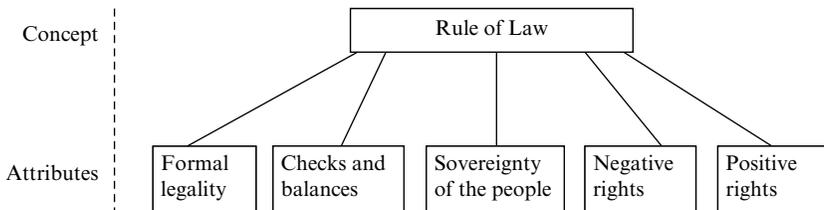

1. The advantages of a thin view

Jørgen Møller

The concept of the rule of law is notoriously difficult to pin down. As with democracy, it is an essentially contested concept. This means that no general consensus about how to define it is likely to be established and that *any* attempt to define it must consider a series of different attributes.¹ It is against this background that several recent works have attempted to capture the variation in rule of law definitions via the use of typologies.² These typologies serve to order different attributes, which have been associated with the rule of law in prior scholarship. For instance, as illustrated in Figure 1.1 below, Møller and Skaaning³ identify no less than five attributes of the overarching concept of the rule of law.⁴

Formal legality entails that laws are general, prospective, clear, certain, and consistently applied. *Checks and balances* can be understood in terms of what Guillermo O’Donnell⁵ terms ‘horizontal accountability’, i.e., an institutional system that sets power against



Note: Adapted from Møller and Skaaning, 2014, 21.

Figure 1.1 Attributes of the rule of law⁶

¹ Gallie, W. B. (1956). ‘Essentially Contested Concepts’. *Proceedings of the Aristotelian Society*, 56, 167–98; Waldron, J. (2002). ‘Is the Rule of Law an Essentially Contested Concept (in Florida)’. *Law and Philosophy*, 21, 137–64; Collier, D., F. D. Hidalgo and A. O. Maciuceanu (2006). ‘Essentially Contested Concepts: Debates and Applications’. *Journal of Political Ideologies*, 11(3), 211–46.

² E.g. Tamanaha, B. (2004). *On the Rule of Law: History, Politics, Theory*. Cambridge: Cambridge University Press; Møller, J. and S.-E. Skaaning (2014). *The Rule of Law: Definitions, Measures, Patterns, and Causes*. London: Palgrave Macmillan.

³ Møller and Skaaning, *ibid*.

⁴ This chapter draws on a number of points formulated by Møller and Skaaning, *ibid*.

⁵ O’Donnell, G. (2007). *Dissonances: Democratic Critiques of Democracy*. Notre Dame: University of Notre Dame Press.

⁶ Note that this overview does not contain the attribute that might be termed ‘order’, reflecting whether the citizens actually obey the rules. As I argue elsewhere (Møller and Skaaning, 2014), this reflects an outcome- or result-oriented dimension, which differs from both the procedural and substantive attributes identified in Figure 1.1.

power within the state, such as in the form of independence of the judiciary and penalties for political or administrative misconduct. *Sovereignty of the people* – or ‘consent’ as it is often simply termed – means that the laws are formulated via the democratic channel. *Negative rights* are the classical liberal rights such as freedom of expression and freedom of association, whereas *positive rights* are social or welfare rights.⁷

This mapping drives home a simple but important point. As with other essentially contested concepts, the rule of law is multidimensional and complex. Moreover, as Bedner (in Chapter 2) points out, there is likely to exist an inherent tension between some of the attributes that scholars identify as defining the rule of law.⁸ In fact, the notion that laws are to be a product of democratic ‘consent’ potentially conflicts with all other attributes. If the people are truly sovereign, making decisions via the democratic channel, the people can tamper with everything from formal legality over checks and balances to freedom rights (whether negative or positive). This is a core insight of Joseph A. Schumpeter’s⁹ renowned ‘realist’ theory of democracy, which I shall return to below. Numerous other potential trade-offs can be identified as well, for instance, Friedrich Hayek has forcefully argued that rights that seek to create social equality (‘positive rights’ in Figure 1.1) are difficult to reconcile with formal legality because they give discretionary power to the state institutions.

What are we, as researchers, to do in this situation? My point of departure in this chapter is two-fold: on the one hand, we must recognise the essentially contested nature of the rule of law; on the other hand, we still want to retain the possibility to do empirical research on rule of law developments, their causes, and their consequences. This presents us with a challenge, which is well reflected in the state of recent research on the rule of law. Empirical analysis of this subject has flourished in recent decades, but because of conceptual disagreements – and confusion – scholars have reached strikingly different conclusions regarding inter alia the causes of the rule of law.¹⁰

What follows is an attempt to suggest a way out of this mess. One possibility, further appraised in Bedner’s chapter, is to embrace complexity. In conceptual terms, this means acknowledging the multidimensional (or ‘thick’) nature of the rule of law, which can then be made an explicit part of the theorising of its causes and consequences.¹¹ A thick definition of the rule of law is one which includes substantive aspects of the rule of law, e.g., democratic consent or the social outcomes stipulated by ‘positive rights’ in Figure 1.1.

