this respect, the extension of the right to access constitutional control to the parliamentary minority in 1974, as well as the ‘revolutionary judicial reform’ of establishing a control post-ante (i.e. question prioritaire de constitutionnalité) through the constitutional reform of 2008, have both modified French constitutionalism and the actual implementation of the Etat de Droit. In agreement with article 61-1 of the French Constitution, every individual now has the right to question the constitutionality of a ‘legislative provision’ that is claimed to infringe ‘the rights and freedoms guaranteed by the Constitution’.

1.3 RULE OF LAW, RECHTSSTAAT, AND ETAT DE DROIT: TOWARDS A COMMON DEFINITION OF THE RULE OF LAW IN EUROPE?

The history of the rule of law in Europe with the development of the English Rule of Law, German Rechtsstaat and French Etat de Droit


53 Ibid. 297.

54 Loi Constitutionnelle, no. 74-904 of 29 October 1974 portant revision de l’article 61 de la Constitution, JO, 30 October 1974, p. 11035.


presents the rule of law as an ‘essentially contested concept’: the contestation is ‘at the core, not just at the borderline’ of the concept.59

Indeed, the very marked differences between these three traditions do not only relate to their content but also to their very essence as ‘evaluative’ principles: ‘The “true”, “best”, or “preferred” meaning of the rule of law depends on the resolution of contestable normative issues; disagreements are therefore to be expected’.60

In this vein, the strong contrasts between the emphasis on legal pragmatism (English Rule of Law), normativity (German Rechtsstaat) and legality (French Etat de Droit) pose questions as to the possibility of doing comparative research on the rule of law. The meanings of the principle appear to be so diverse and dependent upon the national context that one can doubt the theoretical feasibility of reconciling these traditions around a common conception of the rule of law. The question is, in the words of Walter van Gerven, how ‘to bridge the unbridgeable’ when the Rule of Law, Rechtsstaat and Etat de Droit seem to be so incompatible with each other.61 In order to provide a tentative answer to that question, it seems to be relevant to refer to the fundamental ideas/ideals that link these three concepts together; and also to demonstrate that the shift from a ‘rule-book’ to a ‘rights’ conception of the rule of law62 could prove to be useful in order to highlight avenues for cooperation/dialogue between these traditions, which seem to be irreconcilable from a theoretical point of view.

The three legal traditions detailed above share some common characteristics despite their fundamental differences. In this respect, the rule of law served in all three of these legal traditions as a principle to discard the ‘unbridled, unaccountable royal power’ of the monarchs.63 The rule of law means that the society is governed by law and that the ruler can only make his decisions according to the law while also being submitted to the law, himself. The rule of law functions therefore as the ultimate barrier

against the rule of man, the arbitrary power of the ruler as well as unlawful violence. It furthermore provides the citizens with concrete instruments to force state organs to act within the limits set by the law. The rule of law nevertheless does not aim to transform the unbridled power of the sovereign into an unbridled power of the legislature or the judiciary. The rule of law is, in fact, also immersed in the search for a good balance between the executive, legislative and judicial powers.

Dialogue and cooperation between these rule of law traditions could also lead to a refined conception of the rule of law by following Ronald Dworkin’s idea to shift the perspective on the rule of law from a ‘rule-book’ to a ‘rights’ conception of the rule of law. The ‘rule-book’ definition of the rule of law provides that the power of the state and the actions of the citizens should be exercised in conformity with the rules, until these rules are changed in agreement with the procedures foreseen by other rules. In the words of Dworkin, ‘it insists only that whatever rules are put in the book must be followed until changed’. In contrast, the more ambitious ‘rights’ conception of the rule of law provides that the rules capture an ideal of justice that should be recognized within positive law and be enforceable through well-defined legal remedies. This second perspective has a high potential, from the perspective of Dworkin, to enrich democracy and the democratic debate:

It encourages each individual to suppose that his relations with other citizens and with his government are matters of justice, and it encourages him and his fellow citizens to discuss as a community what justice requires these relationships to be.

