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# The Rule of Law in Europe

## *- A Substantive Approach to Judicial Review*

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## **Abstract**

The rule of law is a concept that carries great rhetorical significance. As one of those rare principles whose virtue is universally accepted, it is generally understood that legal systems ought to aspire to it. The rule of law could be described as the organizing principle of governance, compelling states to be governed by means of laws, as opposed to arbitrary commands of the sovereign. Exactly how this is to be achieved however is far more controversial.

Most scholars contrast a formal conception of the rule of law with a substantive one. The basic distinction between the two can be summarized into an inquiry as to whether the rule of law should mean the rule of any laws capable of *guiding behaviour*, or the rule of *good* laws. It has therefore become a recurring theme to address the ideal relationship between the legislative and the judicial branches of government.

Most theorists have traditionally subscribed to a formal conception. This thesis will argue (i) that the Court of Justice in the European Union and the European Court of Human Rights have adopted a substantive approach, and (ii) that a substantive approach is more desirable.

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## Abbreviations

CJEU	Court of Justice of the European Union
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
EU	European Union
EUCFR	Charter of Fundamental Rights of the European Union 2010 O.J. C 83/02
TEU	Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47.
TFEU	Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13.

# 1. Introduction

## 1.1 Problem

The European Commission has called for an improved sanction mechanism to safeguard fundamental values enshrined in Article 2 of Treaty of the European Union (hereinafter TEU),<sup>1</sup> with particular emphasis on the respect for the rule of law. In its communication,<sup>2</sup> the Commission seeks to establish a new and more efficient mechanism pursuant to Art. 7 TEU, in order to sanction the existence or a clear, serious and persistent breach to the values of listed Art. 2.<sup>3</sup> The European Commission has offered a definition for what the concept is supposed to embrace,<sup>4</sup> but it remains abstract and general still.

The Rule of Law Framework alludes to case law from both the Court of Justice of the European Union (hereinafter CJEU), and the European Court of Human Rights (hereinafter ECtHR). The meaning of the rule of law may differ between the two institutions, as well as vertically in relation between the European Union (hereinafter EU) and its member states. Different legal traditions display different conceptions, non-withstanding the different competing views that may exist internally within each tradition.

## 1.2 Research Objective and Inquiries

The purpose of this thesis is to analyse the concept of the rule of law from a theoretical perspective. Contrary to positivism, this thesis submits that legitimacy for legislative authority is primarily to be found in political philosophy, which in turn rests upon a liberal theory of ethics. It will argue that a legal system that does not attach value to a conception of the good, is an inadequate one, and seek to demonstrate that human rights and democratic values are not merely intimately linked to the rule of law, but also inherent in it as a political ideal.

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<sup>1</sup> Consolidated version of the Treaty on European Union, OJ C 326, 26.10.2012, p. 13.

<sup>2</sup> Communication from the Commission to the European Parliament and the Council: A new EU Framework to strengthen the Rule of Law COM (2014) 158/2 final [hereinafter Rule of Law Framework].

<sup>3</sup> The Commission acknowledges that its member states often dispose of adequate mechanisms in their own constitutions to prevent these violations, but they may not always suffice.

<sup>4</sup> Rule of Law Framework p. 4.

This thesis further asserts that a strictly formal conception is ill suited for the structures currently in place. This statement will be supported by reference to case law from the CJEU and the ECtHR, revealing that their conceptions are becoming increasingly substantive.

The object of this thesis was inspired by recent inquiries made by the European Commission. Nevertheless, this thesis does not offer a definitive or complete answer to how the rule of law should be interpreted for the purposes of Arts. 2 and 7. Indeed, the latter article is to be invoked *in casu*, and because of its current arrangement, the rationale for which it is invoked may include political aspects. This thesis seeks only to propose the hypothesis that a strictly formal conception of the rule of law has been abandoned by the CJEU and the ECtHR.

The distinction between formal and substantive rule of law, put differently, can be recapped by one question: is the purpose of the ideal legal system to serve people, or is it to serve governance?<sup>5</sup> The answer to this question contains two elements; one normative and one descriptive. The normative element is concerned with *why* the concept of the rule of law should be defined as substantive, and the descriptive, seeks to establish *how* a substantive definition prevails in the eyes of the above-mentioned courts.

On the question of why, this inquiry will attempt to create a bridge between notions of legitimate governance in political theory and the role of legal systems. This will require a brief clarification on the possible nexus between law and morality, the relationship between law and governing authority and what can be defined as valid laws. Chapter 2 will be important for this purpose, as it clarifies the symbiosis between political philosophy and the rule of law.

As to the question of how, the inquiry will concentrate its attention on the relationship between the legislative/executive and judicial branches of government, the role of judicial review, and the extent that human rights and other substantive standards of justice have to be administered by courts.

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<sup>5</sup> By this I mean, is the purpose of the rule of law to simply provide tools for efficient governance or is the rule of law also meant to enhance and protect the welfare of those governed by it.



### 1.3 Delimitations

This thesis is primarily of a jurisprudential nature. Therefore, it does not purport to give an exhaustive rendition of *lex lata*. The concept of the rule of law is vague, and the material that could be incorporated to this subject is potentially infinite. Thus, the content is carefully selected so as to give a coherent narrative that will allow its readers to arrive at, or dismiss, the hypothesis posited above. As regards European Union law (hereinafter Union law), there are few cases to choose from. Some cases have nevertheless been excluded, where I have found the reference to the rule of law to be of little or no relevance in the outcome of the case. In terms of case law from the ECtHR, the opposite is true, as reference to the concept of the rule of law is abundant. The selection has therefore been made to provide a general overview, while some cases are analysed in depth in chapter 4.2.2, as support for the above-stated hypothesis.

There are three mechanisms for the promotion of the rule of law at the EU's disposal. The first is internal, where it falls within the CJEU's jurisdiction and the mechanisms set forth in Art. 7 TEU. The second is external, through the process of enlargement subject to the Copenhagen criteria, and the last is through the promotion by means of the EU's external policies. The concept of the rule of law in these three areas should in theory be fairly homogenous, albeit not necessarily identical, as the mechanisms in place are different, and the considerations in the latter two may include political aspects. It must be emphasized that, insofar as the EU is concerned, this thesis will attend to the rule of law as it is appears *in* Union Law, that is, its usage internally.

Substance is also a keyword in this respect, as the aim of this thesis is to define what the rule of law means, not how it should be enforced. It is worth reiterating that this thesis will not be concerned with the procedural aspects of Art. 7, and what results in practice the Commission Rule of Law Framework is intended to yield, but rather, it will venture to provide a foundation for when the rule of law concept can be invoked. For the purposes of describing the current practices by the CJEU and the ECtHR, this thesis will by and large limit its attention to aspects of judicial review.

A complete description of the concept of the rule of law from the perspective of the CJEU and ECtHR would, in my view, require an analysis of the rule of law in terms of its *discourse* (a description of the term as referenced by the courts), and an analysis of how the *concept* itself has been adopted (how the theory is reflected in the legal system as such and how the system itself complies with this ideal). Given the above-mentioned hypothesis, the subject matter of this thesis will tend heavily towards aspects of discourse, but for illustrative purposes, a brief overview of how the concept is reflected in the legal system of the EU will be offered as well. However, an accurate assessment of how these courts succeed or fail to satisfy these standards<sup>6</sup> will be overlooked, as it would require a considerably larger engagement than that which is sanctioned by this thesis.

#### 1.4 Method and Structure

It is difficult to assign any conventional method to this thesis, as it draws from theories of political philosophy and jurisprudence. This thesis will not confine itself to a legal dogmatic method; at least as regards chapter 2 and 3, no authority shall be attached to a hierarchy of norms, nor shall any distinction be made between research material stemming from positive and natural law. At the outset, it is worth mentioning that this thesis is built on the premise that modern western democracies are founded upon a *contractarian* political theory (as opposed to a communitarian one), which will be discussed in chapter 2.4. Chapter 2 is dedicated to examining the nature of laws and its role in the domain of political theory, which is important for the design of a narrative that seeks to justify a substantive approach to the rule of law. This chapter will also exhibit comparative elements, borrowing both concrete examples as well as theoretical abstractions from American, French, German and English traditions. Chapter 3 will proceed to clarify the different theoretical definitions of the rule of law, what they mean, and the reasons for why certain definitions are advanced or criticized. Finally chapter 4 will rely on the case law of the CJEU and ECtHR, subject to a traditional legal dogmatic method, to illustrate that a substantive conception of the rule of law has prevailed in the eyes of the

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<sup>6</sup> For example, the margin of appreciation doctrine developed by the ECtHR is has been subject of criticism from a rule of law standpoint.

CJEU and ECtHR. This thesis will furthermore entertain an analytical approach throughout the entire script, especially in chapter 3, which is partly argumentative.

## 2. Framework

### 2.1 Introduction

*The of rule law* - the principle that nations should be governed by laws - is considered to be a fundamental institution in liberal democracies.<sup>7</sup> The concept emerged from the power struggles between sovereigns and their subjects. It stands in contrast to the notion of *rule of man* – the unconstrained and arbitrary rule of those who wield power – and *rule by law* – where the law ceases to be a mechanism that restricts power, but instead becomes an instrument for repressive governance.<sup>8</sup>

Accordingly, its purpose is to restrain state authority, by requiring governments to rule by means of valid laws. It seeks to ensure that no one is placed above or outside the law, that government rules properly as opposed to arbitrarily, and that state's doesn't distort or abuse its relationship with its citizens.

As a fundamental principle in modern democracies, the rule of law is assumed to be a universal good.<sup>9</sup> Although initially touted as a concept within nation states, it has become an inherent component in international legal orders as well. The term has been codified in a multitude of international legal sources, since its first inclusion in the Universal Declaration of Human Rights<sup>10</sup> and the Statute of the Council of Europe,<sup>11</sup> and is now also embedded in the preamble of the Charter of the United Nations. It has been embraced by the EU, enumerated as one of its fundamental principles in Art. 2 TEU, upon which the EU it is founded, and the preamble to Charter of Fundamental Rights of the European Union (hereinafter EUCFR).<sup>12</sup> It is also a precondition for accession

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<sup>7</sup> Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, Southern California Law Review, Vol. 74, (2001). p. 1307.

<sup>8</sup> B. Tamanaha, *On the Rule of law: History, Politics, Theory*. (Cambridge University Press, 2004) p. 92.

<sup>9</sup> J.H.H Weiler, *The Rule of Law as a Constitutional Principle of the European Union*, (Jean Monnet Working Paper 04, 2009) p. 4.

<sup>10</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR).

<sup>11</sup> Statute of the Council of Europe (adopted 5 May 1949, entered into force 3 August 1949) CETS 001.

<sup>12</sup> Charter of Fundamental Rights of the European Union 2010 O.J. C 83/02, para. 2. [hereinafter EUCFR].

pursuant to Art. 49 TEU. The Council of Europe also acknowledges it as one of its three pillars,<sup>13</sup> and the term is to be found in Art. 3 of the ECHR.<sup>14</sup> NGOs and nations alike invoke the rule of law as a means to promote democratic values, human rights, economic prosperity and stability in developing countries.<sup>15</sup>

Yet the term remains elusive,<sup>16</sup> and, perhaps by its very nature, contested. Although the 20<sup>th</sup> century has witnessed the convergence of many western legal systems,<sup>17</sup> these traditions still vary in some essential elements due to cultural, social, political and historical aspects. Absent an overall consensus among nations with regards to its meaning, applying a singular, uniform definition appears to be unfeasible. Nevertheless, if we are deprived of a definition, the concept risks becoming devoid of meaning altogether; an empty rhetorical instrument that can be seized and exploited to justify any agenda. Fortunately, scholars appear to agree on, at the very least, the minimum standards, or rather the overarching architecture, of what the rule of law entails. The existence of a duty to respect the rule of law, does not however guarantee adherence to it.

In practice, the concept has become a standard for good governance. A high “ratio” of rule of law is, in this context, associated with confidence in legal institutions, *inter alia*, that contracts will be enforced, public trust in the court system and law enforcement.<sup>18</sup> The concept also bears an intimate relationship with the institution of human rights, and is emphasized by, as mentioned previously, the UN and the CoE. It is also considered fundamental for economic development, touted to be an indispensable element in capitalist societies. In this regard, the research on the concept of the rule of law has

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<sup>13</sup> Rule of Law Framework p. 3.

<sup>14</sup> Council of Europe, European Convention of the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS5, (entered into force 3 September 1953) [ECHR] preamble para. 6.

<sup>15</sup> See in this regard World Justice Project.2015. The World Justice Project. [ONLINE] Available at: <http://worldjusticeproject.org>. [Accessed 27 April 15].

<sup>16</sup> B. Tamanaha, p. 3.

<sup>17</sup> due to inter alia liberal ideology, democracy and human rights, globalization, international trade and the rise of supra/transnational legal bodies,

<sup>18</sup> Daniel Kaufmann, Aart Kraay, Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996-2006*, World Bank Policy Research Working Paper 4280, July 2007. p. 4.

witnessed an increased importance throughout the last half-century as an instrument used to combat poverty and corruption.<sup>19</sup> Its success rate remains modest still, as the understanding of the idiosyncrasies of recipient countries and their compatibility with western legal systems is still in its infancy. Conversely, there is no uniform or shared understanding as to what the ideal meaning of rule of law should be. Like abstract concepts such as liberty and equality, theories of the ideal categorization of the rule law appear to be destined to remain a perpetual conversation.

The discord between theorists as to which definition should prevail could be unevenly divided into formal and substantive conceptions. The formal theory focuses on the positivistic nature of laws, meaning that a state governed by the rule of law is one where laws need to qualify as “laws”.<sup>20</sup> In other words, laws ought to fulfil some basic requirements; they must be publicly promulgated, clear, general, prospective and stable, or else they will not constitute laws, but mere decisions or commands. The substantive conception of the rule of law promotes the idea that a state governed by the rule of law needs to go beyond the formal conception, thereby including the respect for human rights, democratic values, equality before the law and fairness.<sup>21</sup> It is called substantive because it accounts for values that are independent of any institutional or procedural guarantee; it implies that there are some (policy) requirements, which exist prior to these procedural requirements.<sup>22</sup> Within these conceptions, opinions may also diverge; some formalists will also argue that equality before the law is a necessary prerequisite for the rule of law, others will maintain that it is a matter for the legislature, not an *ipso facto* component of the law. Within the substantive conception, there is even more room for disagreement, as ambiguous substantive standards such as justice, rights, liberty and welfare are introduced as objects of discussion. The natural

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<sup>19</sup> Helder de Ferreira Mendonça André de Oliveira Fonseca, *Corruption, income, and rule of law: empirical evidence from developing and developed economies*, in *Brazilian Journal of Political Economy*, vol. 32, n° 2 (127), pp. 305-314, April-June/2012.

<sup>20</sup> Craig, Paul, *Formal and Substantive Conceptions of the Rule of Law: an Analytical Framework*, *Public Law*, 1997, pp.467-487. P. 467 – 468.

<sup>21</sup> P. Craig, p. 467 & 477.

<sup>22</sup> Brettschneider, Corey, *A More Substantive Conception of the Rule of Law: Non-Arbitrary Treatment and the Limits of Procedure*. p. 4.

divide between formal and substantive theories seems to be more or less consistent with the debate between positivistic and naturalistic legal theories, for which chapter 2.3 will provide a brief introduction. Some of the differences in these theories, however, can be attributed to the evolution of this concept in different legal traditions. It is therefore reflected in their language, which shall be the subject of the next chapter.

## 2.2 Terminology

A first observation that needs to be highlighted is that the word *rule* is not a reference to specific rules, but rather an assertion that the law (should) reign supreme. The rule of law could in this sense be considered a synonym to the *supremacy of law* or *sovereignty of law*. This can be contrasted with the corresponding term in continental Europe, *Rechtsstaat* or *Etat de droit*, meaning the *law-state* or *legal state*, which places the state at centre stage, whereas the English rule of law has no necessary linguistic affiliation with the concept of the state. A more accurate translation of the rule of law into French would therefore be the term - *la prééminence de droit*, as is used interchangeably by the ECtHR. The term *Rechtsstaat* or *Etat de droit* bears a fair resemblance with the concept of *public law (droit politique)* - rules that create and bind the state – which can be distinguished from *positive law* – the law that the sovereign/government creates.<sup>23</sup> The former implies a constitutive justification for government authority and the limits of that authority, while the latter is the resultant exercise of said authority.

The term *law* can also be a source of confusion, as the English legal vocabulary lacks a corresponding distinction between the law as an instrument (*das Gesetz, la loi, lex*), and the law as the overarching system of objective laws (*das Objective Recht, le droit objectif*), yet it makes a distinction between laws and subjective rights, understood as the faculty of individuals to exercise their interests within a legal order (*das Subjektive Recht, le droit subjectif*). This leads the meaning of the rule of law to be potentially conflated with, for example, the Russian concept “*verkhovensto zakona*”, which could be roughly

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<sup>23</sup> M. Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) p. 1.

translated to *supremacy of statute law*, or *prééminence des lois*".<sup>24</sup> Seen from this perspective, the French or German versions are, at the very least, linguistically a wider concept, not exclusively concerned with statute law, but more inclusive to rights, justice, democracy, human dignity etc. However, the existence of rights has also become intrinsic in many present conceptions of the English rule of law, and its distinction to public law is at this point blurred. In fact, values that are all held supreme in western societies, such as the rule of law, democracy and respect for human rights, are intimately related, if they do not overlap, as they share a common conception in 18<sup>th</sup> liberal ideas of individual rights.

Another source of perplexity can be attributed to the perception of the words used. Law as a concept can be simplified into what law is, and what law ought to be. This distinction between reality and ideal is of course subject to an eternal debate in jurisprudence, and hence why the concept of the rule of law will inevitably display the same traits.

“La prééminence du droit comporte donc une inévitable dimension méta-juridique, [...] elle est énoncé du droit positif mais constitue en plus une grille de lecture et d'évaluation de l'ordre juridique positif.