⁷ See Møller and Skaaning, 2014, 17–20.

⁸ See also Barro, R. (2003). ‘Dictatorship and the Rule of Law: rules and Military Power in Pinochet’s Chile’. In: Maravall, J. M. and A. Przeworski (eds) *Democracy and the Rule of Law*. Cambridge: Cambridge University Press; Ferejohn, J. and P. Pasquino (2003). ‘Rule of Democracy and Rule of Law.’ In: *ibid.*; Lauth, H.-J. and J. Sehring (2009). ‘Putting Deficient Rechtsstaat on the Agenda: Reflections on Diminished Subtypes.’ *Comparative Sociology*, 8(2), 165–201.

⁹ Schumpeter, J. A. (1974[1942]). *Capitalism, Socialism, and Democracy*. London: Unwin University Books.

¹⁰ See Haggard, S. and Tiede, L. (2013). ‘The Rule of Law in Post-Conflict Settings: The Empirical Record’. *International Studies Quarterly*, doi: 10.1111/isqu.12103; Møller and Skaaning, 2014.

¹¹ See Coppedge, M. (1999). ‘Thickening Thin Concepts and Theories’. *Comparative Politics*, 41(4), 465–76; Coppedge, M. (2012). *Democratization and Research Methods*. Cambridge: Cambridge University Press.

Empirically, a ‘thick’ approach to the rule of law entails finding ways of aggregating across different attributes.¹² This approach has several strengths: it allows us to appreciate that the rule of law is multidimensional to most of those who refer to it and it enables us to work with ‘thicker’ theories.¹³

However, there is another possibility; namely, to tease out specific properties contained in the overarching concept of the rule of law, conceptually as well as empirically. This can be done either by arguing that one particular attribute makes up the core of the rule of law (and is in this respect more important than others) or by interchangeably isolating and investigating different attributes. The former solution means opting for a ‘thin’ definition which focuses on the formal aspects of the laws, for instance, their character.¹⁴ As this chapter will show, this ‘thin’ approach has a number of merits with respect to theorising, measurement, and causal analysis. In fact, I shall argue that it represents a way of solving some of the disagreements that the essentially contested nature of the rule of law has given rise to.

THICK VERSUS THIN CONCEPTS: SOME GENERAL CONSIDERATIONS

It might seem overkill to devote two entire chapters to discuss the merits of thin versus thick definitions of the rule of law. Are we losing ourselves in the kind of academic exercises that so repulse laymen? Is this a contemporary equivalent of medieval scholasticism, famously dismissed with the notion that scholars debated how many angels could dance on the head of a pin?¹⁵

The answer to these objections are a resounding ‘no’. The question about definitions has priority because it determines everything that comes after it (again see Bedner).¹⁶ This is particularly important for empirical research; the prism through which I look at the definition of the rule of law in this chapter. In short, every conclusion about rule of law developments or the causes or consequences of the rule of law hinges on the definition of the concept.

Let us touch upon both these points, the first descriptive then the second explanatory, in turn. As Sartori¹⁷ once put it, ‘concept formation stands prior to quantification’. Before we can measure how, say, a country fares on the rule of law, we need to define the concept. Furthermore, depending on the definition, we are likely to reach strikingly

¹² See Munck, G and J. Verkuilen (2002). ‘Conceptualizing and Measuring Democracy: Evaluating Alternative Indices’. *Comparative Political Studies*, 35(1), 5–34; Coppedge, M. and J. Gerring, with D. Altman, M. Bernhard, S. Fish, A. Hicken, M. Kroenig, S. I. Lindberg, K. McMann, P. Paxton, H. A. Semetko, S.-E. Skaaning, J. Staton and J. Teorell (2011). ‘Defining and Measuring Democracy: A New Approach’. *Perspectives on Politic*, 9(2), 247–267.

¹³ Coppedge, 2012.

¹⁴ See Møller and Skaaning, 2014, Chapter 1.

¹⁵ There is no direct evidence that medieval scholasticism ever debated this particular question, but questions of the same ilk were treated as part of dialectical reasoning.

¹⁶ Sartori, G. (1970). ‘Concept Misformation in Comparative Politics’. *American Political Science Review*, 64(4), 1033–53.