This ‘rights’ approach can appear as a useful way to bridge the existing gaps between the various European traditions. The ‘rights’ conception of the rule of law has the advantage of departing from a strictly positivist, ‘rule-book’ perspective and of striving for a higher conception of justice within Europe. It has interestingly already been endorsed to a certain extent by the European Court of Justice (ECJ) that makes reference to broad principles such as the principle of equality and proportionality in

65 Ibid.
66 Ibid.
67 Ibid. 32.
68 The relevance of the ‘rights’ conception to ‘bridge the unbridgeable’ is an idea proposed by Professor René Foqué. The author is very grateful for his useful comments in that regard.
order to reconcile the significant differences between legal systems falling under its jurisdiction.\textsuperscript{69}

That being said, it is interesting to look at the own experience of the European Union (EU) to support the development of an EU rule of law that would be shared by all EU Member States beyond the existing diversity described above. In fact, it is only recently that the EU seems to have rediscovered the virtues of the rule of law as one of the key values on which the European integration process was founded at the end of the Second World War. The initiation of the European integration process indeed signified the creation of an era of peace, security and economic interdependence based on a common project regulated by law. It is nevertheless only in 1986 that the ECJ, the judicial guardian of the Treaties, made its first reference to the rule of law when it stated that:

\[\text{T}\]he European Economic Community is a Community based on the Rule of Law, in as much as neither the 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.\textsuperscript{70}

It was already clear from this ECJ ruling that, being a ‘community based on the rule of law’, both the EU Member States and the EU institutions are to be submitted to the rule of law. Since then, European institutions and Member States have made regular references to the rule of law. The rule of law became an integral part of the EU Treaties with the Treaty of Maastricht in 1992 which included multiple references to the rule of law.\textsuperscript{71} It was then progressively recognized as one of the EU’s constitutional principles, anchored in what became Article 2 of the Treaty on European Union (TEU). The enactment of the Lisbon Treaty largely contributed, in this respect, to the Union’s ‘compliance with the principle of the rule of law as far as the Union’s constitutional framework is

\textsuperscript{69} Van Gerven, ‘Bridging the Unbridgeable’, n. 61 above, at 542–4.
\textsuperscript{71} The Preamble to the Maastricht Treaty reaffirmed the ‘attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law’. The principle was also reaffirmed in the articles defining the jurisdiction of the ECJ (Arts 33 and 146); the objectives of the Common Foreign and Security Policy (Art. J1); the Union policy in the field of development cooperation (Art. 130) and in the context of the Common Monetary Policy (Art. 14). Treaty on European Union, 7 February 1992, [1992] OJ C191, 29 July 1992.
concerned'. In fact, according to Dimitry Kochenov, ‘crucial elements of what the rule of law is essentially about are simply not part of the system’.

It is the 2004 and 2007 enlargement processes that really brought forward the rule of law to the top of the EU domestic agenda. The 12 new Member States indeed had a very different state tradition in which the rule of law, in its Western liberal conception, had not played a major role for nearly 50 years under the rule of the Union of Soviet Socialist Republics (USSR). The stability of rule of law institutions was an integral part of the political criteria that had to be fulfilled by these countries in order to qualify for EU Membership. Even though the status and protection of the rule of law were discussed extensively before their accession to the EU, it is arguable that the ‘constitutional liberalism and rule of law still remain weak’ in comparison with the good development of elective democracy in contemporary Central and Eastern Europe (CEE). In the years following the 2004 enlargement, the EU has had to face what Commissioner Reding labelled the ‘Copenhagen dilemma’. While the EU has the necessary instruments to assess the rule of law situation in countries during the accession process, there are

74 The 12 new Member States included: Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, Slovenia (2004 enlargement); Bulgaria and Romania (2007 enlargement).
79 Article 49 TEU makes respect for the rule of law a precondition for EU membership.
only limited tools to ensure that Member States still respect the rule of law once they have become an EU Member State. The whole accession process and political *acquis* retain therefore hardly more than a ‘historical value’\(^{80}\) after the accession. This dilemma has turned out to be particularly obvious as the EU has begun to be concerned by situations of ‘rule of law backsliding’ in certain Member States, in particular Hungary and Poland.\(^{81}\) ‘Constitutional coups’ have affected those two Member States, whose governments have recently attempted to systematically undermine checks and balances mechanisms.\(^{82}\)

These ‘threats to the legal and democratic fabric’\(^{83}\) of the EU forced a reflection on the rule of law in the context of the EU. The importance of the rule of law as one of the fundamental values of the EU was therefore reaffirmed in the European Commission Communication ‘A New EU Framework to Strengthen the Rule of Law’, which provides instruments to address threats to the rule of law within the EU.\(^{84}\) The overall idea behind the Commission Communication was to fill in the gap that existed between political persuasion and the ‘nuclear option’ of Article 7 TEU that foresees the suspension of certain rights deriving from EU Membership in case of ‘serious and permanent breach’ of the values mentioned in Article 2 TEU, including the rule of law.\(^{85}\) In its Communication, the European Commission considered that the EU rule of law includes the following components:

---


[L]egality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law.86

The ongoing reflection on the meaning of the rule of law as a constitutional pillar of the EU testifies both to the importance of the principle and to the remaining gaps in its full operationalization within the EU. This paradox still very much relates to the ‘dual nature of the rule of law’, which combines a strong ‘legal-normative weight’ with a high ‘susceptibility to conceptual stretching’.87 In this case, there is considerable consensus on the importance of the rule of law as a principle that should be applied to the EU institutions and all its Member States. However, the EU has been reminded that it lacks a binding and easily operational definition of the rule of law that could enable its institutions to systematically address threats to the rule of law within its own Member States.