...

La dimension dogmatique de la prééminence du droit ouvre ainsi nécessairement le conflit entre jusnaturalisme et juspositivisme.”<sup>25</sup>

Linguistically, the rule of law means simply that the law rules (governs), but if we define laws mechanically without attaching some ideal as to what the law should be, then one may ask, how can the concept of rule of law suddenly acquire moral content such as rights, human dignity or welfare, when laws

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<sup>24</sup> Council of Europe: Parliamentary Assembly report of the Committee on Legal Affairs and Human Rights, rapporteur: Jurgens, Erik The Principle of the Rule of Law, 6 Doc 11343, 6 July 2007. Available at: <http://assembly.coe.int/ASP/Doc/XrefViewHTML.asp?FileID=11593&Language=EN> [accessed 18 May 2015] p. 1 para. A 4.

<sup>25</sup> Souvignat, Xavier, *La prééminence du droit dans le droit de la Convention européenne de droit de l'homme*, (Éditions Bruylant, 2012). p.16. "The rule of law exhibits therefore an inevitable dimension of meta-law, (...) it is enounced by positive law but constitutes moreover a grid in which positive legal order may be read and evaluated ... The dogmatic dimension of the rule of law opens therefore necessarily the conflict between jusnaturalisme and juspositivisme". Translation suggested by author.



themselves are separate from morality?<sup>26</sup> The answer to this is unclear. The word ‘rule’ may perhaps conflate the concept of law with authority, and if one inquires as to what legitimate authority is, an ethical premise may be required.<sup>27</sup> Some scholars already assimilate moral content into the concept of laws, in which case a substantive interpretation may not pose a problem. For pedagogical reasons, before embarking on the use of the concept in contemporary doctrine and positive law, let us begin by elaborating on the meaning and function of “laws” in the ensuing chapter.

### 2.3 Law and Morality

The ambiguous nature of the concept of law is subject to much polemic. A common point of departure is that the law is a system of norms, created by institutions to regulate social interactions. It constitutes the only justification for the use of force, coercion and sanctions, apart from self-defence. Since the government alone enacts laws, the use of force is monopolized under their command. One can imagine the potential dangers if it were to be misused, so why do we allow the state absolute control of force? Why do we obey laws and why should we? Is it simply for fear of sanction? Are all laws legitimate insofar as those who wield power enact them?

“Xenophon, [...] gives us an imaginary dialogue between Pericles and Alcibiades [...] Alcibiades begins, [...] by asking Pericles what a law is. Pericles tells him that whatever the ruling power enacts is a law, and adds that this is true even if the ruling power is a despot. Alcibiades then asks what force is, for he understands that force is the negation of law, and he takes it that the despot rules by force rather than by persuasion. [...] Pericles retracts his earlier statement that the decrees of a despot are law, for he concedes that they are based upon force. But Alcibiades then points out that, even where the majority rules, they rule by force rather than by persuasion. His implicit suggestion seems to be that, either law is not simply the enactments of the ruling powers, or the antithesis between law and force is bogus, for law itself seems ultimately to be grounded in force.”<sup>28</sup>

When enquiring as to why people should obey the law, one seeks to understand its legitimacy. When enquiring as to why people obey the law, one seeks to

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<sup>26</sup> Mark Bennett, ‘“The Rule of Law” means literally What it Says: The rule of the Law’: Fuller and Raz on Formal Legality and the Concept of Law. In *Australian Journal of Legal Philosophy*, Vol 32 (2007) pp. 90-112, p. 91.

<sup>27</sup> Although this is not necessarily the case. See. Joseph Raz’ account under chapter 2.3

<sup>28</sup> Nigel Simmonds, *Law as a Moral Idea*, (Oxford University Press, 2008) p. 4.

understand its authority. In both instances, the inquiry amounts to a question of its validity. This is why when examining the nature of laws; theorists debate the possible interplay between law and morality. Can laws be legitimate and authoritative independent of moral considerations?

The conversation is often divided between those who believe the law to be a purely *descriptive* phenomenon – the law is - and *normative/prescriptive* – the law ought to be. The former is neutral towards ethics, while the latter is deeply concerned with ethical and political theories.

### 2.3.1 Positivism

Analytic jurisprudence is concerned with *lex lata*, what the law is, rather than *lex ferenda*, what the law ought to be. In this category, we find *legal positivism*, according to which laws are valid as long as they are *posited* according to socially accepted rules. Laws should never be deemed as invalid on the basis of an ethical standard, such as justice or morality. Traditionally, the legal system is held to be nothing more than a system of rules, used as an instrument for order and governance. As expressed by the utilitarian and classical positivist John Austin, laws are simply "commands, backed by threat of sanctions, from a sovereign, to whom people have a habit of obedience".

Modern positivism has abandoned this view, but the question remains; how does one justify the validity of a law objectively, without reducing the concept of law to a discussion about ethics or politics, or without invoking natural law? Hans Kelsen, suggested that in examining whether a law or legal decision is valid, one needs to consult the higher law which confers authority upon the institution that enacted that law. He continues this process until finally, he arrives at the supreme law, which cannot "receive" authority from any higher norm. Thus, at this stage, one has to presuppose a *Grundnorm* (basic law),<sup>29</sup> which must exist to grant the highest norm its validity.<sup>30</sup> Without the aid of natural law, this would appear to be a *deus ex machina* solution to the problem, yet his explanation is quite appealing. The Grundnorm confers authority on the

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<sup>29</sup> Raymond Wacks, *Understanding Jurisprudence* (Oxford University Press, 2012) p. 92.

<sup>30</sup> Hans Kelsen, *The Pure Theory of Law*, (1967) p. 200.

highest law only insofar as people adhere to it. Thus his view remains positivistic in that specific laws are valid, regardless of whether people reject it according to some moral standard, as long as they fulfil the requirements for enactment. According to this view, it is only when a legal system is rejected as whole that it loses its authority. He thus shows that legitimacy can be found internally within the legal system, without an external ethical justification. A point that could be raised against this is that if the legislature is resisted, it will presumably be because it is perceived as unjust. He may justify the positivistic nature of specific laws, but the legitimacy of the legal system is still *de facto* linked to the demo's conception of the good.

The idea that law and morality are wholly separate, is perhaps best expressed by Joseph Raz, one of the leading positivists of the 20<sup>th</sup> century. For him, the law is always a question of fact, not of moral judgment. Since law is capable of guiding our behaviour better than any moral rule, the law asserts its primacy, and its authority is therefore pre-emptive. By pre-emptive he means that, when faced with a choice between two courses of action, A and B, one will weigh one's reasons for choosing either option. But when there is a legal rule directing one's choice towards A, it replaces, or pre-empts, any reason one may have had for choosing either A or B, including moral rules. One must then acknowledge that the law is independent from morality in that, where there is a legal rule, morality is entirely excluded as factor in the decision-making process.<sup>31</sup>

### 2.3.2 Natural Law

Naturalists traditionally reject the notion that the law is separate from morality. The theory is "natural", because it is based on the belief that some laws exist independent of social paradigms, as it predates societies and governments. Historically, natural law was believed to be a reflection of divine law. In modern day, however, natural law is regarded as more of a fictional moral standard to which all positive laws must aspire to. Accordingly, morally bankrupt laws cannot be considered legitimate.

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<sup>31</sup> Wacks, p. 107.

Prominent natural legal philosopher, Lon Fuller, rejected positivism, claiming that the duty to obey laws was not based on force, but on a reciprocal relationship with the government. The government cannot expect rules to be followed, if it does not ensure that those rules will be applied. Hence retroactive laws will usually be considered unjust, which makes the requirement of prospective laws moral. Observing his eight procedural principles, which constitute *the inner morality of laws*, is a precondition for a moral society, even though it is not sufficient one. These procedural norms mirror those of Raz, and will be examined further in 2.5.1.

Ronald Dworkin maintained that laws could not be separated from morality, since laws are not just a collection of social rules, as courts also have to draw on political or moral standards, *law as integrity*, when deciding hard cases.<sup>32</sup> He presumed that laws always have to be capable of providing a right answer; and the right answer is that which best suits the institutional and constitutional history of the legal system. He conceded that the right answer is likely to be contested even among the most prominent lawyers, but the controversy resides in what the right answer is, not whether there is one. In adjudicating a case, the law can be set aside based on principles and rights. To illustrate this, he draws attention to a 19<sup>th</sup> century American case, *Riggs v Palmer*,<sup>33</sup> where a man stood to inherit the will of his murdered victim. The court denied him the inheritance, based on the principle that no one should profit from his own wrongdoing, despite the law in that case suggesting otherwise. Many positivists would argue that standards of justice belong to the prerogative of the legislator, not the courts. Dworkin responded that principles must not be confused with policies, for principles describe rights, while policies describe goals. Rights must always be weighed against policies, and litigation often consists in the rights of one party being measured against, or in relation to, the interests of the community.<sup>34</sup>

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<sup>32</sup> Ronald Dworkin, *Law's Empire*, (Hart Publishing, 1998) p. 225.

<sup>33</sup> *Riggs v. Palmer*, 115 N.Y. 506 (1889).

<sup>34</sup> Wacks, p. 122.

## 2.4 The Constituent Element of State Authority

The rule of law may, in its simplest definition, be understood as laws operating as the supreme authority in the organization of the state. Its chief purpose, as has been mentioned afore, is to confine state authority, so as to prevent arbitrary rule. Arbitrary governance, “the exercise of power ... with indifference as to whether it will serve the purpose which alone can justify use of that power or with belief that it will not serve them”<sup>35</sup> is repugnant to our intuition; it is *inefficient* and *illegitimate*, and thus averting concentrations of powers in the hands of one man or institution seems like a reasonable pursuit. Nevertheless, the notion that it is illegitimate is fairly young in the history of mankind, and one may find opposition to this idea even in present day, suggesting that this belief stems from ideology rather than fact. The question may thus be posed; why should laws reign supreme and what makes governments legitimate? The conventional answer to this question is called *contractarianism* – the idea that government emerges through a contract, assented by the governed. Consent is required due to a professed individual right to self-governance, a product of the equality of individuals due to the absence of any natural subordination among them.

Throughout the middle ages, European kingdoms were governed by a symbiotic relationship and struggle between the Church and the State.<sup>36</sup> In an absolute monarchy, Kings were sovereign, making the citizens his subjects. Since the King was the supreme authority over his territory, disputes were adjudicated according to his will. In this sense, one could say that the absolute monarch embodied the legislative, executive and judiciary in the King.<sup>37</sup> The justification for an absolute monarchy came from divine grace, bestowed upon him by the theology of the Church. This is often referred to as the *divine right of kings*, elevating the King’s status above the law.<sup>38</sup> Of course, the King’s will was not entirely unconstrained, but limits were mostly imposed by the

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<sup>35</sup> Joseph Raz, *Law and Authority*, (Oxford University Press, 1979). p. 219.

<sup>36</sup> B. Russell, *A History of Western Philosophy* (Simon & Schuster Inc., 1945) p. 4-6.

<sup>37</sup> Of course, the idea that of government being divided in branches such as these would be completely foreign to theorist at that time. It is only inserted here as mean of explaining it through the prisms of 21th century models to facilitate understanding.

<sup>38</sup> Loughlin, p. 26.

Church,<sup>39</sup> since the King's supremacy came from divinity, and compelled him to rule in accordance with divine law.<sup>40</sup> Another important restraint was that of the necessity to appease the aristocracy, which particularly in a feudal system, was a vital part of the infrastructure with which the King could execute his will.<sup>41</sup>

The Reformation marked a decisive blow to the previous legitimacy of the Catholic Church's authority, and by extension, the Monarchy's.<sup>42</sup> As adherents to the principle of divine right of Kings lost ground, *the hereditary principle*,<sup>43</sup> which had hitherto provided legitimacy to the King's claim to sovereignty,<sup>44</sup> became contested. Theology had thus for centuries helped cement the political status quo, but in its absence, what rationale could sustain the King's position, and more importantly, on what basis could a dynasty legitimately inherit the right to political rule? In the superseding vacuum of ideas, the liberal doctrine seized the minds of dominant theorists in the British Isles and France.

#### 2.4.1 The Social Contract

If the King is not sovereign, than who should be, and why should political authority be vested thereupon? To answer this question, many prominent theorists imagined a scenario antecedent to government, whereby every individual was free from obligations to the state. This largely hypothetical construction was known as *the state of nature*. One may conceive of the state of nature as a state where no government exists and where no laws framed by man, positive laws, could be imposed upon anyone. Some would say, that anarchy must create a state of absolute liberty for every individual since, in a truly anarchic state, no sanctions can be imposed, and no rights or claims can

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<sup>39</sup> B. Russell, *A History of Western Philosophy* (Simon & Schuster Inc., 1945) p. 619.

<sup>40</sup> Loughlin, p. 28.

<sup>41</sup> Russell, p. 14.

<sup>42</sup> The Protestants rejected the Catholic Church as a mediator of divine revelation, as truth was to be found in one's own interpretation of the bible, and no central authority could intervene in one's readings. The release from "spiritual slavery" led to a deepening subjectivism, theories of ethics came gradually to rely upon introspection, rather than the influence from the external.

<sup>43</sup> Russell, p. 563 – 566.

<sup>44</sup> Blood succession instilled a sense of legitimacy to the transitions of powers for monarchs, especially when supported by the church. Hostile seizures of power without relation to a royal bloodline had a much harder time securing its legitimacy in the eyes of their subjects.

be enforced, rendering it a state of pure self-government. This condition of lawlessness was believed by Thomas Hobbes to produce a state of chaos.

“Hereby it is manifest that during the time men live without a common Power to keep them all in awe, they are in that condition which is called War; and such a war as is of every man against every man”<sup>45</sup>

John Locke believed that the laws of nature, which for him was enacted by God, would still restrain liberty.<sup>46</sup> Thus the state of nature was still ruled through natural law, that is human reason, but without a conventional sovereign to police or judge the relationships among individuals. Apart from the limits that natural law imposed, it was a state of perfect freedom, but also of equality, as in the absence of a sovereign, all relationships are reciprocal, excluding any subordination or subjugation of any individual to another, unless one has consented thereto. Natural law would then confer natural rights upon all individuals, since the law of nature teaches us that:

“[A]ll mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions.”<sup>47</sup>

Although the state of nature is a state of perfect freedom and equality, it cannot persist, and men will come together to institute a government, owing to the lack of an authoritative body to enforce the laws of nature. If a crime against one’s natural rights is committed, one must be the judge and executioner in the defence of those rights.

The pursuit of law enforcement, stability and order, is thus what brings “men” together to institute government, which if it’s to be regarded as legitimate, requires the consent of every man. This covenant is known as *the social contract*. The importance of the social contract for the modern state rests upon the premise that governments are not natural, but instituted by individuals. The government’s right to rule is thus derived from the wilful submission of each individual to be governed.

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<sup>45</sup> Thomas Hobbes, *Of man, being the first part of Leviathan*, (1651). Chapter 13. Sec. 8.

<sup>46</sup> Later theories of natural law made no such demands; in the present day, natural law can be conceived as an objective or universal law. It could be understood as a higher moral standard, which positive law ought to replicate, not very dissimilar from the modern conceptions of human rights or *ius cogens*.

<sup>47</sup> John Locke, *The Second Treatise of Civil Government* (1690). Chap 2. Sec 8.

Which form of governance the social contract would yield was not uncontroversial. No single theory survives onto this day in its original form. The theory that best withstood the sands of time was perhaps that of Locke's, with some elements borrowed from Rousseau. Locke advocates the rule of the majority, yet if natural rights were to subsist from the state of nature to the new state of society, than shouldn't the right to self-rule remain absolute? This would lead to every citizen having the right to resist any decision by the government that she disagrees with. Governments would have to, according to this logic, be democratic, ministered by direct involvement of its citizens empowered by a right of veto. Since this is unworkable in practice, except for communities exceptionally small in scale, Locke advocates a rule of the majority, presumably for reasons of efficiency.<sup>48</sup> Perhaps the consent to a social contract implied a tacit consent to obey all subsequent acts of government, due the "voluntary" nature of one's citizenship. The underlining problem I wish to emphasize here is that governments, if they are to be able to rule, need to be able to coerce, and if that is true, than natural rights must to some degree be forfeited.

Seen from this perspective, it is easier to understand how Hobbes could have arrived at a totalitarian state. In his view, the government was not a party to the contract but the result of it, meaning that men surrendered all their political power once a centralized government was selected. Liberty in the state of nature generated violence and war, and even the worst of despots was better than anarchy.

Rousseau was less radical in claiming that governments had to reflect the general will (*volonté générale*), a concept that resembled more or less a metaphysical notion of the common good. An adapted version of his theory of is still reflected in the form of the principle of parliamentary supremacy. An unfortunate symptom of the theory of the general will, was that it created a conviction that the representative legislature was infallible. Many critics have since identified the general will as the justification for a totalitarian democracy,

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<sup>48</sup> Parts of his political theory was utilitarian, though his theory of ethics clearly wasn't.



by means of the complete submission of the individual to the tyranny of the masses. These matters will be discussed further in chapter 3.

Regardless of these variations, the myth of the social contract provided a legitimate source of authority for the rule of law. This theory, especially that of Locke's, furthered the idea that human dignity was placed at the heart of state authority. It shifted the discourse on sovereignty from a centralized tyrannical monarchy, and assigned it to the people.

#### 2.4.2 Constitutional Theory

Constitutions are the collections of principles or precedents that prescribe how an institution, in this case the state, should be governed. When assembled in a written document or convention, they are perceived to *constitute* the entity in question.