¹⁷ Sartori, 1970, 1038.

different conclusions. This is exemplified by the Muslim-majority countries in the Middle East and Northern Africa (MENA). These countries score relatively high on some rule of law measures and relatively low on others. Upon inspection, it turns out that measures that privilege what might be termed ‘political constitutionalism’ award quite low scores to MENA-countries whereas measures that instead privilege ‘order’ tend to grant relatively high scores to these countries.¹⁸ The eye of the beholder simply determines what we see and what, in turn, is valued.

It follows that explanatory findings or inferences about the causes and/or consequences of the rule of law are fragile and susceptible to even subtle changes in the conceptualisation. It has been convincingly demonstrated that existing rule of law indices are not interchangeable in large-N statistical analysis.¹⁹ Depending on which index we use, we are likely to reach different conclusions about what occasions a positive rule of law development or what the consequences of the rule of law are for e.g. economic growth and human development.

Finally, it is worth noting that the very possibility of analysing whether certain factors are causes or consequences of the rule of law are affected by the definition. If the rule of law is conflated with e.g., democracy – by including ‘consent’/sovereignty of the people’ in rule of law definitions or the rule of law in democracy-definitions – then we cannot empirically probe whether there are causal relationships between the two phenomena.²⁰ In fact, in this case, these are not distinct phenomena, so it makes no sense to argue that one affects the other. As Bedner (Chapter 2) puts it, ‘[a]n analytical concept needs to be sufficiently circumscribed to denote a phenomenon that can be distinguished from other phenomena, even if the latter bear a close relation to it’.

The question of definition is thus significant and not something to be dismissed as an exercise in scholasticism. Conceptual choices have priority in empirical research, and we therefore need to face the essentially contested nature of the concept of the rule of law head-on. We can start by noting that scholars working on conceptualisation disagree vehemently about the general merits of thick versus thin concepts. Coppedge²¹ has forcefully defended the use of ‘thick’ concepts. His basic point is that such concepts are a precondition for the kind of ‘thick’ theorising that any mature science needs to engage in. Furthermore, Coppedge argues that ‘thickening thin concepts’ – and hence theories – is always a possibility, for instance by systematically aggregating across various sub-components based on analysis of e.g. dimensionality. Finally, if a concept can be measured as a latent variable, measurement error will decrease as more indicators are added to the analysis.

Mazucca, on the other hand, has defended the other option;²² namely, to go for ‘thin’ concepts, a strategy he refers to as ‘conceptual atomism’.²³ Mazucca argues that this is

¹⁸ Møller and Skaaning, 2014.

¹⁹ Møller, J. and S.-E. Skaaning (2011). *Requisites of Democracy: Conceptualization, Measurement, and Explanation*. London: Routledge; Møller and Skaaning, 2014.

²⁰ Mazucca, S. (2010a). ‘Access to Power versus Exercise of Power: Reconceptualizing the Quality of Democracy in Latin America’. *Studies in Comparative International Development*, 45, 334–57.

²¹ Coppedge, 1999; 2012.

²² Mazucca, 2010a.

²³ Personal correspondence.

necessary in order to, first, analyse whether different aspects of an overarching concept are affected in different ways by certain explanatory factors, and then second, whether different aspects of an overarching concept affect each other in causal terms. Mazucca exemplifies this with the concepts of the state, which he defines as pertaining to the exercise of power, and the concept of the regime, which he defines as relating to access to power. These are conceptually distinct phenomena, but they have often been lumped together in e.g., thick democracy definitions. In this case, it becomes impossible to analyse whether explanatory factors such as generalised geopolitical pressure facilitate state-building but not democratisation and whether, say, democratisation has positive or negative knock-on effects on state-building.

Elsewhere, Mazucca²⁴ has demonstrated that many seemingly competing findings about the causes of democracy come down to differences in the democracy definition.²⁵ For instance, whether the working class or the middle class emerges as the most important driver of democratisation depends on whether equal and universal suffrage is included as a defining attribute or not.²⁶ Other work has shown that thin concepts decrease the risk of making false historical analogies in comparative historical analysis;²⁷ the point here is that the danger of rendering unequal things equal (and hence erroneously controlling for them in historical comparisons) increases as we thicken the concepts.

Thus, we can return again to the underlying notion that the rule of law is an essentially contested concept. While we will probably never agree on a final definition of such a concept (the concept is open, as Gallie indicated) we might well agree on the thinnest core of the concept. That is, even if people disagree about the outer boundaries or about how far to go conceptually, they might agree about the genesis or starting point. This approach has helped scholars working on democracy strike at a minimum definition that is amenable to measurement. To get a better grasp of the merits of the ‘thin’ approach, we can turn to this literature for guidance.