1.4 RULE OF LAW AND DIVERSITY OF THE INTERNATIONAL LEGAL LANDSCAPE

The last section demonstrated that, even within the EU, the rule of law remains a concept whose both substance and normative functions are still largely debated. The ongoing debate on the rule of law nevertheless does not preclude the rising importance of the principle on the domestic and foreign policy agenda of states,88 as well as regional and international organizations across all legal traditions.89 In this regard, the International

---

86 Communication from the Commission to the European Parliament and Council, n. 84 above.
The rule of law: origins, prospects and challenges

The Bar Association went as far as presenting the rule of law as ‘the foundation of a civilized society’.  

The importance of the rule of law across legal systems can partly be explained by the fact that support for the rule of law crosses the borders between political theories. Though the reasons for supporting the principle and possible outcomes of it are diverse and sometimes point at cross-purposes, it appears that the rule of law can fit in the framework of very different ideologies and intellectual paradigms. In this respect, the two sides of the philosophical spectrum incarnated by the liberal perspective of Hayek and the socialist perspective of Marx attribute a role to the rule of law. On the one hand, Hayek’s philosophy of liberty is based on the rule of law as it provides the necessary conditions for the exercise of the principle of individual freedom. On the other hand, Marx kept an ambiguous and unresolved perspective on the rule of law that can partly be explained by the fact that he did not develop a fully-fledged theory of law. In his writings, Marx nevertheless combined his revulsion for the law as an ‘oppressive class mechanism of the bourgeois state which is determined by the economic base of society’ with ‘an admiration for a severely reformed and democratised form of Rechtsstaat’.

It is more particularly since the end of the Cold War that we have witnessed a real revival of the rule of law. From this perspective, the rule of law was very much at the heart of the Copenhagen Declaration, which was released as an outcome of the Conference on Security and Cooperation in Europe (CSCE) that took place in June 1990, a few months after the fall of the Iron Curtain. In line with Fukuyama’s ‘end of history’ argument, this Declaration constituted ‘the political blueprint for a Europe committed to democratic pluralism, free elections, the rule of law, and the protection of human rights’. This revival has arguably

---

90 International Bar Association, Resolution on the Rule of Law (Prague, 2005). The International Bar Association called the rule of law ‘the foundation of a civilized society’ in a resolution that deplored the increasing threats against the rule of law and welcomed initiatives by national courts to reaffirm the importance of the principle.


93 Ibid. 62.


led a ‘venerable part of Western political philosophy enjoying a new run as a rising imperative of the era of globalization’. In fact, the rule of law has now transformed into a kind of global policy, which ‘[l]ike the state, the market and the bureaucracy, with which it is closely linked … is an institution based on Western, rational values, backed by the authority of international organizations, and disseminated across the globe’.

In that context, references to the rule of law have now appeared in constitutions all over the world. Direct references to the rule of law are included in the Constitution of Canada, Germany, South Africa, India and China, among others. Supreme Courts of the same states or their equivalent have also regularly invoked the rule of law as one of the cornerstones of their respective constitutional system. In line with the numerous references to the rule of law in constitutions all around the world, it is arguable that the rule of law has become ‘one of the greatest unifying factors’ in a global legal landscape characterized by its diversity.

Here are some examples that highlight the large geographical scope of constitutional convergence towards an emphasis on the rule of law.

In the United Kingdom, the Rule of Law constitutes a key principle underpinning the unwritten Constitution. Hence, the rule of law has formally been recognized as a constitutional principle by the Constitutional Reform Act 2005. The Constitutional Reform Act 2005 also strengthened a central aspect of the rule of law, that is the separation of powers between the executive, legislative and judicial powers. In the same line, the House of Lords has stated that ‘the rule of law enforced by the courts is the ultimate controlling factor on which our Constitution is

98 Bingham, The Rule of Law, n. 63 above, at 174.
99 Constitutional Reform Act (UK), see n. 18 above.
100 Hilaire Barnett, Constitutional and Administrative Law, 8th edn (Routledge, 2011), p. 89.
The British Upper Chamber thereby reaffirmed the role of courts ‘in defining the limits of Parliament’s legislative sovereignty’. The Constitution of Canada recognizes in its Preamble that ‘Canada is founded upon principles that recognise the supremacy of God and the rule of law’. The Supreme Court of Canada reaffirmed accordingly that the rule of law is a ‘fundamental postulate’ of the constitutional structure that obliges the administration to make decisions according to the law and not according to the discretionary and potentially arbitrary power of its representatives.