Modern constitutions are designed after classical liberal political theory, fulfilling the function of conferring political powers upon institutions, organizing them, and restricting them; all for the protection and preservation of the interests and liberties of citizenry. The constitution is to the government what the laws created by government is to judicature, that is, governments neither make nor alter constitutional law; that can only be done by the constituent power, which is vested in the people.<sup>49</sup> This ensures that the structural arrangements of governance are relatively permanent. The institutionalized mechanisms for the preservation of liberty cannot be dissolved without struggle, yet, if the people are the true holders of political power, it is difficult to conciliate the notion that the will of its drafters, in any given time, should permanently bind all successive generations.<sup>50</sup> For example, the challenge for the constitutional drafters of the United States was to create a framework for government that preserved the natural rights to "life, liberty and the pursuit of happiness", and reconcile it with democratic governance. Through the institutionalisation of government authority, distribution of powers, checks and balances, independent judiciaries and a representative legislature, the constitution became the source of authority, in lieu of the actual

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<sup>49</sup> Loughlin, p. 279.

<sup>50</sup> Ibid. p. 282.

people. Although legitimacy still flows from the people, by placing power beyond the authority of majorities, “the constitution, initially understood to establish the office of government, becomes constitutive of the entire political sphere [...] authorized to carry on its activities independently of the views of the ordinary people.”<sup>51</sup> In a sense, the American constitution is indeed *of* the people, (it represents the people) and the institutionalisation of authority guarantees that it governs *for* the people (ensuring it rules in the public interest), but it would be inaccurate to say it is *by* the people. The constitution converts “the people” into the structure and principles in which political power is exercised under the constitution, not the actual ordinary people.

The constitution proclaims to have the status of fundamental laws, but what fundamental law means in practice has changed over time. In its simplest sense, fundamental law expresses a hierarchical relationship between ordinary laws and constitutional rules. But how are fundamental laws to be enforced? With the expansion of the concept of judicial review, constitutions became a form of higher de-politicized positive law, for which the judiciary is usually the sole interpreter.<sup>52</sup>

## 2.5 The Constraining Elements of State Authority

As was established in the preceding chapter, the purpose of governments is to protect and preserve the liberty of its citizens. This can only be achieved by limiting government power through the rule of law. How exactly do laws impose restriction of government power? Firstly, it is argued that the nature of laws themselves as rules, limits government authority. Secondly, government authority can be limited by ensuring it respects the rights of those they intend to govern. Finally, institutions have to be organized so as to avoid concentrations of powers in the hands of one singly entity.

### 2.5.1 Law as a System of Rules

Like Xenophon stated, governments must in some sense rule by force. It is the essence of governments that they should be able to coerce its subjects, or else it would be unable to govern altogether. Indeed, according to the contractarian

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<sup>51</sup> Loughlin, p. 285.

<sup>52</sup> Ibid. p. 293.

theory, individuals create governments for the purpose of monopolizing the use of force in the hands of government, so as to avoid disorder and insecurity associated with the dispersal/proliferation of force. It is necessary therefore, that their decrees are associated with sanctions, if they are to be obeyed. But is that enough?

Formal theorists reject the notion that laws need to have certain content, but will nevertheless argue that laws are not simply government decrees with a corresponding sanction. Indeed a distinction is to be made between rules and dictates. It is in the nature of rules that they should be able to guide behaviour, or else they become nothing more than ad hoc decisions. Rules are therefore general, as opposed to specific, as generality of rules is what sets it apart from decisions/commands.<sup>53</sup> For the same reason, rules are prospective, in order to prevent post hoc decisions, and clear, or else they cannot be followed.<sup>54</sup>

Laws must therefore reasonably meet the requirement of rules, if they are to guide behaviour. The basic tenets of laws are therefore that they must be *general, prospective, clear, public and stable*. These tenets resonate with Lon Fuller in his allegory about King Rex, who struggled to rule due to his failure to meet eight procedural norms.

1. The lack of rules or law, which leads to *ad hoc* and inconsistent adjudication.
2. Failure to publicize the rules of laws.
3. Unclear or obscure legislation that is impossible to understand.
4. Retrospective legislation.
5. Contradictions in the law.
6. Demands that are beyond the power of the subjects and the ruled.
7. Unstable legislation.
8. Divergence between adjudication/administration and legislation.

According to Fuller, a legal system that fails to observe these principles, is not truly a legal system, since, if they are not met, the duty to obey positive law is extinguished. The duty to obey is predicated on a reciprocal assurance by the government that laws will be applied correctly.

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<sup>53</sup> Tamanaha, p. 92.

<sup>54</sup> Raz, p. 214. See also T. Bingham, *The Rule of Law* (Penguin Group, 2011) p. 37-38.

## 2.5.2 Law as an Order of Rights

### *I Dignity*

The legitimacy of governments is said to be derived from the consent of the governed, a consent that is required by virtue of the inalienable rights of individuals to self-governance. But where does this notion of consent come from and why is it so important? Locke's answer consists of a natural right to self-determination, which can be deduced from reason, or as it were, natural law. God is the source of natural law, making it objective, as it is independent of our subjective sentiments. For secular theorists, this model will therefore leave much to be desired, as it cannot be separated from theology.

Locke's theory provides that individuals have dignity and hence a corresponding right to liberty. Immanuel Kant, who adopts the reverse approach, presents it accordingly: it is because we are free, that we are endowed with dignity. For him, the concept of human dignity is derived from *agency*. He defines freedom as the ability to act *autonomously*. He contrasts this with acting upon one's instincts, which is simply obeying one's appetites, and is therefore no different than being a slave one's inclinations. To act freely is to give laws to ourselves,<sup>55</sup> which comes from our capacity to act autonomously (i.e. according to reasons contrary to our instincts) and our capacity to act autonomously is what distinguishes us from other living beings or objects. Objects are entirely susceptible to the laws of nature, while autonomous beings can choose different courses of action. When acting according to our inclinations, we are acting as a *means* to the realization of *ends* external to us. Our capacity for autonomy is what makes us authors of, and not instruments to, the purposes of our actions; it is what makes us *ends in ourselves*. Being prized for our own sake, and not as means to something else, implies that we have intrinsic value. To treat human beings as means to an end would therefore be to ignore that value, and to deny them their liberty, which inheres in us as human beings.

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<sup>55</sup> Immanuel Kant, *Groundwork for the Metaphysics of Morals*, (1795). Section 3, Ak: 4:477.

## *II Liberty*

As autonomous beings, we are vested with a natural right to govern our own fates. But for the reasons explained in 2.4, liberty is chaotic, and it must be sacrificed for security. Individuals will thus band together to create a government, and sacrifice a degree of liberty for order. Governance is conducted by means of laws, and the question that the rule of law seeks to answer is, how do we ensure that the liberties of the constituent citizens in society are fairly balanced with order?

First, it is necessary to review what liberty means. As witnessed by the accounts from the state of nature, liberty has traditionally been defined as the absence of external coercion. This is derived from the idea that freedom is the lack of restraint or obstacles preventing one from exercising self-governance. This view, freedom *from* coercion or interference, can be contrasted with the freedom *to* act. This distinction was popularized by Isaiah Berlin, the former becoming known as *negative liberty*, the latter as *positive liberty*.<sup>56</sup> Negative liberty - freedom from coercion – is the absence of external interferences in our affairs, and relates to *opportunity*. Positive liberty on the other hand is concerned with the individual's agency; each individual in his capacity to self-govern being able to pursue his own choices, thus associating freedom with *capacity*.<sup>57</sup> Negative liberty is best achieved with a minimal state, by reducing external intervention in one's affairs, but can therefore also be compatible with autocracy.<sup>58</sup>

Freedom is by its very nature restricted by laws, for they set boundaries for actions one would otherwise be free to pursue (negative liberty is reduced). Conversely, laws also enable liberty; by enforcing laws and criminalizing private violence, laws allow individuals to engage in other activities that would otherwise be unavailable to them (both negative and positive liberty is

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<sup>56</sup> I. Berlin, *Two Concepts of Liberty*, Four Essays on Liberty (Oxford University Press, 1969). p. 3 & 8.

<sup>57</sup> For example, although no external power may prevent someone from travelling, one may still be unable to do so for other reasons, perhaps due to poverty. In such a scenario, one's negative freedom is left intact, while one's positive freedom is compromised. One may be a drug addict, and be free in the negative sense, but unable to master one's internal restraints, and thus not be free in the positive sense.

<sup>58</sup> Berlin, p. 7.

enhanced). Liberty to do whatever the law does not prohibit is what legal theorist Brian Tamanaha identifies as *legal liberty*.<sup>59</sup> Rousseau maintained that the consent of the people is what gives the law its authority; for they become at once subjects and authors of the rules they are obliged to follow.<sup>60</sup> If human dignity is to be respected, governments must be democratic. This exercise of one's right to self-determination in society is what is called *political liberty*. It can be contrasted with *personal liberties*, loosely defined as the exercise one's personal autonomy, the likes of which the government ought to protect and refrain from infringing.

The formal conception of the rule of law does not ensure the respect for political and personal liberties; these are a matter of discretion for the legislature. Political liberties and personal liberties often conflict. A dysfunctional democracy may be so detrimental to the legal or personal liberties of its citizens that it may be less desirable than a benign authoritarian regime. Even in healthy democracies, laws enacted by the majority regularly infringe upon personal liberties. To some extent, legal liberty and personal liberty may be brought into opposition to one another as well. Legislation can be so abundant and pervasive that personal liberties become an illusion, yet in such cases, legal liberty is still technically observed. These competing and sometimes contradicting concepts are difficult to reconcile. But if the purpose of government is indeed the preservation of individual liberty and security, then the ideal concept of the rule of law should reflect the best possible balance between them. Before elaborating on that in chapter 3, a brief presentation of the concept of liberty in terms of rights is appropriate.

### ***III Rights***

“Your right to swing your arms ends just where the other man's nose begins.”<sup>61</sup>

Modern constitutional thought is based on the assumption that individuals have an inalienable right to be free. Yet the existence of natural rights is not entirely

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<sup>59</sup> Tamanaha, p. 34-36.

<sup>60</sup> J.J. Rousseau, *The Social Contract: On the Principles of Political Right* (1762). Book 1 Chapter 8.

<sup>61</sup> Z. Chafee, Jr., *Freedom of Speech in Wartime*, 32 *Harvard Law Review* 932, (1919). p. 957.

without controversy, some going so far as to argue that rights are simply a legal construct lacking ontological foundation. This view leads to the conclusion that rights can only exist through its manifestation in positive law. In his criticism of the French Declaration of Rights of Man, Jeremy Bentham famously held:

“[natural rights are] simple nonsense: natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts.

...

“[Rights are] the fruits of the law, and of the law alone. There are no rights without law—no rights contrary to the law—no rights anterior to the law.”<sup>62</sup>

Rights, as fruits of the law, is what is known to be *legal rights*, as opposed to rights that are innate in us as human beings. The concept of natural rights is derived from natural law, which could be viewed as basic moral principles.

“We may then identify ‘natural law’ with moral rules in so far as they are independent of positive legal enactments. There must be such rules if there is to be any distinction between good and bad laws. For Locke the matter is simple, since moral rules have been laid down by God, [...]. When this theological basis is removed, the matter becomes more difficult. But so long as it is held that there is an ethical distinction between right actions and wrong ones, we can say: Natural Law decides what actions would be ethically right, and what wrong, in a community that had no government; and positive law ought to be, as far as possible, guided and inspired by natural law.”<sup>63</sup>

Natural rights could thus be viewed as rights that exist antecedent to, or independent of, positive law. This concept is what provides the basis for the modern notion of human rights, which, if they exist, would transcend positive legislation.

Natural rights are, in liberal constitutional democracies, the basis for our political and civil liberties. The concept of natural rights as the founding principles of modern societies culminated during the enlightenment with the United States Constitution (together with its subsequent Bill of Rights and amendments), and the French Declaration of Rights of Men and of the Citizen. One can see the direct of trace of the *Lockean* idea of natural rights in the second passage of the United States Declaration of Independence, which famously reads:

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<sup>62</sup> J. Bentham, *Anarchical Fallacies*, (1843). Part 5 Chapter 11 Article 2.

<sup>63</sup> B. Russell, p. 572.

“[w]e hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”

If natural rights were conceptually conceded, they would pose the ultimate limitation on government authority. It is difficult however, to determine what natural rights are, once government is established, since they are pre-political. If they were absolute, then natural rights would create a sphere of individual autonomy that cannot be compromised by public interest, in which case they would amount to very little. At some point, for society to function, rights must become conventional and acquiesce when utilitarian concerns demand it. Rousseau went so far as to argue that once the social contract was ratified, all rights became conditional; indeed, natural rights were altogether forfeited. “Natural rights are limited by what a person can hold on to; civil rights are limited by the general will.”<sup>64</sup> It is in this sense contestable whether natural rights indeed function as a limit for government, since rights can in practice only be realized through the operations of objective law.<sup>65</sup> Once it is reduced to something conditional, it must become something measurable, if it is to be weighed against some other right or interest. Having become quantifiable, a cynical observer would argue that they serve only to justify *in casu* interpretations, cloaked in the rhetoric of the protection of individuals.

*Negative rights* are those, which impose a negative obligation on the state, that is; rights that the state may not infringe. These are: civil rights such as right to integrity, life and safety, equality before the law, freedoms of thought and conscience<sup>66</sup> and, political rights, such as natural justice/rights of the accused<sup>67</sup> and rights of participation in civil society and politics.<sup>68</sup> These rights, also known as the first-generation of human rights, lay at the heart of UDHR<sup>69</sup> and the ECHR. These may be contrasted with *positive rights*, such as economic, social and cultural rights. They are called second-generation human rights, and

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<sup>64</sup> Loughlin, p. 345.

<sup>65</sup> Ibid. p. 369.

<sup>66</sup> Freedom of speech and expression, freedom of religion, freedom of the press, freedom of assembly, freedom of movement.

<sup>67</sup> Right to a fair trial, due process, right to seek redress or legal remedy.

<sup>68</sup> Freedom of association, right to assemble, right to petition, right of self-defence, right to vote.

<sup>69</sup> Arts. 3-21.



impose positive obligation on governments to provide.<sup>70</sup> Lastly, a third-generation of human rights has been introduced in international documents as something to aspire to, but never yielded anything of binding character.<sup>71</sup> It has been argued, that “rights” pertaining to the second and third categories do not exist, and because resources are scarce, cannot be defined as a rights, but mere aspirations or values. It is doubtful whether they can ever serve a justiciable function as a positive legal rule.

To conclude, the theoretical basis for the existence of rights may still be polemic, but it is nevertheless this theory that underpins liberal political theory and constitutional design. Where modern constitutions hold some articles to be entrenched, rights are frequently found at its core, forming the most essential restriction upon public authority.

### **2.5.3 Structural Arrangements**

#### ***I Separation of Powers***

Central to the theme on limitations of power is the principle that governmental functions should be dispersed, famously recognized as the doctrine of *separation of powers*. Said division should be made in a manner which allows for a system of *checks and balances*, thereby preventing any one branch from reigning supreme. The role of each branch may vary significantly between nations, and I shall therefore not enter into detail on this matter. Limitations can be achieved horizontally, by divisions of powers in a centralized government, and vertically, by distributing competences between centralized and decentralized authorities, for instance between national, regional and local authorities. In the latter, a dispersal of powers can be achieved through the concept of subsidiarity, maintaining that interventions should be exercised locally so far as possible.

The concept of separation of powers is often attributed to the Baron de Montesquieu, who introduced/reaffirmed a system of three branches of government, comprising of the *legislative*, *executive* and *judiciary*. This

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<sup>70</sup> See Arts. 22-28 of the UDHR.

<sup>71</sup> For example, right to healthy environment, natural resources, cultural heritage, collective rights etc.

system, often referred to as a *trias politica* or *tripartite*, can be *organic* or *functional*. The former focuses on the separation of institutions vested with particular powers, the latter on the powers that these institutions perform. For organic separation requires that these branches are awarded a degree of independence, that is, they must be free from influence by others, meaning it shouldn't owe its nomination to any other branch, nor should any other branch have powers of revocation over it. This was argued by Montesquieu to be the best means of preserving balance and freedom, allowing authorities to oppose each other while keeping interference at a minimum.

### A Judicial Review

One important aspect of the doctrine of the separation of powers is whether the judiciary should be afforded the capacity to review not only administrative acts, but also legislative ones. In fact, if one were to summarize the main difference between formal and substantive rule of law in practice, it would be to what extent the judiciary can override the legislature. The judicial branch plays the essential role as guardians of the constitution, taking upon it the responsibility to oversee government conduct. Judicial review varies between common law and civil law jurisdictions, seen as common law judges are regarded as authors of law, giving rise to or dismissing laws on a case-by-case basis in light of its tradition of precedent. Due to the principle of parliamentary supremacy, statute law has often held an overriding status in common law, reducing the courts possibility to keep the parliament in check. The introduction of a supreme court has brought a change to this dynamic, but its powers are limited to secondary legislation only.

In the United States, judicial review has been used extensively. The Federal Supreme Court has ever since the decision *Marbury v. Madison*,<sup>72</sup> assumed a constitutional competence to review legislation, an authority that is now decentralized, granting all courts the possibility to rule against legislation they deem to be unconstitutional, provided it is part of a dispute.

In Germany, the *Bundesverfassungsgericht* has ever since the enactment of the *Grundgesetz* from 1949, been the ultimate authority on the validity of

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<sup>72</sup> *Marbury v. Madison*, 5 U.S. 137 (1803)

government acts. Contrary to the American system, it may even perform so called *abstract regulation control*, meaning that legislation can be reviewed by request of the government (federal or state) or a quarter of the *Bundestag*, without reference to a specific case.

In France, the constitution of the 5<sup>th</sup> Republic in 1958, created a quasi-judicial council, the *Conseil Constitutionnell*. Owing to the principle of parliamentary supremacy, legislation has traditionally not been subject to any form of review until 1971,<sup>73</sup> in which the council ruled a law invalid for infringing upon the freedom of association, referring to the preamble of the constitution as well as the Declaration of the Rights of Man and of the Citizen 1789, making natural rights once more justiciable. In 1974,<sup>74</sup> prior judicial review before enactment was made possible at the request of 60 members of the National Assembly or 60 senators. Since 2010, individuals can also submit a request for the review of legislations by which they are affected, so called *question prioritaire de constitutionnalité*.