THEORISING AND MEASURING DEMOCRACY: THE SCHUMPETERIAN SOLUTION

Scholars working on democracy and democratisation face the same conundrum as scholars working with the rule of law: how to deal with an essentially contested concept in empirical research?²⁸

However, whereas empirical research on the rule of law has only flourished in recent decades, similar research on the causes and consequences of democracy has a much more

²⁴ Mazucca, S. (2010b). ‘Macrofoundations of Regime Change: Democracy, State Formation, and Capitalist Development’. *Comparative Politics*, 43(1), 1–19.

²⁵ See also Møller, J. and S.-E. Skaaning (2013). *Democracy and Democratization in Comparative Perspective: Conceptions, Conjunctions, Causes, and Consequences*. London: Routledge, Ch. 8.

²⁶ Ibid.

²⁷ Møller, J. (2016). ‘Composite and Loose Concepts, Historical Analogies, and the Logic of Control in Comparative Historical Analysis’. *Sociological Methods and Research*, 45, 651–77.

²⁸ In fact, ‘democracy’ serves as the essentially contested concept *par excellence* for Gallie, 1956. See also Collier et al., 2006.

impressive pedigree.²⁹ One reason for this is probably that the conceptual question of how to define democracy in a way that is amenable to theorising and measurement was confronted a long time ago. In that sense, empirical work on democracy and democratisation is more mature than similar work on the rule of law.

The key intervention here was Schumpeter's *Capitalism, Socialism, and Democracy*.³⁰ In this book, Schumpeter rejects what he terms the 'classical doctrine' of democracy,³¹ which he construes as an arrangement that realises 'the common good' for the people. This classical notion is therefore very thick, but according to Schumpeter, it is also hopelessly vague and unrealistic. In its stead, he introduces a very thin definition of democracy: 'the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote'.³²

In a nutshell, Schumpeter argues that democracy simply 'means that the reins of government should be handed to those who command more support than do any of the competing individuals or teams'.³³ It follows from this that liberal rights, such as the freedoms of expression and association, are not defining attributes of democracy, and neither is equal and universal suffrage. On the contrary, Schumpeter³⁴ argues that the *demos* delimit itself, e.g., by disenfranchising women or lower classes, and that democracy does not guarantee liberal rights.³⁵

We need not go into the debate about whether Schumpeter misrepresents the classical notion to point out that, in the guise he presents it, the classical concept serves as an almost pure specimen of a 'thick', substantive definition. One of Schumpeter's objections is that democracy, in this sense, is not amenable to measurement. In his work on so-called 'polyarchy', Robert A. Dahl famously criticised the details of the Schumpeterian definition but accepted the notion of actually-existing democracy being what Schumpeter terms a *modus procedendi*; an institutional framework for gaining executive power via elections.³⁶ What Dahl did was, first, to add to the Schumpeterian conception the aforementioned liberal rights as a set of surrounding liberties necessary for genuine democratic competition and, second, to argue that equal and universal suffrage is necessary to appreciate the normative ideal of the sovereignty of the people.

Many scholars see Schumpeter's and Dahl's definitions as being too minimalist.³⁷ However, even these critics tend to agree that the attributes highlighted by Schumpeter

²⁹ See Møller and Skaaning, 2013.

³⁰ Schumpeter, 1974 (1942).

³¹ *Ibid.*, 250.

³² *Ibid.*, 269.

³³ *Ibid.*, 272–3.

³⁴ *Ibid.*, 243–5.

³⁵ *Ibid.*, 243, fn. 9. Schumpeter uses an example from the New Testament to make this point: 'In particular it is not true that democracy will always safeguard freedom of conscience better than autocracy. Witness the most famous of all trials. Pilate was from the standpoint of the Jews, certainly the representative of autocracy. Yet he tried to protect freedom. And he yielded to a democracy.'

³⁶ Dahl, R. A. (1971). *Polyarchy: Participation and Opposition*. New Haven: Yale University Press; Dahl, R. A. (1989). *Democracy and Its Critics*. New Haven: Yale University Press.

³⁷ See Held, D. (2006). *Models of Democracy*. Cambridge: Polity Press.

and Dahl form the core of the concept. In fact, it is largely meaningless to define democracy in a way that does not include the electoral attribute.³⁸ One way of thinking about this is by saying that contested elections make up the *condiciones sine quibus non* of democracy, that is, a set of defining properties necessary for the concept to make sense.³⁹ To anticipate a point made below, this is analogous to the role of ‘formal legality’ in the rule of law.