The Basic Law for the Federal Republic of Germany makes three references to the rule of law. First, the rule of law should be respected for a German citizen to be extradited in the conditions set by the law (article 16(2)). Second, the Basic Law emphasizes the German contribution to the European Union (EU) that is an organization based on the rule of law (article 23(1)). Finally, the Basic Law refers to the rule of law as an organizing principle of decentralization when it emphasizes that:

The constitutional order in the Laender must conform to the principles of republican, democratic, and social government based on the rule of law, within the meaning of this Basic Law. (article 28(1))

In South Africa, the rule of law has played an important role in unifying the country and legitimizing the new constitutional regime in the post-Apartheid era. The principle is therefore mentioned in article 1 of the Constitution of the Republic of South Africa:

102 Ibid.
104 Roncarelli v. Duplessis [1959] SCR 121, Supreme Court of Canada, 27 January 1959, at 141, available at http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2751/index.doc (accessed 15 December 2017). The full quotation reads as follows: ‘in the presence of expanding administrative regulation of economic activities, such a step and its consequences are to be suffered by the victim without recourse or remedy, that an administration according to law is to be superseded by action dictated by and according to the arbitrary likes, dislikes and irrelevant purposes of public officers acting beyond their duty, would signal the beginning of disintegration of the rule of law as a fundamental postulate of our constitutional structure’.
105 Basic Law for the Federal Republic of Germany, see n. 32 above.
The Republic of South Africa is one, sovereign, democratic state founded on the following values ... : Supremacy of the constitution and the rule of law.106

To signify the major differences between the new and old constitutional orders, the Constitutional Court of South Africa has reaffirmed several times in its jurisprudence the importance of the rule of law along with the other ‘founding values’ included in the first article of the Constitution: ‘They inform the interpretation of the Constitution and other law, and set positive standards with which all law must comply in order to be valid’.107

The Supreme Court of India has recognized the rule of law as a ‘basic structure’ of the Indian Constitution and therefore presented the rule of law as a ‘terrestrial concept having its habitat within the four corners of the constitution’.108 As a ‘basic structure’ of the Indian Constitution, the rule of law principle cannot be altered nor abolished even through a constitutional amendment.109

The People’s Republic of China (PRC) added a reference to the rule of law in the midst of its opening up and reforms policy. A 1999 constitutional amendment (article 13) modified the substance of article 5 of the PRC Constitution.110 Article 5 of the PRC Constitution now reads as follows (see Chapter 3):


The People’s Republic of China governs the country according to law and makes it a socialist country under rule of law.111

1.5 RULE OF LAW AS A ‘BUZZWORD’: CONCEPTUAL WEAKNESS, LEGAL PLURALISM AND CULTURAL/REGIONAL RELATIVISM

Despite the rising consensus on the importance of the rule of law, numerous critiques have arisen on the actual relevance of the rule of law as a concept. The main critiques against the rule of law pertain to its conceptual weakness, the existence of non-legal and extra-legal rules to govern society, and the elusive character of the consensus engendered by the cultural/regional diversity of rule of law traditions. It will be argued that it is nonetheless the polyphonic nature of the concept that has enabled the emergence of a consensus on the importance of the rule of law and that helps appraise the existing diversity in rule of law traditions.

1.5.1 Conceptual Weakness

Critiques of the rule of law point out the conceptual weakness of the concept. In fact, the concept is now so widely used in both the legal and political arenas that it has become a kind of ‘buzzword’, sometimes used without a well-defined substance. The rule of law is presented as the primary solution to tackle many of the contemporary problems that range from poverty alleviation, the fight against corruption, terrorism, international crimes, international security, international migration and international security. While these discourses refer to the positive effects that the rule of law might have, they hardly provide handful elements that help explain what is actually meant by the rule of law. It is the lack of theoretical rigour in the use of the concept of the rule of law that has eventually led a part of the literature to question its overall relevance. The most critical assessment of the rule of law is probably the assessment of Judith Shklar:

It would not be very difficult to show that the phrase ‘the Rule of Law’ has become meaningless thanks to ideological abuse and general over-use. It may

well have become just another one of those self-congratulatory rhetorical
devices that grace the public utterances of Anglo-American politicians. No
intellectual effort need therefore be wasted on this bit of ruling-class
chatter.\textsuperscript{112}

1.5.2 Legal Pluralism

The critique on the rule of law is furthermore reinforced in a context
where the possibility to rule a state only on the basis of the law can be
seriously questioned.\textsuperscript{113} The example of states or communities character-
ized by a high degree of legal pluralism is particularly obvious in that
regard. Legal pluralism refers to the idea that the state does not hold a
monopoly on norm making: ‘there are plural sources of law, and it gives
these sources equal status’.\textsuperscript{114} More particularly, legal pluralism within
developing countries is very often characterized by a clear absence of a
consolidated legal system, the weak establishment of the legal system
when compared with para-legal sources of norms, and, finally, the
discrepancies between the society and the legal institutions that are very
often the product of (soft or imposed) legal transplants.\textsuperscript{115}

The coexistence of legal and para-legal rules can challenge the
promotion of the rule of law as a univocal source of social order and
justice and thus make the promotion of the rule of law more difficult.\textsuperscript{116}
In this respect, R.E. Brooks demonstrated that some recent attempts to
promote the rule of law have not proved very successful because they
failed to take sufficiently into account local norms and culture.\textsuperscript{117} At the
same time, legal pluralism and para-legal rules also have the ability to
strengthen some aspects of the rule of law and have therefore become
progressively part of development programmes. Community-based rules

\textsuperscript{112} Judith N. Shklar, ‘Political Theory and the Rule of Law’ in Allan C.
Hutcheson and Patrick Monahan (eds), The Rule of Law: Ideal or Ideology
Essentially Contested Concept’, n. 59 above, at 139.
\textsuperscript{113} Bertrand Mertz, L’Etat de Droit en Accusation: La Démocratie a-t-‘Elle
\textsuperscript{114} Laura Greenfell, Promoting the Rule of Law in Post-Conflict States
\textsuperscript{115} Brian Z. Tamanaha, ‘The Rule of Law and Legal Pluralism in Develop-
\textsuperscript{116} See e.g., Ronald Janse, ‘A Turn to Legal Pluralism in Rule of Law
\textsuperscript{117} Rosa Ehrenreich Brooks, ‘The New Imperialism: Violence, Norms and
can indeed strengthen the rule of law in areas where weak states and legal institutions can hardly deliver, for instance, in the field of disputes resolution.\footnote{Marc Hertogh, ‘Your Rule of Law is Not Mine: Rethinking Empirical Approaches to EU Rule of Law Promotion’ (2016) 14 Asia-Europe Journal 43, at 55–6.}

Legal pluralism is also present within states with a strong penetration of the private sector. In this respect, it is arguable that private standards have also developed as a major source of norms in various fields ranging from environmental sustainability, fair trade to consumers’ protection. Private standards refer to norms adopted by the private sector that function as important national or transnational regulatory instruments. Though they do not especially contradict with international or national laws and regulations – they should indeed often be seen as being interrelated – private standards have become an important new governance tool, more particularly within developing countries.\footnote{Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters, ‘Conclusion: Private Standards, A Global Governance Tool’ in Axel Marx, Miet Maertens, Johan Swinnen and Jan Wouters (eds), Private Standards and Global Governance: Economic, Legal and Political Perspectives, Leuven Global Governance Series (Edward Elgar, 2012), p. 304.} Private standards therefore contribute to a larger process of normative diversification in which law does not appear as the unique regulatory structure.\footnote{Nicolas Hachez, ‘What Elements of the Rule of Law Can be Put to Use at International Level’ (2013) 2 Belgian Review of International Law 307, at 318.}

1.5.3 Cultural/Regional Relativism

The elusive nature of the consensus on the rule of law becomes rapidly clear when one notes the absence of a common understanding of the concept. As argued by S. Chesterman, ‘the content of the term “rule of law” … remains contested across both time and geography’.\footnote{Simon Chesterman, ‘The International Rule of Law’ (2008) 56 American Journal of Comparative Law 331, at 340.} Political systems, along with legal culture and history, explain, to a large extent, the differences in understandings of the rule of law. In this respect, the difficulties to reconcile the so-called ‘Western’ (i.e. Western liberal democratic) understandings of the rule of law with other conceptions appears to be a major impediment to the emergence of a common/universal perspective on the rule of law:
For many Western states, where the process of government modernization started in the eighteenth century, this does not amount to a challenge to their identity. For some developing nations, however, that still found their internal stability, to a great extent, on ancestral patterns of life, the requirements that the rule of law and democracy establish can lead to a clash of values which it may be hard to overcome.\textsuperscript{122}