The role of the courts in the exercise of public authority lay at the heart of the liberal constitutional democracy. What it amounts to is not simply a separation of powers in a formal sense, but includes a conversation on rights as a function of the legal system. For countries historically subscribing to a strict principle of parliamentary supremacy, most notably the UK and France, the existence and preservation of rights has gradually become a central of aspect of its juridical reality, particularly since the ratification of the ECHR,<sup>75</sup> as opposed to Germany and the United States where rights have enjoyed a constitutional status since the establishment of their respective constitutions. This discussion pertaining to the relationship between and the legislature and the judiciary will be amended in the following chapter, where the contrast between formal and substantive rule of law will be accentuated.

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<sup>73</sup> Décision n° 71-44 DC du 16 juillet 1971.

<sup>74</sup> Décision n° 74-52 DC du 23 décembre 1974.

<sup>75</sup> Note however that most of the rights included in the ECHR existed already in these traditions, albeit perhaps not under the status of fundamental rights.

### 3. Some Characteristics of Formal and Substantive Theories

The discourse around the concept is frequently voiced in terms of a formal rule of law and a substantive rule of law. As a point of departure, it is useful to contrast it with the rule by law. The term rule by law consists of a legal system where no requirements are imposed on the enactment or the content of laws. In such a system, any and all laws enacted by the government will be legitimate, reducing laws to anything that the sovereign pronounces. If the rule of law is intended to limit government authority, then rule by law is to be understood as the exact opposite, that is; laws are reduced to instruments of repression by the government, instead of a mechanism for the limitation on governmental powers. Perhaps the lesson illustrated by this is that laws are nothing more than an instrument that can be used for good or subverted into evil - to limit oppression or to exacerbate it; law is, like Xenophon implied, force.

A formal conception of the rule of law relates to a legal system where laws have to fulfil a set of minimal requirements. These requirements are formal because they are deduced from the concept of the law itself. It is therefore in concert with most theories of legal positivism, in its rejection of moral concerns.<sup>76</sup>

“If the rule of law is the rule of the good laws then to explain its nature is to propound a complete social philosophy. [...] It [the rule of law] is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man.”<sup>77</sup>

The substantive conception of rule of law acknowledges the formal theory as its premise, but expands beyond it to include the respect for human rights and ethical standards such as justice, human dignity and equality. Laws can

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<sup>76</sup> This is in my view incorrect, at a certain level of abstraction, upholding a political ideal such as the rule of law will eventually fall back on moral precept; be it to endorse markets, virtue, human dignity, utility or similar. Legal positivism “successfully” describes laws as independent of morality because it occupies itself with a descriptive analysis. The rule of law is on the other hand, admittedly, an ideal, which by its very definition is a normative engagement, and therefore a matter of policy.

<sup>77</sup> Raz. p. 211.

therefore be rejected if their content is considered unjust or undemocratic. Take torture or capital punishment as an example. Such punishments will be entirely in harmony with a formal conception of the rule of law, insofar as the criteria for their application are set forth in advance through laws that are public, clear and general. Those who subscribe to a substantive conception of the rule of law will likely dismiss this form of punishment or exercise of power as categorically inhumane, and therefore illegal. The very notion of *ius cogens* can thus only be furthered by including an ethical theory in the concept of the rule of law. It implies that human rights, or natural rights, must triumph over positive law, when and if they conflict.

This chapter shall be devoted to a discussion of the rule of law with regards to certain themes, how they relate to it, and what benefits and problems each conception of the rule of law introduces.

### 3.1 Legality

The rule of law has hitherto been discussed as a means to restrict government authority. Much of the divide between those who advance a formal or a substantive conception turns its attention to the quality/content of laws. Common to both conceptions however, is the fact that the rule of law can only be achieved through a fidelity to the principle of legality. This means that the legislature may only act in accordance with a legislative process previously established in law, and that all subsequent exercise, be it executive or administrative application of the law, is confined to the limits established in laws. The difference between the formal and substantive conception comes down to the judicial function. Whereas formalists maintain an equally strict adherence to legality in the adjudication, a substantive rule of law allows for a more instrumentalist approach, meaning that legal reasoning also engages in normative and policy considerations in order to promote justice and to protect of individuals. Let us first dissect the concept of legality in those parts where there is agreement.

In criminal and administrative law, legality is best exemplified by the requirement that the imposition of sanctions is supported by a legal rule. Legality means, firstly, that a legal rule must apply to all cases where the

prerequisites of the rule are fulfilled, that is, a prohibition of a reduction of the rule. This can be exemplified by the maxim *Nullum crimen sine poena* (no crime without punishment). Legality also requires that a legal rule should only apply to cases where the prerequisites of the rule are fulfilled, that is, a prohibition of extensive/analogical interpretation of rules. This can be exemplified by the *Nullum crimen sine lege* (no crime without law).<sup>78</sup> The law-applier must also refrain from manipulating the legal rule and remain faithful to its content.<sup>79</sup> Compliance with the above-mentioned principles leaves many situations in a vacuum. What are we to do in practice when, after examining the particular circumstances in a given case, the applicability of a given rule is uncertain, there is no rule applicable, good reasons are present against the applicability of a rule or where two or more rules apply? Because the law must provide an answer to all disputes, such cases must be resolved with regards to spirit of the legal system. This would lead one to expect that the law-applier must show a concern for the coherence of the system, the intent of the legislator and the value-basis of the system as a whole.<sup>80</sup> When a judge is confronted with such cases, will he not be engaged in a normative reasoning, or maybe even a subjective one? In any of these difficult cases, the judge will inevitably have to infringe either the prohibition of reductive or extensive/analogical interpretation of the law.<sup>81</sup> Where the prerequisites of the rule are fulfilled, it becomes a matter of simple application. But where the rule is vague, or for whichever reason the application of the rule is riddled with uncertainty, the judge must resort to an extensive interpretation or analogy. For reasons concerning the security of the individual, in the domains of criminal law and cases involving administrative sanctions, a restrictive interpretation supplemented by the *in dubio-principles* may be deemed necessary. Where the applicability of one or several rules is contested in other legal domains, *e-contrario*, analogy or extensive interpretations may be the only means of reaching a coherent verdict.<sup>82</sup>

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<sup>78</sup> Frändberg, p. 59-60.

<sup>79</sup> Ibid. p. 59-60.

<sup>80</sup> Ibid. p. 61.

<sup>81</sup> Ibid. p. 61.

<sup>82</sup> Ibid. p. 71 - 72.

Upholding the principle of legality is indispensable to the rule of law. If those who apply the law have discretion to reduce or extend it at will, people will be placed *above the law*, as they will be able to evade sanctions prescribed in those laws. It also places people *outside the law*, as seeking justice becomes futile if one cannot rely on the results the law is intended to yield. It renders laws unpredictable, since its application becomes seemingly random. It creates insecurity, since coercive measures by the state become a matter of interpretative discretion, rather than subject to procedural requirements.<sup>83</sup> But upholding legality can also be undesirable. Should the judge apply the law faithfully even when the law is fundamentally inadequate? If a law sanctions torture, should a judge not make exceptions to that law (reductionism)? If the law denies “justice” to an applicant due to a “defective” procedural rule, does he not need to extend the scope of the rule? A substantive conception of the rule of law would perhaps answer this question in the affirmative, and most constitutional traditions have abandoned a strict adherence to formal legality in favour of proportionality approach to legal reasoning,<sup>84</sup> at least where equality and fundamental rights are concerned. However reasonable this may seem, it does present a few problems, which will be discussed in chapter 3.5.

### 3.2 Legal Certainty

If we concede Raz’ premise that laws can only be defined as laws if they *can* be obeyed, then for enactments of the legislature to constitute laws, they must be capable of guiding human behaviour.<sup>85</sup> From this we understand that predictability is one of the cardinal principles of the rule of law. Laws, like rules,<sup>86</sup> must therefore be *general, prospective, clear, public and stable*. These basic tenets are customary for most formal and substantive definitions.<sup>87</sup>

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<sup>83</sup> Frändberg, p. 62 – 63.

<sup>84</sup> J. Greene, *the Rule of Law as a Law of Standards*, The George Town Law Journal, Vol 99, 2011, pp. 1289-1299. p. 1291.

<sup>85</sup> Raz, p. 214.

<sup>86</sup> See. 2.5.1

<sup>87</sup> Tamanaha, p. 93. Raz also adds that the judiciary must be held independent, that natural justice is observed, that courts have reviewing power over some principles, that courts are accessible and that the discretion of crime-prevention agencies does not pervert the law. These are principles “designed to ensure that the legal machinery”

Laws cannot be completely predictable. If laws are to be general, then laws cannot regulate all circumstances. The task falls therefore on the application of laws in *in casu*, which by its very nature diminishes its predictableness. In some cases, comprehensive certainty is not even desirable, for instance in areas of private law, where parties are delegated the possibility of regulating their own affairs. In matters such as these, legal certainty displays a tension with liberty. Liberty is by its very nature chaotic, and a state devoid of liberty, is also one where legal certainty is enhanced. But whenever a dispute arises, the legal system must provide a resolution. This means that, according to Frändberg, laws must be *available*, in other words:

- (1) The system must be capable of providing an answer to a legal question,
- (2) The answer must be comprehensible,
- (3) The answer is easily obtainable<sup>88</sup>

Legal systems must be *capable* of providing an answer to every case, or else subjects to the legal system are placed in a lawless state of affairs.<sup>89</sup> The rule must be comprehensible, which means they must be clear, for vague and ambiguous rules are not capable of guiding behaviour. But vagueness is inherent in all that is general, thus striking the right balance between generality and clarity is a challenging task. Moreover, sacrificing generality to increase certainty, by creating more detailed and specific laws, may even be counterproductive, as overly detailed regulation makes the content of laws more complex and less intelligible.<sup>90</sup> The law must be obtainable, requiring rules of procedure for the publication of laws. All of these principles are useless if the information obtained is not reliable.<sup>91</sup> This is why laws must be prospective and not retroactive, and why laws must be stable and not subject to constant change.

From a formalist perspective, these tenets presumably function as guidelines. They guarantee qualitative characteristics of laws, but defective laws cannot be remedied during its application without the law-applier resorting to substantive

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enforces laws properly. These extra requirements serve to ensure that laws are capable of guiding behaviour. See Raz, 210-218.

<sup>88</sup> Frändberg, p. 116.

<sup>89</sup> Ibid. p. 117-118.

<sup>90</sup> Ibid. p. 120.

<sup>91</sup> Ibid. p. 116-117.



considerations. For instance, since criteria such as generality, clarity, stability are not absolute and are often in conflict with one another, deciding when to uphold or to exempt a law from application in a specific case will ultimately depend on the judge's evaluation of the intent of the legislature, notions of fairness, precedent-value, internal coherence within the system etc. It often happens that some laws are formulated in general terms, but in practice target specific persons, or that rules are so vague that they allow wide administrative/executive discretion. It may be the case that exceptions need to be made for the prohibition of non-retroactivity, in which case such exceptions will *de facto* be based on criteria of morality or justice.<sup>92</sup>

### 3.3 Equality

It is curious that Raz appears not acknowledge equality as one of his basic tenets. This view is not a very popular one, as even most formalists admit that equality is integral to the concept, but perhaps there is good reason for it. On the one hand, the idea that laws should restrain the ruling authority can only be achieved if the ruling authority is subjected to a common rule. The rule of law would be futile if some individuals were to be placed above law, and inefficient if some individuals or entities were placed outside the law. On the other hand, one could nevertheless easily imagine a legal system wherein the legislature engages in “unjust” discriminations, is subordinated to its own rules, but is still able to produce predictable laws capable of guiding behaviour. It is furthermore in the nature of laws themselves to discriminate between different categories of people, or else it would be impossible to determine which laws should or should not apply to particular cases. What equality reasonably is intended to mean, is the absence of *arbitrary* discrimination. But the very definition of “arbitrary” will thus require a substantive evaluation.<sup>93</sup> Equality must then logically mean that discriminations can only be accepted if they are justifiable.<sup>94</sup> We accept that state officials should have powers, privileges and legal defences that are not available to private citizens etc.<sup>95</sup> Legal systems do

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<sup>92</sup> See for example the Nuremberg trials.

<sup>93</sup> Tamanaha, p. 94.

<sup>94</sup> Frändberg, p. 101.

<sup>95</sup> P. Craig *Formal and Substantive Conceptions of the rule of law: an Analytical Framework*, Public Law, 1997, pp.467-487. p. 471.

*de facto* discriminate against children, prisoners, immigrants, and we find it reasonable to do so, yet we do not allow slavery. What is the distinction? Bingham tells us in the former cases, their positions are genuinely different.<sup>96</sup> In my view, the insufficiency of formal legality, from a moral standpoint, becomes evident here, in that a legal system that does not acknowledge the moral imperative of human dignity, may also find “objective” justifications for enslavement. *Equality in the law*<sup>97</sup> is something formal legality cannot address altogether.

We are then lead to ask; on what grounds can discrimination be justified? An answer to this cannot be provided without consulting an ethical theory; one needs to balance utility, dignity and other values. Progressive taxation discriminates against people, and may deprive them of property they would otherwise have a legitimate claim to, but discriminating for these purpose does not offend our collective moral conscience, perhaps because wealth is not attached to us humans beings. Discrimination on the basis of wealth for the common good of the community is something that can be rationalized as a matter of policy. But discriminating on the basis gender or race is held to be intolerable, a sentiment that formal legality may struggle to account for with its pure instrumental approach to the rule of law.

### 3.4 Procedural “Rights”

“[F]or every right, there is a remedy; where there is no remedy, there is no right.”<sup>98</sup>

Laws create rights and duties, whereby the concept of the rule of law would be severely undermined if those to whom laws are addressed, have no means to seek redress when their rights and duties are affected. Judicial safeguards ensure that the state cannot arbitrarily implement measures against its citizens without the courtesy of due process.

The meaning of judicial safeguards is usually framed in substantive terms as a human right, for example *right to fair trial*, encompassing inter alia a right to *be heard*, in *reasonable time*, in a *public and impartial hearing*, a *right to an*

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<sup>96</sup> Bingham, p. 55-56.

<sup>97</sup> Frändberg, p. 105-106.

<sup>98</sup> British maxim.

*appeal, access to evidence* etc. Within criminal law, one also speaks of *rights of the accused*. Procedural rights of this sort are arguably a product of the legal system as such, as Joseph Raz maintained. The logic would seem that for laws to guide behaviour, it has to be applied correctly, and therefore laws must in some sense be applied fairly, even though the word fair seems quite dubious as a formal requirement. Technically, access to remedies could be satisfied by adjudication on the basis of trial by combat, ordeal or mob tribunals. Yet these forms of “dispute resolutions” would frustrate the formal purpose of laws, that is to say to guide behaviour, since its content would then become irrelevant for its application. Right to a fair trial is in this sense not a substantive concern, just a product of the legal machinery; it’s arguably not really a right at all, and effective judicial protection is not really about protecting anyone. Or is it? The answer to this question is contentious, and before offering my opinion, a few words are in order regarding the nature of judicial safeguards.

Judicial safeguards are of particular importance due to what is at stake. Whereas legal certainty and equality are intangible concepts, criminal/administrative sanctions may be directly related to the individual’s physical and mental health. The value of these judicial safeguards is amplified by the state’s monopoly on violence. As has been touched upon in chapter 2.4, in the state of nature, the individual is the judge, jury and executioner for any violation of his “rights”. When entering into society, the use of force, even to enforce or reclaim what is rightfully his, is supposedly forfeited to the state. Once this has occurred, it becomes incumbent upon the state to protect its citizens, and all the more important still, to refrain from arbitrarily infringing upon the rights of its citizens. It befalls the state to administer the use of physical or psychological violence between citizens in the domain of criminal law, and to use force against them when it is necessary for the maintenance of peace and order.<sup>99</sup>

The state can, when it is called upon, choose from an arsenal of measures which violently undermine our most precious liberties; incarceration,

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<sup>99</sup> Frändberg, p. 145.

detention, arrest, confiscation, intrusion, trespassing, appropriation etc.<sup>100</sup> Given the implications of such actions, it is imperative to limit its discretion to what is provided for in statutory law,<sup>101</sup> and to ensure that the individual is afforded procedural safeguards against arbitrary or wrongful charges. Some of these procedural guarantees are central to modern legal thinking, but is actually based on moral reflections. Take for example the principle of the *presumption of innocence*. First, it should be noted that it does not reasonably mean that judges are to presume the innocence of the accused; judges should not be predisposed to rule one way or another. What the principle envisions is that the burden of proof falls upon the prosecution, that conviction must be supported by evidence beyond reasonable doubt, and that in case of doubt, judges must acquit.<sup>102</sup> It is evident, that a principle of this character is the product of ethical thinking, for it is clearly not a prerequisite for the “legal machinery” to function. Formal rule of law also leaves us in the dark as regards which acts are to be legitimately penalized and what sort of punishment should follow; it is ultimately a question of policy.

The conflict between the two definitions in this sense could be summarized in the interpretation of the term “arbitrary treatment”, the likes of which both conceptions of rule of law fundamentally seek to prevent. In a purely formal interpretation, arbitrary treatment is disallowed insofar as the laws are predictable and correctly applied, in other words, they provide procedural due process. In a substantive sense, inasmuch as one includes the right of human dignity, arbitrary treatment takes on a much wider definition. This can be properly illustrated by distinguishing the terms procedural justice from substantive justice, the latter of which, a formal conception of the rule of law will not concern itself with altogether. Take for instance a case of an innocent person winding up convicted of crime he did not commit. This would appear to indicate a failure of the criminal justice system, yet, if procedural justice is

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<sup>100</sup> Ibid. p. 147.