Schumpeter’s and Dahl’s conceptual contributions have provided a foundation for later empirical research on democratisation and democratic stability. For instance, in his hugely influential work on these subjects, Adam Przeworski enlists a Schumpeterian definition to make democracy amenable to measurement.⁴⁰ Przeworski sees democracy as institutionalised uncertainty defined by recurrent elections, which in turn are characterised by ‘*ex ante* uncertainty’, ‘*ex post* irreversibility’, and repeatability.⁴¹ Together with a group of collaborators, he has used this definition to reassess a number of influential theories of democratisation and democratic stability.⁴² Others have favoured the somewhat more demanding ‘Dahlian’ definition, which also proves amenable to empirical measurement and analysis.⁴³

Even if many scholars favour thicker definitions, they would at least agree that these empirical measures are tapping into the core of democracy, and therefore they would find the corresponding empirical results relevant for comprehending the processes of democratisation. What is more, many would accept that the best way of investigating whether democracy, as such, has certain causal effects is by isolating its electoral core empirically.⁴⁴ If we instead use thicker definitions, it becomes blurred as to what exactly it is about democracy that causes or follows from something else.

THE RULE OF LAW: GOING MINIMALIST

The rule of law research agenda is still awaiting its Schumpeter or its Dahl. I make no presumption of trying to fill this role. However, in the following, I will peruse existing writing on the rule of law and discuss whether we can identify a rule of law core equivalent to the electoral core of democracy identified by Schumpeter and elaborated by Dahl.

³⁸ Collier, D. and R. Adcock (1999). ‘Democracy and Dichotomies: A Pragmatic Approach to Choices about Concepts’. *Annual Review of Political Science* 2, 537–565, (559); Collier, D. and S. Levitsky (1996). *Democracy with Adjectives: Conceptual Innovation in Comparative Research*. The Helen Kellogg Institute for International Studies, University of Notre Dame, Working Paper 230.

³⁹ Møller and Skaaning, 2011.

⁴⁰ Przeworski, A. (1991). *Democracy and the Market: Political and Economic Reforms in Eastern Europe and Latin America*. Cambridge: Cambridge University Press, 14.

⁴¹ Alvarez, M., J. A. Cheibub, F. Limongi and A. Przeworski (1996). ‘Classifying Political Regimes’. *Studies in Comparative International Development*, 31(2), 529–46, (50–51).

⁴² Przeworski, A., M. E. Alvarez, J. A. Cheibub and F. Limongi (2000). *Democracy and Development: Political Institutions and Well-Being in the World, 1950–1990*. Cambridge: Cambridge University Press; see also Svobik, M. (2012). *The Politics of Authoritarian Rule*. New York: Cambridge University Press; Boix, C., M. K. Miller and S. Rosato (2013). ‘A Complete Dataset of Political Regimes, 1800–2007’. *Comparative Political Studies*.

⁴³ Bernhard, M., T. Nordstrom and C. Reenock (2001). ‘Economic Performance, Institutional Intermediation, and Democratic Survival’. *Journal of Politics*, 63(3), 775–803.

⁴⁴ Carbone, G. (2009). ‘The Consequences of Democratization’. *Journal of Democracy*, 20(2), 123–37, (126).

Table 1.1 *Principles of the rule of law of Fuller and Finnis*

Fuller	Finnis
<ul style="list-style-type: none"> ● Generality of law ● Promulgation ● No retroactive laws ● Clarity of laws ● No contradictions in the laws ● Laws do not require the impossible ● Relative constancy of laws through time ● Congruence between official action and declared rule 	<ul style="list-style-type: none"> ● Rules are prospective ● Rules are possible to comply with ● Rules are promulgated ● Rules are clear ● Rules are coherent with one another ● Rules are sufficiently stable ● The making of decrees is limited ● Officials are responsible and accountable for compliance with the rules

Note: Adapted from Møller and Skaaning (2014, 15).

As good a place as any to start is with Raz's⁴⁵ well-known assertion that the rule of law 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kinds or respect for persons or for the dignity of man'. This of course speaks in favour of a thin definition that isolates the core of the rule of law. What then does Raz mean by the rule of law? Basically, he construes it as a combination of what in Figure 1.1 is termed 'formal legality' and some aspects that pertain to what in Figure 1.1 is termed 'checks and balances'. More particularly, Raz identifies the following principles of the rule of law:⁴⁶

- laws are prospective, open, and clear
- laws are relatively stable
- open, stable, clear, and general rules guide the making of laws
- independence of the judiciary must be guaranteed
- principles of natural justice must be observed
- courts have review powers over the implementation of the other principles
- courts are easily accessible
- the discretion of the crime-preventing agencies is not allowed to pervert the law.

These principles are not far from those listed in two other classical treatments; namely, those of Fuller⁴⁷ and Finnis,⁴⁸ respectively. As illustrated in Table 1.1 above, these largely concern 'formal legality'.