References to the rule of law within constitutions or Supreme Courts’ rulings all over the world do not signify that the same constitutions or Supreme Courts attach a similar meaning to the rule of law. Depending on the constitutional tradition, the actual influence of the rule of law, as a constitutional principle, will largely depend on the extent to which the principle is integrated in the structure of the constitution, its substance, and its implementation.\textsuperscript{123} The legal culture also influences the views as to the need to anchor the principle of the rule of law within a constitutional order.\textsuperscript{124} The idea that constitutionalism serves the purpose to specify the state power ‘by the advance imposition of rules’\textsuperscript{125} such as the rule of law indeed strongly diverges across time and geography.

Cultural/regional diversity regarding the rule of law is finally reinforced by the fact that the rule of law, in contrast to human rights, is not grounded in a universal declaration or international agreement that would set clear benchmarks on what the rule of law actually means. The adoption by consensus of the 2012 High Level Declaration on the Rule of Law at the National and International Levels\textsuperscript{126} potentially constitutes an important milestone in that regard. Nevertheless, the Declaration does not provide a well-detailed definition of what the rule of law actually means.

\subsection*{1.5.4 Conceptual Vagueness and the Rule of Law}

While the critiques on the rule of law should obviously not be neglected, they should still not preclude the relevance of the rule of law in an

\textsuperscript{124} \textit{Ibid.}
increasingly globalized international legal landscape. It is very much the contested nature of the rule of law that has enabled the emergence of a consensus on the importance of the rule of law. The rule of law as a principle has not been completely captured by one specific legal tradition or culture. It has very much developed as a home-grown concept across time and geography. The centrality of the rule of law therefore opens new avenues for transnational dialogue and cooperation between legal systems. In addition to corresponding to an ideal, that is not static but part of the dynamic development of legal systems, the rule of law can serve as a ‘benchmark’ to attest the progresses, setbacks, challenges and prospects of legal systems in various geographic and temporal contexts.127

In order to grasp the diversity of understandings on the rule of law, rule of law theories generally use classification tools to describe and explain the state of rule of law development within a given legal system. The reasoning is simple: the more a legal system complies with the identified core characteristics of the rule of law, the closer it is to a fully-fledged rule of law. In this process, the literature usually draws a distinction between ‘formal’ and ‘substantive’ versions of the rule of law, in other words, between ‘thin’ and ‘thick’ versions of the rule of law.128 This distinction will here not be approached from a static but rather from a dynamic point of view in a context where legal systems are constantly evolving. While not aiming to provide a final definition, approaching the rule of law as an ideal will help determine in fine ‘the nature of the specific legal precepts which can be derived from the rule of law’.129

1.6 ‘THIN’ AND ‘THICK’ RULE OF LAW

‘Thin’ rule of law is limited to a minimalist version of the rule of law and includes the basic conditions to have a legal system. The eight principles


of legality emphasized by Lon Fuller are often the fundamentals that are referred to. They include (1) a need for general rules: laws and regulations should be expressed in an abstract way and applicable to all; (2) publicity: laws and regulations should be accessible to the individuals/entities submitted to the law; (3) non-retroactivity: laws and regulations should only be applicable to situations occurring in the future and not to situations that arose in the past; (4) understandability: laws and regulations should be written in a way/language that can be understood by the individuals/entities submitted to them; (5) consistency: laws and regulations should not contradict each other and clear procedures for resolving conflicts of norms should be established; (6) the possibility for practical implementation: laws and regulations should not establish rights or obligations that cannot materialize because they are truly unrealistic; (7) stability: though changes and reforms are inherent to the daily life of any legal system, laws and regulations should not change too often to ensure foreseeability and legal certainty; and (8) good enforcement of the norms: laws and regulations should not only exist in the books but should also be applied in practice and submitted to administrative or judicial scrutiny.\textsuperscript{130}

Against the idea of ‘casual positivism’, Jeremy Waldron argues that the formal rule of law of Lon Fuller needs to be complemented by a procedural emphasis on the rule of law.\textsuperscript{131} The rule of law is not only about the existence of general rules, it is also about their operationalization in the activities of the judiciary, which should respect among others the principles of fairness and due process.\textsuperscript{132} The complementarity between formal and more procedural understandings of the rule of law does not rule out the intrinsic tension that remains between the need for certainty and the necessary flexibility when applying the law to the specificities of an individual case.\textsuperscript{133} With these two complementary views, the rule of law becomes directly linked to the political ideals of the separation of powers and independence of the judiciary. In fact, ‘no


\textsuperscript{132} \textit{Ibid.} 7–8.

conception of law will be adequate if it fails to accord a central role to institutions like courts, and to their distinctive procedures and practices’.  