<sup>101</sup> Frändberg, p. 172.

<sup>102</sup> Ibid. p. 159.

served, can any objections to that specific case really be raised from a formal perspective?<sup>103</sup>

### 3.5 Politics

What makes formal legality attractive is that it is politically neutral. Its basic tenets set the tone for how the state should govern, and makes no further ideological claims thereafter. For example, formal legality is a necessary component for capitalism, as market-economies require a degree of certainty and predictability in order for trade and investment to flourish. Capitalism may, however, be entirely disbanded in a formal legal system, as it cannot function without substantive components such as property rights and contracts. Whether these institutions should exist becomes a matter of social choice, the product of positive legislation. Similarly, socialism is also contingent on a formal rule-based system. The area and scope of state involvement in private affairs will likewise be a matter of social choice, to which formal legality is equally silent.<sup>104</sup>

Its neutrality therefore leads to a bittersweet advantage, as the main criticism against a strict formal approach is that it does not restrict government authority enough. Tyrannical governance is still possible, as repressive laws are still capable of fulfilling requirements of generality, prospectiveness, clarity and so forth. Indeed, formal requirements may in this sense even be counter-productive, as the fulfilment of the formal requirements may give the illusion of legitimacy for “wicked” regimes.

Nevertheless, if one is to acknowledge human rights as the supreme law, then the task of safeguarding them will usually fall within the jurisdiction of the judiciary, by means of judicial review. In most of Europe the establishment of Constitutional Courts to safeguard fundamental rights<sup>105</sup> has led to a concern that law and politics are being conflated.<sup>106</sup> Substantive judicial review is particularly prominent in Germany, where the atrocities during the Second

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<sup>103</sup>For interesting analysis on this issue with regards to the respect for the “active” intelligence of individuals, see Brettschneider, p. 9.

<sup>104</sup> Tamanaha, p. 98.

<sup>105</sup> Ibid. p. 110.

<sup>106</sup> Ibid. p. 110 - 111.

World War was partly blamed on the failure of a positivistic legal system to impose sufficient restraints on the Weimar republic, thereby allowing the Third Reich to emerge. The superseding constitution, das *Grundgesetz* of 1949, saw a radical change in the conception of the *Rechtstaat*, placing the value of human dignity at its core, beyond the reaches of the legislature, with the Bundersverfassungsgericht as the ultimate authority on its meaning.

In cases where the law is silent or unclear, or where many possible laws may be applicable, judges must apply a strict and consistent method with regards to precedent, the intent of the legislature etc., but the outcome is always at risk of being tainted by the judge's subjective interpretation. These powers are amplified when judges are accorded the discretion to weigh general principles, rights and standards of fairness, possibly replacing the rule of law with the *rule by judges*. Given that judges are less accountable to democratic processes, an excessively thick substantive concept of the rule of law risks centralizing power in the hands of the judiciary, rather than the legislature or executive, making it susceptible to the same kind of corruption and abuse that the rule of law seeks to remedy.<sup>107</sup> There is furthermore no guarantee that the judiciary will use its powers wisely, and where its decisions are final and supreme, it may backfire and stratify immoral decisions as constitutional. For example, in the *Scott v. Sandford*,<sup>108</sup> the United States Supreme Court ruled, in one of the most controversial decisions in its history, that the Missouri Compromise had been unconstitutional, for it would have deprived Scott's owner of his property, thus declaring/affirming slaveholding a constitutional right.

### 3.5 Democracy

Formal legality is not only neutral as to the economic system in place, but also the form of government. It is true that formal legality is compatible with democracy, just as it is compatible with authoritarian regimes. One could perhaps contend that democratic accountability would add legitimacy to a formal legislative process,<sup>109</sup> and it is true that a democratic law-making

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<sup>107</sup> Tamanaha p. 112.

<sup>108</sup> *Dred Scott v. Sandford*, 60 US 393 (1857)

<sup>109</sup> Michel Rosenfeld, *The Rule of Law and the Legitimacy of Constitutional Democracy*, Southern California Law Review, Vol. 74, (2001), p. 1314.

procedure does not add substantive content to the laws themselves. Democratic law-making should nevertheless be regarded as belonging to a substantive conception of the rule of law, as the justification for a democratic form of government cannot be accounted for in the absence of a specific political theory. Tamanaha posits however, that without formal legality, democracy will be circumvented, and without democracy, formal legality loses its legitimacy.<sup>110</sup> The second part of that statement is fallacious.<sup>111</sup> Such a claim appeals to a substantive ideal, that any other social order that denies individuals the right to self-rule would be illegitimate. As has been described above, formal legality is regarded as formal due to it being, allegedly, value-free. Any requirements imposed upon such a legal system are purely functional, and are not motivated by moral aspirations or ideals. Its justification or legitimacy resides within the system itself, not in some external moral consideration.<sup>112</sup> In short, although democracy is compatible with a formal rule of law, it is not necessarily a requirement, but rather, merely an option among many within formal legality.

If we accept a substantive concept of the rule of law, we are still left with the problem of how to balance democratic laws and human rights. Constitutional democracies elevate individual rights to the rank of a higher law, but if individual rights are held to be absolute, then settling disputes becomes impossible. Given that individual rights can be compromised, one must first determine what these individual rights are, and then how far they should extend. The problem with a substantive conception of the rule of law is augmented by the fact that the existence of certain rights is far from unanimous.<sup>113</sup> Pluralistic societies will rarely agree on a homogenous set of supreme values. The task of safeguarding these rights must therefore be left outside of the influence of the legislature, causing tensions between human rights and democracy. Since the judiciary has neither “power of sword nor purse”, it has been deemed appropriate to accord these powers of review on the

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<sup>110</sup> Tamanaha. p. 99-101.

<sup>111</sup> I am not supposing that he is unaware of this, since he does acknowledge that there are competing views on this matter. There is no true or false here, I just simply disagree with this logic, provided we are in fact operating under the same premise.

<sup>112</sup> See. 2.3.1

<sup>113</sup> See 2.5.2 on rights.

judicature.<sup>114</sup> As a counterargument to the supposition of the anti-democratic nature of human rights, Tamanaha suggests the following:

“[L]imits of this sort [individual rights] is self-imposed by the demos on the demos [...] so striking a legislation to vindicate rights is not anti-democratic.

...

Freedom is foremost self-determination (democracy), but to be genuinely self-determining one must first be free (individual rights). [...] Democracy is therefore restrained by individual rights for the greater good of democracy.<sup>115</sup>

Of course, democracy and substantive rule of law are not to be conflated; both emphasize the right to exercise influence, but in different ways. For example, a substantive rule of law does not advocate that the right to self-governance also includes a participatory right in judicial decision-making process, nor does it require that judicial decision-making should be democratic.<sup>116</sup> There is a distinction to be made between the right to be consulted in a legal matter where one is implicated, and a participatory right to decide its outcome. These concepts are however symbiotic, in that, the same underlying theory of human dignity provides justification for both ideals. In this respect, one ideal will be incomplete without the other.

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<sup>114</sup> Loughlin, p. 293.

<sup>115</sup> Tamanaha, p. 104-105.

<sup>116</sup> In fact, it promptly opposes the latter. "Mob verdicts" is something a substantive conceptions of the rule of law attempts to prevent.



## 4 The Rule of Law in Supranational Law

In examining the rule of law between nation states we encounter some difficulties. Linguistically, the rule of law functions independently of the state, unlike its German and French counterparts. This is probably why the ECtHR has chosen to rely upon the term *la prééminence de droit*, and why the CJEU has occasionally expressed it as a *community based on the rule of law*, which has mostly been translated, although not consistently, to *Rechtsstaatlichkeit* and *Communauté de droit*.

The main issue with exporting the concept of the rule of law to international law stems from the absence of a sovereign, with the implication therefore that there can be no legitimate legislature. The state of affairs internationally resembles that of a state of nature, only as between states rather than individuals. Obligations in international law are primarily self-imposed through treaties or deduced from previous conduct in the form of customs. The state-designed tradition of the rule of law doesn't fit easily at this stage, since there is no supreme body of sanctions to remedy breaches of obligations. Enforcement becomes a matter of mutual respect and/or self-interest. It would be similar to a state of nature where duties and obligations between individuals could only be derived from private regulation, i.e. where, for example, contracts could only be enforced either voluntarily, through persuasion or private violence.

Since there is no global government, there can be no working separation between the executive, legislative and judicial branches. International law is sometimes accused of being a mere product of geopolitical relations, yet it would appear that the desire displayed by all nations to express their conduct in legal jargon suggests, at the very least, a shared understanding that international relations should be governed by laws. Moreover, the fact remains that international law is respected in an overwhelmingly majority of cases by states and private actors alike.<sup>117</sup> The ideal limitation of discretionary power is perhaps unachievable, as every state is independent and sovereign over its own

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<sup>117</sup> Bingham, p. 113.

territory, but absolute power is nevertheless restricted as states in general do operate within a legal framework,<sup>118</sup> even if breaches go unpunished on occasion. The sources of international law are set forth in Art. 38 (1) of the Statute of the International Court of Justice, providing a minimal degree of certainty.<sup>119</sup> Even so, predictability and stability comparable to domestic legislation is unattainable as the process of norm-making is heavily decentralized, being the result of negotiations and compromise between entities with quasi-legislative powers. The Vienna Convention on international treaties<sup>120</sup> provides transparency in the conclusion, ratification, reservation, interpretation, validity and termination of treaties and Art 2.1 of the Charter of the United Nations<sup>121</sup> recognizes all states as equal sovereigns. Nevertheless, when speaking of the rule of law in international terms, it needs to be addressed in terms of an autonomous definition.

The EU is perhaps the one anomaly, since it has transformed itself into a closed and complete entity that can be said to faithfully embody the concept of the rule of law in the traditional sense of the concept. This will be subject of sub-chapter 4.1. In chapter 4.2, I shall demonstrate how the rule of law functions as a substantive interpretative standard with regards to the ECtHR.

#### 4.1 The Rule of Law in the European Union

Although the term rule of law was not explicitly mentioned in the treaties before the Treaty of Maastricht, the concept as such has permeated the formation of the EU law from the outset. In its first appearance, it was given a place in the preamble of the Treaty on the European Union and an operative role in common foreign and security policy<sup>122</sup> and development cooperation.<sup>123</sup> In later years, it became a condition for accession in what became known as the

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<sup>118</sup> Stéphane Beulac, *The Rule of Law in International Law Today*, in *Relocating the Rule of Law*, (Hart Publishing, 2009) p. 207.

<sup>119</sup> Statute of the International Court of Justice, 3 Bevans 1179; 59 Stat. 1031; T.S.993; 39 AJIL Supp. 215 (entered into force 24 October 1945)

<sup>120</sup> Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entered into force 27 January 1980).

<sup>121</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI (entered into force 24 October 1945)

<sup>122</sup> Art. 21 TEU.

<sup>123</sup> Art. 208 TFEU.

Copenhagen criteria. It was finally codified as a foundational principle of EU,<sup>124</sup> adherence to which is sanctioned under Art 7 of TEU, where member states may have their rights suspended if they found responsible of a serious and persistent breach of the rule of law.

The EU was devised as a collection of institutions with powers attributed to them to bind its member states. Sanctions were attached to these powers, in order to prevent institutions from overstepping their authority. For this reason, a supreme court had to be established, to exercise judicial review over these institutions, creating a Community (Union) of laws. The system turned out to be incomplete; the relationship between Union law and national laws had not yet been determined, nor had the effect of Union law in national courts been discussed. This deficiency was later to be addressed by the CJEU, by means of the doctrine of *direct effect*,<sup>125</sup> and subsequently establishing the *supremacy of EU law*<sup>126</sup> and conclusively sanctioning transgressions by furnishing individuals with possibility of obtaining compensation.<sup>127</sup>

Before immersing in the substance the rule of law within Union law, it should be stressed that the rule of law exhibits three major functions for EU. The first is *regulatory* in the internal functions of the legal system itself. The second and third are external, the former being *instrumental*, by applying pressure upon the prospective states to conform with the rule of law in order to accede to the Union, and the latter *promotional*, through EU foreign policy. The following study is only concerned with the internal aspect.

The concept of the rule of law is not explicitly mentioned in the Treaty of the Functioning of the European Union [hereinafter TFEU].<sup>128</sup> It is in the TEU that the rule of law appears listed as a foundational principle in Art 2. Art. 7 TEU allows for a sanction mechanism against members states culpable of a serious

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<sup>124</sup> Art. 2 TEU.

<sup>125</sup> Case C-26/62 *Van Gend en Loos* [1963] ECLI:EU:C:1963:1

<sup>126</sup> Case C-6/64 *Costa v ENEL* [1964] ECLI:EU:C:1964:66

<sup>127</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECLI:EU:C:1991:428

<sup>128</sup> Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47. The phrase rule of law appears in Arts 14.2 (2) and 263 (2) TFEU, but refers to rules that constitute laws, not to the concept that laws should reign supreme.

and persistent breach to the values of Art. 2. The term rule of law is occasionally invoked by the CJEU as the founding principle of Union law (Community based on the rule of law) but it is more reminiscent of a meta-rule or interpretational principle, rather than an operative norm. Given that many aspects of the rule of law has been developed by the Court within the sphere of the previous Economic Community, it is still unknown whether the use of term rule of law developed by the CJEU bears any connection to Art. 2 TEU,<sup>129</sup> although some theorists suggest that the rule of law, as referred to by the CJEU, displays different characteristics than the term currently in Art. 2 TEU.

“Der Grundsatz der Rechtsstaatlichkeit aus Art. 6 Abs. 1 EUV (currently Art. 2 TEU) wendet sich nicht unmittelbar an die Gemeinschaft sondern stellt vordergründig ein Gebot typenkonformer Ausgestaltung für die Mitgliedstaaten auf.

...

Indem Art. 6 Abs. 1 EUV als Homogenitätsgebot die verschiedenen mitgliedstaatlichen Verfassungstraditionen miteinander verwebt und auf Mindeststandards festsetzt, [...] Der Grundsatz der Rechtsstaatlichkeit ist jedoch keine Rechtsnorm der Gemeinschaftsrechtordnung.”<sup>130</sup>

#### 4.1.1 Formal elements

##### *I Legality*

With its decision on the *supremacy* of Union law, the CJEU created a “Community based on the rule of law” (*Rechtsgemeinschaft* or *Communauté de droit*), which changed the character of the EU treaties as regards to ordinary international treaties. It took on a “constitutional character” with a full set of sanctioning mechanisms to warrant the observance of its laws, rather than a simple reciprocal relationship between signatory states.<sup>131</sup>

“The European Economic Area is to be established on the basis of an international treaty which merely creates rights and obligations as between the Contracting Parties and provides for no transfer of sovereign rights to the inter-governmental institutions which it sets up. In contrast, the EEC Treaty,

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<sup>129</sup> E. Wennerström, *The Rule of Law and The European Union*, (Iustus Förlag, 2007) p. 118.

<sup>130</sup> R. Ullerich, *Rechtsstaat und Rechtsgemeinschaft im Europerecht*, (Nomos, 2011). P. 125. ”The principle of the rule of law in Art. 6 para. 1 is not immediately directed towards the Community, but sets an outline for compliance by Member States ... Art. 6 para. 1 seen as an edict of uniformity that weaves together the different constitutional traditions, puts forth minimum standards for the Member States ... However, the principle of the rule of law is not a legal norm in Community law.” Translation suggested by author.

<sup>131</sup> Compare with the principle *Inadimplenti non est adimplendum*

albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the *rule of law*. The Community treaties established a new legal order for the benefit of which the States have limited their sovereign rights and the subjects of which comprise not only Member States but also their nationals. The essential characteristics of the Community legal order which has thus been established are in particular its primacy over the law of the Member States and the direct effect of a whole series of provisions.”<sup>132</sup>

## A Separation of Powers

The institutional distribution of powers in the European Union is one that is difficult to conciliate with an organic form of the doctrine, typically found at national level. No sharp distinctions are made between the EU institutions as regards the traditional separation of powers into legislative, executive and judicial branches. Although the European Parliament is strictly accorded a legislative function, the Commission is generally regarded as the executive, yet in some areas, such as competition law; it presides over a quasi-legislative function, which is also true for the Council of the European Union [hereinafter the Council]. Instead, authority is kept in check by means of the principles of institutional balance, autonomy and loyal cooperation.<sup>133</sup> The absence of a stricter separation of powers is said to be unfeasible, seen as the EU is an intergovernmental institution, having to be more responsive to political interests of nation-states, and having to adhere to an overarching ideal of integration. This reflects in turn a more pervasive check on centralized authority found in a horizontal dimension, which has given rise to a general principle of Union law, namely *the principle of subsidiarity*.<sup>134</sup> It limits the institutions, in areas of shared competences,<sup>135</sup> to act only insofar as the objectives cannot be achieved by the member states themselves.

## B Hierarchy of Norms

Previous to the Lisbon Treaty, the vertical ordering of legislative acts was perceived to be unclear. The chief legal instruments – regulations, directives and decisions<sup>136</sup> – could be used as primary norms to pursue policies, and could

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<sup>132</sup> Opinion No 1/91, (*Draft Opinion on the EEA*) [1991], ECLI:EU:C:1991:490.

<sup>133</sup> M.L. Fernandez Esteban, *The Rule of Law in The European Constitution*, (Kluwer Law International, 1999) p. 157.

<sup>134</sup> Art. 5 (3) TEU.

<sup>135</sup> Art. 4 TFEU.