Hayek⁴⁹ too, in his influential work on the rule of law emphasises these very attributes. Formal legality rests on the maxim that '*ought implies can*'.⁵⁰ The notion of the rule of

⁴⁵ Raz, J. (1979). *The Authority of Law: Essays on Law and Morality*. Oxford: Clarendon Press, 211.

⁴⁶ See Møller and Skaaning, 2014, 15.

⁴⁷ Fuller, L. L. (1969). *The Morality of Law*. New Haven: Yale University Press, 39.

⁴⁸ Finnis, J. (1980). *Natural Law and Natural Rights*. Oxford: Clarendon Press, 170–71.

⁴⁹ Hayek, F. A. v. (1960). *The Constitution of Liberty*. London: Routledge; Hayek, F. A. v. (1973). *Law, Legislation, and Liberty. Vol. 1*. Chicago: University of Chicago Press.

⁵⁰ HiiL (2007). 'Rule of Law: Inventory Report', http://www.HiiL.org/uploads/File/1-947-Rule_of_Law_Inventory_Report_2007.pdf

law is premised on the normative position that subjects ought to obey the law, but this, in turn, entails that it is possible for them to do so. The principles listed in Table 1.1 can be seen as a way of accomplishing this.

If we were to identify a core of the rule of law, the criteria pertaining to formal legality would clearly be the place to start. This approach to the rule of law would also fit well with the term, which does not in itself indicate that laws should have any particular substance; as Raz once observed, it is not called the ‘rule of *good* law’.⁵¹ The ‘formal legality’ criteria by definition presuppose an even thinner conception; namely, rule by law (power is exercised via law). Furthermore, as Bedner (in Chapter 2) shows, they also entail that state action is subject to law; otherwise ‘formal legality’ is by definition undermined.⁵² On top of this, the criteria describe the characteristics of laws, i.e., that they are general, public, prospective, certain, and consistently applied. Finally, most would argue that the properties general and consistently applied mean that formal legality include equality before and under the law.

Most scholars would probably be ready to accept that these characteristics make up necessary defining properties of the rule of law. This once again shows that even essentially contested concepts might not be contested if we only seek to identify their core. Waldron⁵³ lends support to this point when observing that while there is considerable dispute over the institutional or political arrangements that the rule of law requires, there is a relative consensus over its basic juridical requirements – namely, the aforementioned criteria pertaining to formal legality.⁵⁴ This is illustrated in Figure 1.2 below where formal legality is a part of an inner uncontested core of the rule of law with a contested outer circle comprising the politico-institutional requirements of the rule of law. The point is that the vehement debates about the rule of law do not concern the conception of formal justice but the characteristics of the legal system that is to apply it and the political system that is to realise and guarantee it.

Considering that formal legality is the core attribute of the rule of law and that nearly everyone accepts it as a defining attribute, it is all the more paradoxical that there are

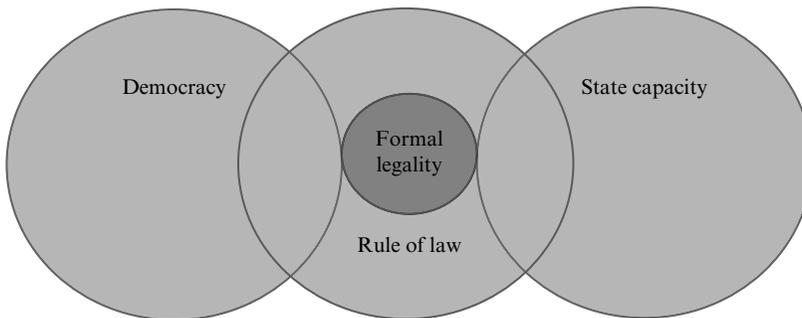


Figure 1.2 Formal legality, the rule of law, and overlaps with neighbouring concepts

⁵¹ Raz, 1979, 211. My emphasis.

⁵² See also Raz, 1979, 212.

⁵³ Waldron, 2002.

⁵⁴ Collier et al., 2006, 228–230.

virtually no large-N indices that measure it. In fact, only with The World Justice Project's recently published 'Rule of Law Index' do we have a measure that covers formal legality.⁵⁵ The equivalent would be that the most influential democracy measures did not tap into the Schumpeterian core of electoral competition for power. This situation underscores that empirical research on the rule of law is still rather immature compared with the neighbouring literature on democratisation and democratic stability.

Besides capturing the core of what legal scholars mean by the rule of law, there are several additional advantages in focusing on formal legality. In doing so, the rule of law becomes something analytically separate from a series of neighbouring concepts, including state capacity, checks and balances, freedom rights, and democracy. In other words, it is possible to investigate empirically whether explanatory factors (say, the level of socio-economic modernisation or a Muslim majority) affect formal legality in different ways than they affect these neighbouring concepts. Furthermore, we are well placed to investigate causal interrelationships between, among other things, formal legality and democracy.