It is noteworthy that the formal or procedural guarantees of a ‘thin’ rule of law do not preclude of the content and quality of the norms. Whatever the content of the law is, every citizen and the state itself are bound by the law, entitled to the protection of the law and able to use the remedies foreseen by the law. The paradigmatic scope but also the limitations of ‘thin’ theories are well-explained by Joseph Raz who argues:

A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecutions may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies. This does not mean that it will be better than those Western democracies. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.  

In contrast to the ‘thin’ theories of the rule of law, another part of the literature puts forward the idea of a ‘thick’, more substantive version of the rule of law. ‘Thick’ theories do not only look at formal and procedural characteristics but also at the letter of the law. While not focusing only on the institutions, they also relate to the outcomes, the goods that ‘the rule of law brings to society’. These goods can include, among other elements, human rights, democracy, stability, equality before the law and human dignity. The starting point of ‘thick’ theories is therefore the limitations in the scope of ‘thin’ theories, as well as the assumption that the rule of law can act as a vehicle leading to other public goods. The argument is that the lack of attention paid to the content of the law makes ‘thin’ theories of the rule of law inadequate to grasp all the dimensions of the rule of law and the ideal of justice related to it.

134  Ibid. 55.
The conceptual limitation of the formal rule of law was already indirectly pointed out by Aristotle who recognized that while ‘laws … should be authoritative … laws are necessarily poor or excellent and just or unjust in a manner similar to the regimes to which they belong’. This normative distinction demonstrates that the existence of a formal system of general, understandable, consistent, transparent, non-retroactive, well-implemented and enforced rules is not sufficient from the perspective of substantive rule of law. Jeremy Waldron therefore points out that ‘not every system of command and control that calls itself a legal system is a legal system’. David Dyzenhaus talks about ‘wicked legal systems’ to describe these legal systems that have become the instruments of political regimes whose nature simply dismisses the idea of the rule of law, for instance, in the case of South Africa under the Apartheid Government. His argument and extended case-study call for the inclusion of moral elements in the consideration and reflection upon legal systems. His support for a substantive version of the rule of law allocates, in addition, a particular role to judges who have to uphold a substantive version of the rule of law in order to highlight the characteristics of what is a government and a governance under the rule of law.

In contrast to a ‘thin’ understanding of the rule of law, ‘thick’ rule of law incorporates ‘elements of political morality’ that vary depending on the specificities of the legal, political and social structures of a state. In the West, the political morality of the ‘thick’ rule of law is closely connected to the foundations of liberal democracies: ‘it is a morally cherishable expression of commitments to the dignity and equality of individuals’. It tends furthermore to mirror the connections and interdependence between rule of law, democracy and human rights – the so-called ‘trinity’ formed by three interlinked and mutually reinforcing fundamentals of Western liberal democracies. According to this view, liberal democracies based on the rule of law and protective of human

137 Aristotle, Politics, n. 4 above, at 81.
The rule of law: origins, prospects and challenges

rights would have become ‘the sole legitimate form of socio-political organization and model to be promoted globally’. On the one hand, the enhancement of the rule of law is a necessary condition for the protection of human rights. The level of generality of human rights requires, in fact, the implementation and enforcement of good laws, in the sense of substantive rule of law. On the other hand, the rule of law and democracy appear as two intertwined and interdependent principles. In the view of the Statute of the Council of Europe, the rule of law, along with individual freedom and political liberty ‘form the basis of all genuine democracy’. In a democratic rule of law system, it is the society that defines its own values in agreement with the rules that regulate the political process. The rule of law furthermore offers transparency, publicity, as well as guarantees in terms of equality, which are all clear prerequisites to ensure the good functioning of the checks and balances mechanisms within the democratic state. This process should not be seen as an acquis but rather as a dynamic process:

The democratic rule of law needs to be permanently cultivated: and it is because of this permanent maintenance that the state must renew its legitimacy in a broadly supported understanding of the changing society.