<sup>136</sup> Art. 288.

equally be used as secondary supplementary norms to implement, in greater detail, policies set forth in primary norms. The Lisbon Treaty solved this by providing a straightforward hierarchy divided into five tiers: (i) The constituent treaties and the EUCFR, (ii) General principles of law, (iii) Legislative Acts, (iv) Delegated Acts and (v) Implementing Act. The latter three are comprised of the previously mentioned regulations, directives and decisions, defined in Art 288 as secondary legislation. There is no hierarchy between them; the choice is simply contingent upon the intended objective. The hierarchy in secondary legislation introduced by the Lisbon Treaty resides instead in the choice of norm-making procedure. Legislative acts are adopted jointly by the EP and the Council, on proposal by the Commission.<sup>137</sup> Its form is what separates it from delegated acts, which may in terms of content, be virtually identical to legislative acts, since they are also supposed to be of general application and may supplement or even “amend” (revoking and replacing) non-essential content of legislative acts. The main difference between the legislative and delegated acts is therefore the granting of legislative authority to the Commission, while the Council and the EP retain the power to veto such acts and revoke said authority.<sup>138</sup> Commission then implement these acts by means of rules of general application or pure implementation.<sup>139</sup> What distinguishes implementing acts from delegated acts is the fact that the former are confined to the authority received by the higher acts (whereas delegated acts may, as mentioned, supplement or replace content of legislative acts). The line between legislative and administrative acts may sometimes seem blurry, since the separation of powers within the EU is not *organic*, and the legislative and delegated acts are separated only by *form* or the scope allowed to the Commission for implementing acts of general application. This blur is further perpetuated by the fact that decisions are considered legislative acts, which would run contrary to the basic tenet of the rule of law of generality. In theory, however, this is remedied by the requirement for a legal basis for every administrative and legislative act, and the closely related obligation to motivate

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<sup>137</sup> Art. 289 TFEU.

<sup>138</sup> Art. 290 TFEU.

<sup>139</sup> Art. 291 TFEU.

legislative acts.<sup>140</sup> An additional issue, albeit perhaps an unimportant one, is that Art 288 TFEU is incomplete. For example, an administrative decision, which is not enacted subject to a legislative procedure pursuant to Art. 289 TFEU, will neither fulfil the criteria of delegated acts nor implementing acts, but is still somehow intended to be valid according to Art. 288 TFEU.<sup>141</sup>

### C Judicial Review

One of the most important instances in the formation of a legal system based on the rule of law, was to institute a mechanism for examining the legality of EU measures. Hence, the CJEU was accorded the authority to review acts of other EU institutions. Art. 263 (1) TFEU allows the Court to review acts that have binding legal effects upon third parties issued by the Council, Commission, ECB, EP and the European Council, provided (i) the act *can* be open to challenge, (ii) the challenge is made by an agent with *standing*, (iii) the act is challenged on the *basis of illegality* pursuant to Art. 262 (2) TFEU and (iv) it is done within the *time limit* set forth in Art. 263 (6) TFEU.

Legal or natural persons who lack standing according to Art. 263 TFEU can challenge acts indirectly by means of referral from national courts.<sup>142</sup> If the *access* criterion is fulfilled, the applicant will have to show that one of the *grounds* criteria for annulment, or invalidity, is present. These can be either (i) lack of competence, (ii) infringement of procedural requirement, (iii) infringement of the Treaty or any rule of law relating its application or (iv) misuse of power.<sup>143</sup> The meaning of the phrase “any rule of law relating to its application” is unclear since there is no *travaux préparatoires*. This ambiguous formulation allowed the CJEU to review legislation not just based on legality, but also its content, developing general principles of EU law,<sup>144</sup> which will be the subject of the proceeding chapter. First, let us review two landmark cases based on Art. 263 TFEU in which the rule of law has been explicitly referred to.

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<sup>140</sup> Art. 296 (2) TFEU.

<sup>141</sup> P. Craig & G. de Búrca, *EU Law: Text, Cases, and Materials* (Oxford University Press, 5th ed., 2011) p. 118.

<sup>142</sup> Art. 267 TFEU.

<sup>143</sup> Craig & de Búrca, p. 519.

<sup>144</sup> *Ibid.* p. 525.

### *C1 Les Verts v. European Parliament*

In *Les Verts*,<sup>145</sup> the CJEU held that the list of bodies subject to review under Art. 173 TEEC (now 263 TFEU) was not exhaustive, establishing that it would be contrary to the rule of law and the spirit of the treaty, if legislations with effect vis-à-vis third parties could evade the CJEU's revision.

#### *Facts:*

*Les Verts*, a French political party, accused the Bureau of the European Parliament of trying to ensure the re-elections of the incumbent members of the EP elected in 1979, by adopting a decision that provided the allocation of contributions for costs of preparations for the upcoming European elections in 1984. Art. 173 TEEC only provided for the review of measures adopted by Council and the Commission, the reason being that the EEC-treaty had originally only conceded the EP powers of consultation and political control, without binding effect on third parties.

#### *Held:*

“It must first be emphasized in this regard that the European Economic Community is a community based on the *rule of law*, inasmuch as neither its member states nor its institutions can avoid a review of the question [...]. The Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.”<sup>146</sup>

Concluding that a strict application of the provision would amount to a denial of justice, the CJEU extended the provision to include all institutions that could adopt measures with binding effect on third parties.

### *C2 UPA v. Council*

As regards the question of standing, the CJEU declared in *UPA*<sup>147</sup> that the rule of law implies a right to effective judicial protection of the rights that stem from its legal order.

#### *Facts:*

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<sup>145</sup> Case C-294/83 *Parti écologiste "Les Verts" v European Parliament* [1986] ECLI:EU:C:1986:166

<sup>146</sup> *Les Verts*, para. 23.

<sup>147</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* [2002] ECLI:EU:C:2002:462.



The CJEU had to respond to an appeal of a decision of the Court of First Instance (currently General Court). It had dismissed the application by UPA, a trade organization representing the interests of Spanish agricultural businesses, as manifestly inadmissible. The application was for the annulment of a Council Regulation concerning reformation of an aid scheme for olive oil markets. The objection against admissibility was argued on the basis that the UPA had lacked standing pursuant to Art. 173, since the aid scheme was not of its direct or individual concern.

*Held:*

“The European Community is, however, a community based on the *rule of law* in which its institutions are subject to judicial review of the compatibility of their acts with the Treaty and with the general principles of law which include fundamental rights.”<sup>148</sup>

The CJEU granted that a community based of the rule of law entitled natural or legal persons the right to effective judicial protection, and tied it to the principles of fundamental rights. Nevertheless, the CJEU did not relax its criteria on standing, and seeking to remain within its jurisdiction, it concluded that it was for the member states to ensure that adequate legal protection was offered.

#### 4.1.2 Substantive Elements

##### *I Proportionality*

Borrowing from the German principle of *Verhältnismäßigkeit*, the principle of proportionality stipulates that the state must refrain from undertaking measures that are not adequate, causal and necessary in relation to a legitimate public objective of the measure. Proportionality gained importance in constitutional legal orders during the 19<sup>th</sup> and 20<sup>th</sup> century. Its role became prominent where adjudication involved constitutional rights, since otherwise, all legislations which infringed upon said rights, would be invalid *ab initio*. Conversely, the principle of proportionality was also prominent in the protection of individual rights once the welfare state began to expand, in order to balance the

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<sup>148</sup> *Upa*, para. 38.

interferences upon civil liberties.<sup>149</sup>

Proportionality is thus a purely substantive requirement, leaving the judiciary with the final word as to whether the content of a state action is appropriate. The concept was first developed by the CJEU, but has now been enshrined in Art. 5 (4) of the TEU as well, mandating that EU action should not go beyond what is necessary to achieve its objectives. This article however, serves mostly as a guideline for the legislative process, rather than a norm that CJEU can base its rulings upon. The development of the principle of proportionality has arguably been one of the most important principles in the formation of the EU legal order, superseded only by the principle of supremacy and direct effect.<sup>150</sup> From a theoretical perspective, proportionality can be viewed as the counterpart to the principle of supremacy and direct effect.

When the applicant invokes the principle as a means to invalidate/annul a measure, the CJEU will verify whether the measure was (i) suitable to achieve the desired end, (ii) said end was legitimate, (iii) the burden imposed on the individual is excessive in relation to the end being sought (least restrictive effective means) and/or (iv) whether the measure is manifestly disproportionate.<sup>151</sup> When it comes to the review of EU legislations, the CJEU generally favours the manifest disproportionate test, meaning in practice that EU legislations will rarely be set aside on this ground. Only in a few occasions has the CJEU adopted the least restrictive effective means test towards its own legislations, as in *Swedish Match*,<sup>152</sup> wherein the CJEU deemed that an absolute prohibition of oral tobacco was necessary for the promotion of public health, and concluded that it was effectively the only measure by which this could be achieved. The CJEU will perhaps be more inclined to aside EU acts base on the least restrictive means test, when procedural guarantees of individuals are in

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<sup>149</sup> W. Sauter, *Proportionality in EU Law: a balancing act?*, TILEC Discussion Paper No. 2013-003, 2013.

<sup>150</sup> W. Sauter, p. 6.

<sup>151</sup> Case C-331/88 *The Queen v Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte: Fedesa and others* [1990] [Fedesa] ECLI:EU:C:1990:391. Paras. 13-17.

<sup>152</sup> Case C-210/03 *Swedish Match AB and Swedish Match UK Ltd v Secretary of State for Health* [2004] ECLI:EU:C:2004:802.

jeopardy.<sup>153</sup> As regards measures adopted by member states, the proportionality test will take into consideration factors of harmonisation and competences. In areas that have not been subject to harmonisation or common policies, the CJEU will be less likely to apply a less restrictive means test.<sup>154</sup> Proportionality naturally plays a key role in the assessment of public policy exceptions and overriding reasons of general interest, which member states may invoke against EU intervention.<sup>155</sup> In summary, review of proportionality is particularly important where the EU legislature enjoy a broad discretion in areas of economic, political and social policies that are very complex,<sup>156</sup> where fundamental rights are concerned or where the measures involves penalties.<sup>157</sup>

## *II Legal Certainty*

As one of the general principles of Union law, legal certainty requires EU institutions in its legislative or administrative capacity to act in a manor that is *clear, precise* and that the legal implications of such actions are *foreseeable*. From this principle, the CJEU has stated that acts may not have *retroactive effect*. These are all basic tenets of the formal conceptions of the rule of law. However, the prohibition of retroactivity is not absolute. In exceptional circumstances, retroactive effect has been deemed acceptable where there is a pressing EU objective put at risk.<sup>158</sup> The CJEU has incorporated substantive elements to this principle as well. In case law, retroactivity can be divided into actual retroactivity, and apparent retroactivity. Actual retroactivity has already been discussed; where a new measure is applied to events in the past. Apparent retroactivity is more complicated, for it involves measures that apply to events, which have occurred but have not yet concluded at the time of the enactment. Under these circumstances, the prohibition to retroactivity does not apply, but the CJEU has found it reasonable to mitigate the harm for private parties who have already planned their endeavours based on the old legal regime. This is

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<sup>153</sup> See below in 4.1.2 IV A in *Kadi v Council*.

<sup>154</sup> Sauter, p. 16.

<sup>155</sup> *Ibid.* p. 15.

<sup>156</sup> Case C-491/01 *The Queen v Secretary of State for Health, ex parte British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd*. [2002] [American Tobacco] ECLI:EU:C:2002:741.

<sup>157</sup> Craig & de Búrca p. 527-530.

<sup>158</sup> Fedesa, paras. 41-47.

called the principle of *legitimate expectations*, and is derived from the German *Rechtsstaats*-principle known as *Vertrauensschutz*, meaning in simple terms that private parties in certain circumstances acquire a right to have their expectations realized, when acting in good faith due to assurances given by the authorities.

### *III Principle of Equality*

If the spirit of the original European Economic Community was the integration and liberalization of markets between its member states, then the principle of equality was its material vessel. The concept of the internal market is the perfect illustration of the relationship between equality and liberty. What can be a greater testament for the rule of law and the freedoms it is intended to enhance, then the removal of one of the most arbitrary of all barriers; discrimination based on nationalities. The principle of equality, or non-discrimination, features frequently in the treaties: as a foundational value,<sup>159</sup> as a general prohibition of discrimination on grounds of non-discrimination,<sup>160</sup> as a requirement of equal treatment of men and women,<sup>161</sup> as a fundamental right<sup>162</sup> etc. But it's not only a vertical prohibition on member states or a constraint on the conduct of private parties, it is also a principle that the CJEU applies to review the content of all legislations. Nevertheless, the meaning of equality is not easily discernable. It involves defining which persons are in a similar enough position for a different treatment to be regarded as discrimination. It also requires an evaluation on whether the discrimination is unjustified, since it is an inevitable characteristic of laws to make distinctions between its subjects. At this point, one realises that, as a matter of Union law, the principle of equality is not to be understood as a purely formal equality before the law. Defining what constitutes an arbitrary treatment can sometimes be a controversial matter, as in *D v. Council*,<sup>163</sup> where the CJEU found that the Council's refusal to pay allowance to the partner of an employee in a registered

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<sup>159</sup> Art. 2 & 3(3) TEU.

<sup>160</sup> Art. 18 TFEU. See also Art. 45, 49 & 56.57 TFEU.

<sup>161</sup> Art. 2 & 3(3) TEU. See also Art. 157 TFEU.

<sup>162</sup> Art. 21 (1) EUCFR.

<sup>163</sup> Case C-125/99 *D and Sweden v Council* [2001] ECLI:EU:C:2001:304

partnership, which he would have been entitled to in a marriage, did not constitute a discrimination based on sexual orientation.

#### *IV Fundamental Rights*

The concept of human rights is expanding within the framework of the EU. As of yet, three formal sources of human rights are recognized in Art. 6 TEU: the EUCFR, the ECHR and general principles of EU law. The position of the ECHR as an authoritative source has not yet been acknowledged by the CJEU as binding, but is nevertheless one of inspiration for the general principles of EU law. This allows the CJEU to maintain its supremacy and autonomy, and to go beyond the ECHR when it deems necessary.<sup>164</sup> This may change once the EU accedes to the ECHR, which it is obliged to do under Art. 6 (2) TEU.<sup>165</sup> If accession takes place, the CJEU will no longer be the final arbiter of EU law, insofar as its acts are challenged on the grounds of violations of human rights. For the time being, the CJEU pays close attention to the case law developed by the ECtHR and refers to it regularly, but it has not been shy of differing in its interpretations.<sup>166</sup> The ECtHR will indirectly review acts of the EU when the implementation of such acts are left at the discretion of its member states,<sup>167</sup> or where the act in violation of the ECHR is an international agreement entered into by a member states.<sup>168</sup> Otherwise, the ECtHR will presume the compatibility of said acts with the ECHR provided the EU control systems affords an equivalent protection, and that there is no evidence that control being dysfunctional.<sup>169</sup>

Although morally commendable, allowing to CJEU to review legislation on the basis of human rights presents a few difficulties. In the early years of the EEC, the CJEU felt that its jurisdiction should be confined to economic issues, entertaining a sceptic approach towards the existence of fundamental rights in

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<sup>164</sup> Craig & de Búrca, p. 367.

<sup>165</sup> The CJEU has brought the negotiations to halt after issuing a negative opinion. See *Opinion 2/13 Opinion pursuant to Article 218(11) TFEU* [2014] ECLI:EU:C:2014:2454

<sup>166</sup> Craig & de Búrca, p. 404.

<sup>167</sup> *Cantoni v France*, App no 17862/91, 11 November 1996, Reports 1996-V.

<sup>168</sup> *Matthews v United Kingdom* App no 2833/94, 18 February 1999, Reports of Judgments and Decisions 1999-I.

<sup>169</sup> *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* App no 45036/98, 30 June 2005

its case law. A first glimpse of it could be observed in *Stauder*<sup>170</sup>, where the CJEU acknowledged *obiter dicta* that fundamental rights did indeed constitute a general principle of Union law. The CJEU gradually developed a precedent of general principles, which included the respect for human rights, alluding to various international instruments. With the EU taking a more active role in areas of security and anti-terrorism, the measures subject to challenge on the basis of violations of human rights increased considerably.<sup>171</sup>

Developing a doctrine of human rights has not been a simple task, as the CJEU has been reluctant to borrow from constitutional traditions. Unlike the ECHR, which intends to reflect “collectively shared commitments of all member states”, the CJEU cannot “assert an approach where particular rights does not appear in every national constitution”.<sup>172</sup> Defining which rights ought to be considered, and their weight relative to the collective interests or policies subject to scrutiny, is therefore very challenging, as the CJEU can neither reasonably borrow a “maximum universal standard” approach from a particular state, nor settle for a “minimum common denominator” from all states.<sup>173</sup>

The matter is further complicated when it comes to measures implemented by a member state, purported to breach human rights. This is partly owed to the difficulty of determining what is meant by actions that fall within the scope of Union law, and partly because member states are not always keen on the CJEU determining which standards of human rights ought to be observed.<sup>174</sup> The former issue is still controversial, for although Art. 2 TEU provides that the EU is founded on the values of human rights, and Art. 3 TEU stipulates that the EU should aim to promote these values; the EU has not been conferred with powers to act concretely in its treaty, whenever these values fall outside the scope of Union law. Its jurisdiction is growing, in light of the data protection act, and it already possess an extensive instrument in the area of non-discrimination.<sup>175</sup> It has effectively used its residual powers<sup>176</sup> in the formation

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<sup>170</sup> Case 29/69 *Stauder v Stadt Ulm* [1969] ECLI:EU:C:1969:57

<sup>171</sup> *Ibid.* p. 373.

<sup>172</sup> *Ibid.* p. 369.

<sup>173</sup> *Ibid.* p. 381.

<sup>174</sup> *Ibid.* p. 381.

<sup>175</sup> Art. 19 TFEU

of Fundamental Rights Agency and EU's external human rights and democratization programmes. However, whenever the EU attempts to intervene in the internal affairs of its member states, it is counteracted with a political backlash.