Finally, by isolating formal legality, we can probe whether the rule of law has consequences for economic growth or human development independently of, say, democracy or state capacity. This will arguably tell us more than an empirical analysis showing that the rule of law in a more general, and thus indistinct sense, has such corollaries. This is illustrated in Figure 1.2.

Much therefore speaks in favour of a thin definition of the rule of law as formal legality – at least if the purpose is to do empirical research. However, there are some important objections. These turn upon the notion that the normative foundation of the rule of law is to avoid arbitrary exercise of power and hence to safeguard liberty. For instance, Benjamin Constant objected to Montesquieu's argument that liberty is to be able to do what is legal⁵⁶ by pointing out that such 'legal liberty' matters little if the laws are despotic.⁵⁷ Caldwell⁵⁸ similarly notes that 'the characteristics that Hayek required law to possess (e.g., that they should be abstract, universal, prospective, and consistently enforced) are, because they focus on the form rather than the substance of restrictions, not sufficient to guarantee that personal liberty is preserved'.

Here we can start by responding that formal legality actually places some important limitations on the exercise of power, hence tempering arbitrariness and favouring liberty. For instance, it does so by foreclosing the kind of retrospective laws that make the future consequences of one's actions unpredictable and by making sure that subjects can reasonably know when they break the law (because it is made public). Even more important is the criteria that laws are general and consistently applied. These criteria serve to avoid the historically extremely frequent abuse of power so well captured by a famous statement

⁵⁵ See Møller and Skaaning, 2014, Ch. 1. The new Varieties of Democracy-project also includes one indicator that taps into aspects pertaining to formal legality.

⁵⁶ Montesquieu, 1989 (1748), 155, puts it as follows: 'Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power.'

⁵⁷ Tamanaha, 2004, 37.

⁵⁸ Caldwell, B. (2004). *Hayek's Challenge. An Intellectual Biography*. Chicago and London: The University of Chicago Press, 347.

attributed to Peruvian President Oscar Benavides (1876–1945): ‘For my friends, anything. For my enemies, the law.’ As Bedner (in Chapter 2) describes, this was the reason E. P. Thompson could end up endorsing a legal system that, in his belief, was clearly skewed in the favour of elites. Simply because repression or even exploitation had to take legal forms in the English system that Thompson discussed, it inherently limited the exercise of power and hence exploitation.⁵⁹

However, even if direct arbitrariness is avoided, the objection that formal legality does not guarantee liberty cannot simply be left at the wayside. Laws could still be repressive in a way that would make a mockery of the normative ideal of the rule of law, however conceived. Adapting Martin Krygier’s terms, while formal legality mitigates the arbitrariness that follows from *unruly* power, it does not mitigate the arbitrariness that follows from *unlimited* power.⁶⁰ Furthermore, countries increasingly implement formal legality as a kind of façade, below which we find ineffective and/or repressive legal systems. This problem is avoided if we instead see the core of the rule of law as constitutionalism. Sartori defines this concept as follows:

[t]he constitutional solution adopts rule by legislators, but with two limitations: one concerning the method of law-making, which is checked by a severe iter legis; and one concerning the range of law making, which is restricted by a higher law and thereby prevented from tampering with fundamental rights affecting the liberty of the citizen.⁶¹

Reaching back to Figure 1.1, the concept of constitutionalism therefore includes the two attributes termed ‘checks and balances’ and ‘negative rights’. We can also frame this in terms of the supremacy of law, or in other words that law transcends politics.⁶² This would be an alternative rendering, based on the rule of law being something that explicitly constrains the exercise of power, not only in form but also in substance. Meanwhile, it would still make the rule of law analytically distinct from neighbouring concepts such as democracy and state capacity. In fact, as mentioned earlier, there would be some tension with democracy as constitutionalism qualifies and diminishes the sovereignty of the people.

A simple empirical example serves to illustrate the difference between the two conceptions of the rule of law. Singapore, which is an autocracy, would probably score high on formal legality (as the exercise of power is predictable) but much lower on constitutionalism (as power is not constrained).⁶³ This example also drives home an important point, which follows from the attempt to distinguish between rule of law and neighbouring concepts: formal legality can co-exist with political systems that are illiberal, authoritarian, and/or undemocratic in nature.

⁵⁹ See also Krygier, M. (2016). ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’. *Annual Review of Law and Social Science*, 12, 209–10.

⁶⁰ Krygier, 2016, 203–4.

⁶¹ Sartori, G. (1987). *The Theory of Democracy Revisited*. Chatham: Chatham House, 308. See also Holmes, S. (1995). *Passion and Constraint: On the Theory of Liberal Democracy*. Chicago: University of Chicago Press.