‘Thick’ theories are nevertheless not exempt from criticisms either. First, they exclude the possibility of a universal understanding on the rule of law since they are linked to elements of ‘political morality’ that are debated and sometimes contested across cultures, social and political systems. For example, the definition of justice, the ultimate value that

145 Ibid. 264.
146 Statute of the Council of Europe signed in London on 5 May 1949, 87 UNTS 103, 1:1168, entered into force on 3 August 1949.
law should achieve, will vary across cultures, nations, states and development stages.\textsuperscript{149} In this line, the neo-leftist Peking University Professor Pan Wei negates the universal character and desirability of the Western liberal democracies-type of rule of law.\textsuperscript{150} He argues that the rule of law can exist without democracy\textsuperscript{151} and that China can ‘hardly be converted’ because it is ‘indifferent to “universal” political values’.\textsuperscript{152} In contrast, ‘thin’ theories would make the rule of law more agreeable across social, legal and political cultures.\textsuperscript{153}

Second, ‘thick’ theories are also facing populist discourses that present the rule of law as a threat to democracy. The way in which Silvio Berlusconi neglected a 2011 ruling of the Italian Constitutional Court is particularly emblematic in this regard. In this ruling, the Constitutional Court declared unconstitutional a law that proclaimed the Prime Minister’s ‘legitimate inability’ to appear before a court.\textsuperscript{154} Silvio Berlusconi disregarded this ruling and emphasized that the Court’s decision should be subordinated to the democratic will of the people:

Democracy in this fashion raises the \textit{vox populi} to the highest power, under which also stand the institutions and principles of a rule of law state.\textsuperscript{155}

The tension between the rule of law and democracy has become even more prominent in the context of rising populism, in which the ‘wisdom

\textsuperscript{149} Zhiyun Liu, ‘The Perspective of “Justice” of International Law in the Global Context’ (2011) 6 \textit{Frontiers of Law in China} 549, at 590.
\textsuperscript{150} China’s New-Leftism is a movement of intellectuals very active in the public debate that emerged in the 1990s. Their thoughts are nourished by strong criticisms against capitalism and Western liberal democracies that have, from their point of view, had too great an influence on China’s post-opening and reforms society. They reject the excess of capitalism, the idea of the universality of human rights, and promote a turn back or forwards towards the socialist model. Li He, ‘Chinese Intellectual Discourse on Democracy’ (2014) 19 \textit{Journal of Chinese Political Science} 289, at 304.
\textsuperscript{152} \textit{Ibid.} 43.
\textsuperscript{153} Tamanaha, \textit{On the Rule of Law}, n. 128 above, at 13.
\textsuperscript{155} \textit{Ibid.}
of the crowds’, as opposed to the special and often technocratic knowledge of ‘elites’, is being celebrated.\textsuperscript{156}

Third, ‘thick’ theories consider the rule of law too much as an enabling factor – the rule of law leading to human rights, democracy, human dignity, sustainable development, corruption-free society, etc. – and not enough as an individual concept with specificities of its own. This instrumental perspective on the rule of law might damage the core objectives of the rule of law and its promotion. ‘Thick’ theories make it difficult to operationalize the rule of law and assess its development on the basis of predetermined indicators. Substantive versions of the rule of law are harder to measure as their components might conflict with each other and imply measurement mistakes and broader conceptual confusion.\textsuperscript{157}

Informed by the devastating experiences of some states such as South Africa, ‘thick’ understandings of the rule of law have nevertheless become widespread and are deeply embedded in the conceptual framework of the United Nations and the International Commission of Jurists.

At the UN level, the definition provided in the report of Secretary General (UNSG) Kofi Annan on the *Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* in 2004 incorporates a ‘thick’ version of the rule of law and emphasizes that laws must comply with human rights in order to guarantee respect for the rule of law. It reads as follows:

\begin{quote}
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. It requires, as well, 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.\textsuperscript{158}
\end{quote}

Another well-known ‘thick’ definition of the rule of law is the one that was provided by the International Commission of Jurists in its Delhi

\textsuperscript{156} Jan-Werner Müller, *What is Populism?* (University of Pennsylvania Press, 2016).


Declaration back in 1959. The Declaration recognized the rule of law as an enabling factor not only of civil and political rights but also of people’s dignity:

Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed 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 realized.

159 The linkage between the rule of law and human dignity is further developed by David Luban who argues that violations of the rule of law challenge human dignity because they lead to ‘perpetual uncertainty and fearfulness because one’s fate lies in the hands of official whim, which can choose at will to stigmatize conduct as criminal’. David Luban, ‘The Rule of Law and Human Dignity: Re-examining Fuller’s Canons’ (2010) 2 Hague Journal on the Rule of Law 29, at 41.