Such was also the case with the establishment of the EUCFR, with the UK, Poland and The Czech Republic taking measures to limit its scope of application within their respective jurisdictions.<sup>177</sup> The protocol is generally perceived as having little practical importance however, as the EUCFR is only intended to be a codification of prevailing general principles, and the case law collected so far is unaffected by the protocol. It is furthermore highlighted in Art. 51 (1) EUCFR that it applies to member states only when implementing Union law, and 51 (2) EUCFR iterates that it does not create new powers for the EU. Out of the same anxiety for the broadening of EU powers, Art. 52 (5) was included distinguishing the civil and political liberties in the charter from the social and economic rights, with the intent on restating the latter as non-justiciable.

A *Kadi v. Council*

*Facts:*

In *Kadi*,<sup>178</sup> the (UN) Security Council had adopted a resolution that states were to freeze funds and other financial assets of Usama bin Laden, and individuals associated with him or Al-Quaida. In order to effectively implement this resolution, the Council of the European Union adopted a series of measures directed towards the Taliban, who had been harbouring terrorists, including Regulation No 881/2002. Its annex contained the names and addresses of Kadi and Al Barakaat located in Jeddah, Saudi Arabia and Al Barakaat International Foundation registered in Stockholm, Sweden.

*Held:*

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<sup>176</sup> Art. 352 TFEU

<sup>177</sup> See. Protocol (No 30) on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom.

<sup>178</sup> Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECLI:EU:C:2008:461.

The first two contested issues in appeal - that the Council had lacked legal basis to adopt the measure and that the measure was not of general application - were rejected by the CJEU. The CJEU proceeded to acknowledge its lack of jurisdiction to review a resolution from the Security Council. Nevertheless, it asserted that a review of a measure adopted by an EU institution, even if it was to give effect to a Security Council resolution, would not undermine the primacy of said resolution in international law, provided that the review concerned its compatibility with a higher law in the Union legal order, namely fundamental rights.

“[T]he review by the Court of the validity of any Community measure in the light of fundamental rights must be considered to be the expression, in a community based on the *rule of law*, of a constitutional guarantee stemming from the EC Treaty as an autonomous legal system which is not to be prejudiced by an international agreement.”<sup>179</sup>

Seen as the review did not concern a measure directly attributable to the UN, and the review system before the Sanctions Committee was in the main an inter-governmental and of diplomatic nature, the CJEU proceeded to examine the measure’s compatibility with the fundamental rights in Union law. It held that Kadi’s rights of defence, in particular right to be heard and right to effective judicial protection, had not been respected as a result of the freezing of his funds. The CJEU acknowledged the legitimate security concerns of keeping Kadi in the dark about the considerations leading up to his inclusion in the list. It held nonetheless that the failure to communicate the grounds for which these restrictive measures had been enacted, and the failure to inform him of the inculpatory evidence therein within a reasonable time after these measures were implemented, had denied him procedural justice. As for his right to property being restricted, the CJEU conducted a proportionality test as to whether public interest could outweigh the private interests of Kadi. The CJEU held that although the restrictive measure of this nature could in principle be justified, the regulation had not afforded him the procedural guarantee enabling him to put his case before the competent authorities.

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<sup>179</sup> *Kadi*, para. 316.



## 4.2 The European Court of Human Rights

Unlike the EU, the CoE has explicitly endorsed the rule of law since its conception. The preamble of the statute of the Council of Europe of 1949 reads:

“Reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the *rule of law*, principles which form the basis of all genuine democracy”<sup>180</sup>

Art. 3 furthermore imposes upon its members the obligation to respect the rule of law:

“Every member of the Council of Europe must accept the principles of the *rule of law* and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, [...]”

It is made explicit as one of the fundamental principles behind the ECHR.

“Being resolved, as the governments of European countries which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law, [...]”<sup>181</sup>

In contrast to the CJEU, the term rule of law has witnessed an active role in the case law of ECtHR. It relies heavily on the concept of the rule of law as an interpretational tool, although it is not consistent in its usage of the French term *etat de droit* or *prééminence de droit*. It is arguably the case that there are different nuances in their meanings, or as regards the context in which they are used, but I shall nevertheless treat them as one since they seem to exhibit the same traits.

“A quelques rares exceptions près, la notion d’Etat de droit est systématiquement invoquée à l’appui d’un discours relative au juge et plus largement à l’administration de la justice, [...]”<sup>182</sup>

In cases where *Etat de droit* is embraced, the translation into English reads, “state governed by the rule of law”. By virtue of the vast number of cases in

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<sup>180</sup> Statute of the Council of Europe 1949, preamble para. 3.

<sup>181</sup> ECHR, Preamble para. 6.

<sup>182</sup> E. Carpano, *État de Droit et Droit Européens: L’évolutions du modèle de l’état de droit dans le cadre de l’européanisations des systèmes juridiques*, (Logiques Juridiques, 2005). “With some rare exceptions, the notion of a state government by the rule of law is systematically invoked to support a discourse in relation to the judge, and more broadly, the administration of justice”. Translation suggested by author.

which the term rule of law appears, this rendition is not intended to give an exhaustive list of cases, but it shall confine itself to an overview that fits the current structure.

#### **4.2.1 Formal Elements**

A majority of the cases in which the term rule of law is invoked, are related to formal elements of the rule of law, albeit occasionally introducing substantive concerns in the midst of its deliberations. Before indulging in these formal elements in detail, let us rehearse the two landmark cases, which saw the ECtHR define the rule of law as principle of interpretation applicable to all articles of the ECHR.

##### ***I Principle of Interpretation***

In the landmark case *Golder v. the United Kingdom*<sup>183</sup>, the ECtHR established for the first time that the rule of law was to be regarded as a principle of interpretation.

The applicant, who at the time served a prison sentence, had requested a contact with a solicitor in order to sue a prison officer for libel. He had asked permission by The Home Secretary to consult a solicitor, which he was denied. It was argued by the government of the United Kingdom that his right to a fair hearing had not been infringed, given that he had not formally been denied access to a court, and in addition, he would still be able to find recourse to the court system after his release.

The ECtHR concluded that under these circumstances, he was effectively hindered from exercising his right to a fair hearing. The revolutionary aspect of this case stems from the fact that Art. 6 does not explicitly grant a right to access to court, only a right to the determination of one's civil rights and obligations. The government of the United Kingdom had argued that Art. 6 would be served by providing a right to a fair and public hearing. The ECtHR found this insufficient, and expanded the meaning of Art. 6 beyond its literal content, arguing access to courts was inherent in Art. 6 "read in its context and

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<sup>183</sup> *Golder v. the United Kingdom*, App 4451/70, 21 February 1975. Series A no. 18

having regard to the object and purpose of the Convention”, by invoking the preamble of the ECHR.

“[I]t would be a mistake to see in this reference a merely ‘more or less rhetorical reference’, devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration’ was their profound belief in the *rule of law*. It seems both natural and in conformity with the principle of good faith [...] to bear in mind this widely proclaimed consideration when interpreting the terms of Article 6 para. 1 according to their context and in the light of the object and purpose of the Convention.

In *Amuur v. France*,<sup>184</sup> Somali asylum seekers had arrived on the 9<sup>th</sup> of March 1991 in Paris-Orly Airport, and were kept in the international zone at the Hôtel Arcade pending their application for asylum. On the 24<sup>th</sup> they were put in contact with a lawyer, courtesy of a humanitarian organization, whereupon they lodged an application on 26<sup>th</sup>.<sup>185</sup> By the 29<sup>th</sup>, the Ministère de l’Intérieur had refused them leave to enter, which was followed by immediate deportation, effectively denying the applicants the right to have their status reviewed. On the 31<sup>st</sup> the Créteil tribunal de Grande Instance ruled on their application that they had been deprived of their liberty. The French government argued that their conduct did not amount to a deprivation of liberty, as the applicants had been free to leave at any time; they were merely barred from entering the country. They further argued that holding refugees in centres for detention pending their deportation was well within their rights. The Commission for Human Rights also conceded that the conduct question did not extend to a deprivation of liberty within the meaning of Art. 5 ECHR, but a mere restriction of it.

The ECtHR differed, finding that, as regards refugees, the possibility to leave was purely theoretical. The ECtHR concluded that even if domestic law had been followed, the lawfulness of a detention might still be unlawful if it does not comply with the rule of law.

“In laying down that any deprivation of liberty must be effected ‘in accordance with a procedure prescribed by law’, Article 5 para. 1 (art. 5-1)

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<sup>184</sup> *Amuur v France*, App no 19776/92, 25 June 1996, Reports 1996-III.

<sup>185</sup> *Ibid.* para. 45.

primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law;...they also relate to the *quality* of the law, requiring it to be compatible with the *rule of law*, a concept inherent in all the Articles of the Convention.”<sup>186</sup>

French domestic law had not allowed for courts to review the conditions of detention and impose limits upon its duration, nor did it allow for legal or humanitarian assistance. The ECtHR found that the law failed to provide adequate legal protection against arbitrary interferences. In conclusion, the judgment held that the rule of law allows for a substantive review of the content of the law, i.e. a quality control as to what amounts to an unjustified deprivation of liberty, and it additionally declared the concept rule of law as forming part of all articles of the ECHR.<sup>187</sup>

## ***II Legality***

The principle of legality is one of the most important instruments available to the ECtHR for review. It is a method of preventing arbitrary interferences of the rights of individuals, and is most commonly raised in relation to the limitations clauses found in Arts. 5, 7, 8 and 10 ECHR.<sup>188</sup> It requires that state interventions of the rights of individuals comply with domestic law, and furthermore that domestic law ensures a basic quality standard.

When establishing the existence of the domestic law, the ECtHR takes a cautious approach in interpreting domestic law, emphasizing its subsidiary role and that it does not wish to be regarded as a “court of fourth instance”.<sup>189</sup> However, where interpretations of domestic conflict with that of the national courts, and where the effectiveness of review is in jeopardy, the tendency is to prioritize the ECtHR’s own interpretation.<sup>190</sup> It does not confine itself to the review of only legislative acts, adopting a material definition of the word “law”.<sup>191</sup>

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<sup>186</sup> Ibid. para. 50.

<sup>187</sup> Ibid. para. 53.

<sup>188</sup> G. Lautenbach, *The Concept of the Rule of Law and the European Court of Human Rights*, (Oxford Scholarship Online, 2014). p. 70.

<sup>189</sup> Lautenbach, p. 80.

<sup>190</sup> Ibid. p. 86.

<sup>191</sup> Ibid. p. 83.

The requirement for a certain quality allows the ECtHR to reject domestic laws, as in the case *Amuur*, if they do not comply with universal standards of foreseeability and accessibility. In *Malone v. United Kingdom*,<sup>192</sup> the subject of a criminal investigation fell victim to telephone and mail correspondence interceptions by the police. These practices were publicly known, but were not specifically supported in statutory law. The ECtHR held that the term “in accordance with law” under Art. 8 ECHR required compliance with the rule of law, as it were; the law in question must to be foreseeable. It does not, however, have to be foreseeable to the extent that the individual in question is able to adapt his or her behaviour, but it must be sufficiently clear for the public at large to understand the conditions in which public authorities may seek recourse to such actions. Given that the secrecy of these executive practices, in general, placed such actions beyond scrutiny for those targeted by it, the ECtHR found that such an extensive executive discretion meant “the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking.”<sup>193</sup> The principle of legal certainty is closely related to quality control, which the ECtHR has also associated with the rule of law.<sup>194</sup>

In the context Art. 5 ECHR and deprivation of liberty, the ECtHR held in *Engels v. Netherlands*,<sup>195</sup> that it would be contrary to the rule of law, if departures were allowed from the list in Art 5 (1) ECHR, in which one may be legitimately dispossessed of one’s liberty.

### ***III Judicial Safeguards***

Reference to the rule of law appears frequently in relation to disputes that concern the right to a fair trial. When the ECtHR invokes the rule of law for the protection of substantive rights, it often curbs its attention to issues of procedural inadequacies that in turn has resulted in the breach of said right. Procedural rights under the convention are guaranteed first and foremost by Arts. 5-7. All of the principles included in Art. 6, apart from equality of arms,

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<sup>192</sup> *Malone v. United Kingdom*, App no 8691/91, 2 August 1984, Series A no. 82.

<sup>193</sup> *Ibid.* para. 79.

<sup>194</sup> *Baranowski v. Poland*, App 28358/95, 28 March 2000, Reports of Judgments and Decisions 2000-III.

<sup>195</sup> *Engels v Netherlands*, App 5370/72, 8 June 1976, Series A no. 22.

such as the rights of defence,<sup>196</sup> rules of evidence,<sup>197</sup> presumption of innocence,<sup>198</sup> right to an impartial hearing in reasonable time,<sup>199</sup> have been associated with the rule of law.

The ECtHR expanded the meaning of Art. 6 in *Golder* to include a right to *access to court* in determining one's civil rights and obligations or criminal charges against him. The ECtHR is not restricted to the domestic legal classification of what is considered a right or criminal charge. Domestic law may limit the content of one's rights, thus preventing one from being able to rely upon Art. 6 to a certain extent, but the rule of law precludes domestic measures of this sort when they limit a whole range of civil claims, or where they confer immunities upon a group of people.<sup>200</sup>

The ECtHR has also held that it would be contrary to the rule of law if individuals were denied access to courts to settle their de facto civil rights, even in cases where domestic law categorises such cases as falling under administrative law with no *de jure* effect on their civil rights.<sup>201</sup>

In *Horsnby v. Greece*,<sup>202</sup> the ECtHR appealed to the rule of law when stating that Art. 6 also includes the requirement that judicial decisions are properly enforced/executed. In *Ryabykh v Russia*,<sup>203</sup> the ECtHR maintained that a reading of Art. 6 in light of the concept of the rule of law entails that the principle of *res judicata* must be upheld.

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<sup>196</sup> *Poitrinol v France*, App no 14032/88 23 November 1993, Series A no. 277-A.

<sup>197</sup> *Gäfgen v Germany*, App no 22978/05 1 June 2010, Reports of Judgment and Decisions 2010.

<sup>198</sup> *Salabiaku v France*, App no 10519/83 7 October 1988, Series A no. 141-A.

<sup>199</sup> *Bottazzi v Italy* App no 34884/97, 28 July 1999, Reports of Judgments and Decisions 1999-V.

<sup>200</sup> *A v United Kingdom*, App no 35373/97 12 December 2002, Reports of Judgments and Decisions 2002-X.

<sup>201</sup> *Pellegrin v France*, App no 28541/95 8 December 1999, Reports of Judgments and Decisions 1999-VIII

<sup>202</sup> *Horsnby v Greece* App no. 18357/91 19 March 1997, Reports 1997-II.

<sup>203</sup> *Ryabykh v Russia* App no. 52854/99 24 July 2003, Reports of Judgments and Decisions 2003-IX.

## 4.2.2 Substantive Elements

### *I Freedom of Speech: Castell v. Spain*

In *Castell v. Spain*,<sup>204</sup> the ECtHR declared that the press played a central role in a state governed by the rule of law, thereby associating the concept with freedom of speech in Art. 10 in the ECHR.

#### *Facts:*

Miguel Castells was a senator acting in a political party advancing Basque independence. In a newspaper article, he recalled a list of murders and attacks in the Basque County, attributing them to various extremist organizations. The attacks had gone unpunished, and in his view, the “right-wing” government was allegedly conspiring with the radicals, in a form of a proxy struggle to rid of any dissidents. He did not only accuse the authorities of turning a blind eye to these atrocities, by letting these attacks be carried out with impunity, he also insinuated that their resources, weapons and information must somehow have been provided by the government.<sup>205</sup> The government brought criminal procedures against Castells, and he was sentenced to one year in prison for insulting the government and its civil servants.<sup>206</sup> One of the defences raised before the Spanish Supreme Court was the accuracy of his allegations, but Spanish case law was still unclear as to whether truth could be pleaded as a defence against slander towards a state institution. The Spanish Supreme Court ruled that a large part of the evidence in support of the truthfulness of his claims was inadmissible.<sup>207</sup>

#### *Held:*

First, the ECtHR clarified that the right to freedom of speech is not absolute, but any infringement to it must, according to Art. 10 ECHR, be prescribed in law, pursue a legitimate aim and be necessary. The ECtHR did not object to the legality of the Supreme Court decision.<sup>208</sup> The aim was considered to be legitimate for the prevention of disorder, even though the criminal offense in

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<sup>204</sup> *Castells v. Spain*, App. No 11798/85, 23 April 2 1992, Series A no. 236.

<sup>205</sup> *Ibid.* para. 7.

<sup>206</sup> *Ibid.* para. 13.

<sup>207</sup> *Ibid.* para. 12.

<sup>208</sup> *Ibid.* para. 38.

Spanish domestic law was based on defamation. The interference was argued by the Spanish government to have been necessary, seen as the defamatory accusations had come shortly after the adoption of the Constitution, in a time of turbulence and violence by different political factions.”<sup>209</sup> The ECtHR rejected the claim of necessity, since Castells had been deprived of the possibility of validating the truthfulness of his accusations.<sup>210</sup>

“In this respect, the pre-eminent role of the press in a State governed by *the rule of law* must not be forgotten. Although it must not overstep various bounds set, inter alia, for the prevention of disorder and the protection of the reputation of others, it is nevertheless incumbent on it to impart information and ideas on political questions and on other matters of public interest.”<sup>211</sup>

## ***II Torture and Inhumane treatment: Soering v. United Kingdom***

In a case that raised much controversy, *Soering v. United Kingdom*,<sup>212</sup> the ECtHR concluded that subjecting a person to the death penalty and the preceding psychological damage that said penalty might incur, the death row phenomenon, was incompatible with the rule of law.

### *Facts:*

The case involved a German national who had co-authored the murder of two American citizens in the United States. He was arrested in England, and a request for extradition was procured by the Circuit Court of Bedford in Virginia. The government of the United Kingdom argued that extradition to Virginia would not fall under Art. 3 ECHR’s prohibition of torture and inhuman treatment, since the person suffering from the potential degrading treatment would occur outside of the signatory state’s jurisdiction. If understood otherwise, said interpretation would extend the signatory state’s responsibility beyond the scope of the text of the article, allowing criminal fugitives to evade justice, and requiring signatory states to violate their international agreements on extraditions.