⁶² Berman, H.J. (1983). *Law and Revolution: The Formation of the Western Legal Tradition*. Cambridge: Harvard University Press, 9.

⁶³ Krygier, 2016, 211. But see also Møller and Skaaning 2014, Ch. 7 who show that Singapore scores higher than expected on several rule of law components.

However, using constitutionalism as the key to be understanding the concept of the rule of law is difficult for a particular reason: it is premised on isolating aspects of the broader institutional arrangements that guarantee the judicial principles pertaining to formal legality. As already pointed out, these institutional or even political requirements are much more contested in the literature, meaning that it will probably be much more difficult to get scholars to find a specific definition of constitutionalism that can gain acceptance as a core meaning of the rule of law.

The final possibility would be to abandon the notion that we can identify one specific core of the concept and simply recognise its multifaceted nature by disaggregating it in empirical research. This strategy entails interchangeably isolating the different attributes included in Figure 1.1 above – and possibly including ‘order’ (whether people obey the laws) as an additional attribute (see fn. 5 above). Empirically, this would entail identifying measures for formal legality, checks and balances, consent, negative rights, and positive rights (and, if one wishes, order). This would enable scholars to investigate whether these aspects of the overarching concept are affected in different ways by key explanatory factors and whether they affect each other. Likewise, it might be possible to identify sequences or syndromes by which countries progress in the direction of the rule of law or how they diverge from the same. That is, scholars will be in a favourable position to probe whether some attributes go together empirically and which are first affected if a country experiences a negative rule of law development.

This strategy has become more realistic as a number of rule of law indices have been published in the latest years.⁶⁴ Furthermore, the Varieties of Democracy-project (V-Dem) has recently published hundreds of disaggregated indicators, many of which can be used to get at the attributes listed in Figure 1.1.⁶⁵

CONCLUSIONS

The aim of this chapter has been to couch an argument in favour of thin definitions of the rule of law within some more general considerations about the trade-offs between thick and thin concepts. This is probably the place to restate a caveat alluded to in the Introduction: the choice of definition is not something that can be settled in a final way when working with an essentially contested concept such as the rule of law. Rather, it depends on the purpose of the specific investigation (see also Bedner in Chapter 2).

The vantage point of this chapter has very much been one that focuses on the possibility to identify the causal drivers of the rule of law, its potential consequences, and the way different attributes of the overarching concept affect each other. This way of approaching the rule of law almost automatically gives a competitive edge to thin definitions that make the rule of law analytically distinct from neighbouring concepts and amenable to measurement. Most obviously, it speaks in favour of separating the rule of law from democracy and state capacity, two phenomena that might plausibly be corollaries to, or causes of, the rule of law. The advantages of this strategy can be demonstrated by glancing at the

⁶⁴ See Møller and Skaaning, 2014, Ch. 3.

⁶⁵ See Coppedge and Gerring et al., 2011.

neighbouring democratisation literature – or, more particularly, the way scholars working within this field have dealt with the definition of democracy. Recent research on democratisation, democratic stability, and the consequences of both has benefited hugely from the prior conceptual work of Schumpeter and Dahl. These seminal contributions have provided an anchor for later empirical work, even though democracy is also an essentially contested concept. They have done so by isolating the electoral core of democracy – a strategy that has enabled scholars to analyse causal relationships.

Is it possible to do something similar with the rule of law? In this chapter, I have argued that if we are to identify a clear core, formal legality would be it. This is clearly the best way to isolate the core of the rule of law and thus to investigate whether this core affects developments in a different way than neighbouring phenomena such as democracy. Not only is the concept of formal legality distinct from virtually everything else of interest to rule of law scholars, it also has the merits that (if the criteria pertaining to formal legality are in fact observed) it serves as a way of avoiding some of the arbitrariness that is clearly the antithesis to the rule of law, however understood. In fact, I went quite some way towards arguing that formal legality limits the exercise of power more than is often recognised. Finally, as it pertains to basic judicial requirements it is a relatively uncontested part of the otherwise essentially contested concept of the rule of law.

With that said, one might still object that formal legality can co-exist with very oppressive laws – something that is also often seen as inimical to the rule of law. Based on this, one might instead favour a (less thin) definition premised on constitutionalism, thereby entering the murky waters of the politico-institutional requirements of the rule of law. Finally, one might throw one's arms in the air, give up the search for a particular core, and instead embrace disaggregation. A number of new datasets makes this a realistic approach. However, this approach is clearly less satisfying than one that succeeds in creating some consensus about the thin core of the rule of law while still recognising that the essentially contested nature of this concept means that there will never be an agreement about how far to go in thickening the concept.