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<sup>209</sup> Ibid. para. 41.

<sup>210</sup> Ibid. para. 48.

<sup>211</sup> Ibid. para. 43.

<sup>212</sup> *Soering v. United Kingdom*, App no 14038/88, 7 July 1989, Series A no. 161.



*Held:*

“It would hardly be compatible with the underlying values of the Convention, that "common heritage of political traditions, ideals, freedom and the *rule of law*" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture, however heinous the crime allegedly committed. Extradition in such circumstances, while not explicitly referred to in the brief and general wording of Article 3 (art. 3), would plainly be contrary to the spirit and intendment of the Article, [...]”<sup>213</sup>

As for the probability of capital punishment materializing, the ECtHR confirmed that aggravating circumstances that could potentially yield such a sentencing were likely to be met according to the law of the state Virginia. Despite assurances from the United States Federal Government that capital punishment was unlikely to be employed, and that the extradition treaty itself rested on these assumptions, the ECtHR concluded that the risk was nevertheless sufficient to raise concern, since the crime did not fall under the jurisdiction of the federal courts, and that the judicial bodies in Virginia could not bind themselves in advance as to which decision they may reach.<sup>214</sup> Concerns for the duration of the confinement before all appeals could be exhausted, the extraordinary conditions of anticipating executions and his age and mental state at the time the crime was committed (concern for the proportionality of the punishment in regards to the offense), all amounted to the requisite for severity under Art. 3 ECHR being satisfied.<sup>215</sup> ECtHR ruled that if the Secretary of State were to extradite Soering, it would constitute a violation of Art. 3’s prohibition of torture and inhuman treatment.

### ***III Equality and Freedom of Association: Welfare Party v. Turkey***

In *Refah Partisi*,<sup>216</sup> the ECtHR had to consider whether the dissolution of a prominent political party by the Turkish Supreme Court was in contravention of the freedom of association pursuant to Art. 11 ECHR.

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<sup>213</sup> Ibid. para. 88.

<sup>214</sup> Ibid. para. 97.

<sup>215</sup> *Soering* para. 111.

<sup>216</sup> *Refah Partisi v Turkey*, Applications nos. 41340/98, 41342/98, 31343/98 and 41344/98, 13 February 2003, Reports of Judgments and Decisions 2003-II.

*Facts:*

The “welfare party” was a Turkish political party holding the majority of seats in the Turkish national assembly after the election of 1995. In 1998, the Turkish constitutional court ordered the dissolution of the party, contending that it was a centre for anti-secular activities. These were based on public statements of high-ranking officials within the party, suggesting they wanted to create multiple legal systems, institute sharia law for the Muslim community and use jihad as a political method.<sup>217</sup> The party argued that its anti-secular remarks had been made in the context of the domestic debate, which was a very polemic issue still. It maintained that the party had never advocated the abolishment of secularism or the Turkish constitutional order and that the party’s criticism was well within its rights, if freedom of conscience and expression is to be respected. They noted that none of these statements had been made subject to criminal offense and that the attempt to dissolve the party was in fact based on a disapproval of the party’s economic policy. The Turkish government replied that the party was trying to capitalize on religious sentiments in the country, and let the country descend into a theocracy, a regime it had only recently been able to overthrow. The government reminded the ECtHR that the concept of *militant democracy*, a democratic system that defended itself against political movements that sought its own demise, was legitimate, as follows from the constitutions of Italy and Germany.

*Held:*

Art. 11 ECHR requires an intervention in the freedom of assembly to be prescribed in law, that it is done in pursuit of a legitimate aim and that it is considered necessary. While assessing the measure’s proportionality, the ECtHR narrowed its attention to the question of necessity.

The rule of law means that all human beings are equal before the law, in their rights as in their duties. However, legislation must take account of differences, provided that distinctions between people and situations have an objective and reasonable justification, pursue a legitimate aim and are proportionate and consistent with the principles normally upheld by democratic societies. But the rule of law cannot be said to govern a secular society when groups of persons are discriminated against solely on the ground that they are of a

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<sup>217</sup> Ibid. para. 68.

different sex or have different political or religious beliefs. Nor is the rule of law upheld where entirely different legal systems are created for such groups.

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There is a very close link between the rule of law and democracy. As it is the function of written law to establish distinctions on the basis of relevant differences, the rule of law cannot be sustained over a long period if persons governed by the same laws do not have the last word on the subject of their content and implementation.<sup>218</sup>

The ECtHR held that instituting a parallel legal system, would undermine the state's role as the guarantor of individual rights and freedoms. Multiple legal systems would also compromise the state's role as the impartial organizer of diverse beliefs and religions in a democratic society<sup>219</sup> and would contravene the principle of non-discrimination. The ECtHR also held that Sharia law was materially incompatible with values of democracy and human rights, and that reforming society by means of Jihad would produce a pressing social need for the dissolution of the party.

#### ***IV Non-retroactivity***

##### *Facts:*

*In S.W v. United Kingdom*,<sup>220</sup> the ECtHR was asked to rule whether a conviction for rape within a marriage, which at the time, in 1990, was not necessarily recognized in common law as an unlawful offense, would be in violation of Art. 7 of the ECHR prohibiting retroactive criminal sentences. The applicant was found guilty of forcing his wife into sexual intercourse, an act which in common law, dating back to a decision in 1736, was not automatically considered to be a crime, as wives were presumed to have given herself up onto her husband, owing to their matrimonial consent and contract. This concept of marital immunity had been reinforced on numerous occasions and was reaffirmed in a case as late as 1987. The Sexual Offences Act of 1956, and its amendment of 1976 failed to adequately correct this, leaving *lex lata* ambiguous. Exceptions to this rule had been supplied, wherein said consent could be revoked, which the Crown Court found to have transpired in this case. The Court of Appeal confirmed this, and referred to it as an indication of

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<sup>218</sup> Ibid. para. 43.

<sup>219</sup> Ibid. para. 90.

<sup>220</sup> *S.W v United Kingdom*, App 20166/92 22 November 1995, Series A 335-B.

common law's flexibility in adapting to social attitudes. The main reason for dismissing the appeal was thus that its decision was removing an anachronistic and offensive fiction in common law. The House of Lords subsequently upheld this decision.

*Held:*

The applicant argued that, since recent case law had reaffirmed the concept of marital immunity, the conviction must be seen as a change in the law, because the law was de facto being extended to encompass cases that had previously been excluded from criminal liability. This "new" law was retroactively being applied to the circumstances of his case, which at the time did not constitute an offense.<sup>221</sup>

The ECtHR began by declaring that the prohibition of retroactivity was an essential element of the rule of law, its purpose being, to protect against arbitrary prosecution, conviction and punishment.<sup>222</sup> It could not be used to the disadvantage of the accused, and the prosecution had to be clearly stated in law in advance. It conceded that the common law system, that of a gradual development of criminal law through judicial law making, was not incompatible with Art. 7, insofar as the essence of the offense could be reasonably accessed and foreseen.<sup>223</sup> As to the application of Art. 7 to the present case, although the concept of marital immunity seemed to have been in effect both before and after said decision, the ECtHR held that the evolution of the case law appeared to follow a clear direction in favour of dissolving the concept to marital immunity, a development that was in harmony with the essence of the offence, and displayed a reasonably foreseeable development. The ECtHR further added that the abandonment of the concept of marital immunity was in line with the essence of the respect for human dignity and freedom, which lay at the heart of the ECHR. According to the ECtHR, non-retroactivity, does not prevent convictions based on laws that are not fully effective at the material time, provided it is reasonably foreseeably, compatible

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<sup>221</sup> Ibid. para. 37.

<sup>222</sup> Ibid. para. 34.

<sup>223</sup> Ibid. para. 35- 36.

with the essence of the offense and does lead to an arbitrary or substantively unjust conviction.

In *Streletz, Kessler and Krenz v Germany*,<sup>224</sup> the ECtHR ruled on a case of transitional justice. The case concerned three Germans, who had previously held high offices in East Germany (hereinafter DRG), convicted of crimes committed under the old regime by a court under the new regime (hereinafter FRG) in place after the unification. They stood accused of, among other things, incitement to commit murder, as they had been responsible for the policy that introduced the use of land mines and firearms against those who attempted to cross the border between the two countries. The applicants had maintained that their actions were lawful under prevailing legislation at that time, pleading that article 17 (2) of the People's Police Act and Article 27 (2)<sup>225</sup> of the State Borders Act justified the use of firearms to prevent the commission, or continuation, of an offence which constituted *serious crime*. These flight attempts were regarded as serious crimes, evidenced by previous state practice and case law. The Regional Court held that these practices went beyond the actual wording of the statute, and concluded that these were crimes under the criminal code of the DRG, since state practices under the old regime had infringed upon precepts of justice and human rights protected under international law.<sup>226</sup> The Federal Court of Justice upheld this ruling, adding that an interpretation that could justify the shooting of fugitives was mistaken, regardless of previous practices. The interpretation raised by the accused would contravene the statute itself, the constitution of the DRG and its obligations under international public law.<sup>227</sup> The constitutional court approved, holding that the requirement for objective justice under the constitution included a concern for human rights,<sup>228</sup> and subsequently denied that the previous court

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<sup>224</sup> *Streletz, Kessler and Krenz v Germany*, App. Nos 34044/96, 35532/97 and 44801/98, 22 March 2001

<sup>225</sup> *Ibid.* para 37-38.

<sup>226</sup> *Ibid.* para. 19.

<sup>227</sup> *Ibid.* para. 20.

<sup>228</sup> *Ibid.* para. 65.

decisions had violated the prohibition of non-retroactivity found in Art. 103 §2 of the Grundgesetz.<sup>229</sup>

*Held:*

The ECtHR concluded that these approaches by the German courts were not at odds with Art 7 ECHR at first sight. Whether or not state practice had de facto differed from these articles was a matter better left for domestic courts, but the ECtHR did find that said practice was not in harmony with GDR's constitution and international obligations, especially since its constitution included the respect for the rule of law, human rights and human dignity. The ECtHR further held that even though they had not been prosecuted under the previous regime, it did not make the applicant's potential convictions unforeseeable. The applicants had held high positions in government, and were themselves involved in engineering state practice. They must therefore have been aware that said practice were unconstitutional and in breach of international law.<sup>230</sup>

“The Court considers that it is legitimate for a State governed by the *rule of law* to bring criminal proceedings against persons who have committed crimes under a former regime; similarly, the courts of such a State, having taken the place of those which existed previously, cannot be criticized for applying and interpreting the legal provisions in force at the material time in the light of the principles governing a State subject to the *rule of law*.”<sup>231</sup>

The ECtHR concluded by stating that practices, which flagrantly infringed human rights and the right to life, could not afford the protection of Art. 7 of the ECHR.

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<sup>229</sup> Ibid. para. 22.

<sup>230</sup> Ibid. para. 68 & 78.

<sup>231</sup> Ibid. para. 81.

## 5. Conclusion

### 5.1 The Minimum Features of the Rule of Law

The rule of law is a political ideal, serving as a pretext for advancement of ideologies, development reforms and many other objectives. It is a prerequisite for the modern understanding of a liberal democracy. Its purpose is to provide a design for how society should be organized, resting on the premise that unconstrained political power provides for poor governance. To this end, governments must be subordinated to a higher authority, and submit itself to its own laws. Laws need to be able to guide human behaviour, if they intend to govern, and not merely oppress. For laws to guide behaviour, they must be expressed in the form of rules, that is; they must be prospective, intelligible, general, accessible - in other words predictable - if they are not be reduced to ad hoc commands. For these rules to guide behaviour, they must furthermore be discharged correctly by law-appliers. State functionaries must therefore be bound by certain rules of conduct and apply laws faithfully, characterized by the principle of legality. It is also imperative that the entity in charge of the resolution of disputes, the judicial branch, is held independent of the rest, for if the government is a judge in its own cause, it could always rule in its own favour. It follows that some judicial safeguards must be provided, such as impartial judges and public hearings to keep them accountable. They must also provide those to whom the law address, access to hearings where they may have rights and obligations may be resolved, if the content of laws are not be relegated to empty words. Every decision by an administrative or executive authority, or judgment by a judicial authority, must, according to the principle of legality, be authorized in law. Every law must be enacted by the legislature in accordance with some rules of procedure; in other words, laws must also be authorised by laws. But who/what authorizes the legislator to enact laws?

### 5.2 Arguments in Support of a Substantive Approach

The legal system proposed by a formalistic definition of the rule law may indeed exist independently of a moral platform. Positivists make a convincing theoretical case for its purely functional precepts. But even these principles do not develop in a vacuum; they are but a product of political and ethical

developments in society. It may indeed be true that a purely analytical description of what the law *is* may lead to a conception of laws as independent of morality, but once it engages in a conversation about the rule of law - a political ideal - it enters into the territory of what *ought* to be, which cannot be separated from moral concerns. Indeed, to argue that the rule of law is nothing more than *the rule of rules* is, in my view, to create a false equivalency between legal positivism and the rule of law. To answer why the rule of law ought to be aspired to, one needs to appeal to political and/or moral justifications, which makes a purely formal conception of the rule of law an exercise in circular reasoning.

Indeed, the domain in which the rule of law is to be discussed is not one that belongs exclusively to jurisprudence; it is an area where jurisprudence and political philosophy converge. Modern western democratic states ascribe their legitimacy to political theories developed during the age of enlightenment, and particularly, political liberalism. The theory, as we have come to appreciate in modern day, proposes that individuals, as autonomous agents, are born with dignity and are therefore naturally equal and free. Since liberty is inherent in human nature, we are also endowed with inalienable rights. Liberty and the right to self-determination can be understood as the right not to be subjected to the will of others, unless we've consented thereto, meaning that a state without democracy is a state without legitimacy. But the *raison d'être* of governments is in the main to provide us with security from the chaos that anarchy unleashes, and to thereby enhance our freedom, not reduce it. This is why even democratic states must ensure that our basic human rights cannot be violated. It is also why a substantive approach to rule of law ought to be preferred, since it is consistent with the doctrine of the social contract.

The main practical argument for a strict separation between the concepts rule of law, human rights and democracy appears to be the claim that it would dilute the concept of the rule of law, depriving it of any useful meaning. Even if this were true, what is the utility of advancing a political ideal that does not account for the value of human rights? What usefulness can there be in promoting a legal doctrine that is, in theory, compatible with slavery or



torture? Is it simply because its predictability provides for economic growth? Then why not advance a doctrine that also includes property rights and freedom of contract? Promoting formal rule of law is often useful, but it is rarely sufficient.

It is also argued that to include a “thick” conception of the rule of law would be to advocate an entire social philosophy. This, I will concede, may be true but the extent of which this is problematic is greatly exaggerated. Those who are manifestly concerned about this, have a tendency to fall into a slippery slope fallacy, as it were, if one acknowledges human rights or human dignity as part of the concept of the rule of law, then A will lead to B, which inevitably leads to C, whereupon the rule of law becomes a political ideology promoting the welfare state. This *inevitability* is unfounded, indeed, adopting A may lead to B, but as rational beings, we can still decide to halt at B, and disregard C altogether. Unless of course, it is presupposed that courts are completely immune to social pressures, and that once powers of substantive judicial review has been conferred upon them, they will relentlessly expand their own prerogatives. This is entirely possible, but apart from a few general tendencies, there is not evidence of courts ever becoming completely unaccountable, since precedent can be overturned, and constitutions can be changed or amended.

Many of the concerns shown by those who subscribe to a strict formalist approach are reasonable; the fear of the “judicialisation” of politics, rule by judges, the democratic deficit of judicial review, the possibility of positive rights becoming justiciable and the ideological demands imposed by an overly “thick” constitution upon the legislature. These problems would perhaps fade if the judiciary had little to no influence over the legislative branch, but I must submit, the solution to this is to be found in a conversation within the framework of a substantive conception rule of law, not in the complete rejection of it. Indeed the complete rejection of it may even be considered somewhat naive, since a formal conception of the rule of law fails to address many important issues.<sup>232</sup>

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<sup>232</sup> See to that effect chapter 3.

### 5.3 The Rule of Law according to the CJEU

Although elements of the concept of the rule of law can be transplanted beyond the jurisdiction of nation states, it must be adapted to the idiosyncrasies of international law, owing primarily to a lack of centralized legislative authority. The relationship between states can be reasonably paralleled to that of the state of nature, where there is no sovereign to exercise absolute dominion. This is why the sources of international public law cannot be organized in a fixed hierarchy, and why rights and obligations usually stem from consent (treatises), state practice (customs) and general principles. Sanctions and remedies are dependent on loyalty and cooperation between states, implying that rights and obligations do arise in a state-less environment, but enforcement is based on mutual respect, self-interest and/or force, rather than authority. The last century has witnessed of growth of supranational bureaucracies to facilitate compliance with international law. Courts have been developed to resolve disputes, trade organizations, financial institutions, private dispute resolutions bodies and a multitude of NGO's with quasi-legislative faculties have materialised to steady the rules of conduct beyond the nation state.

The EU is one supranational entity that seems to reflect a more complete conception of the rule of law. Seen as it is an organization establishing a complete legal order with legislative capacities and a comprehensive set of remedies, it is sensitive to the same tendencies towards capricious rule that all centralized powers face. This is why its design is based on a structure of institutional balance, a vertical separation of powers and a "supreme court" to constrain its authority. The restraint imposed by the CJEU is mainly exercised through the process of judicial review. Because of a concern for the interests of private and legal persons, the judicial review process must engage in an assessment of the content of legislative and administrative acts by the EU as well as its member states, so as to ensure that public actions are proportional, non-discriminatory and do not contravene the legitimate expectations and fundamental rights of those it is purported to govern.

The principle of proportionality limits the legislative capacity to acts which are adequate and necessary to achieve its objective, and which do not impose an

excessive burden on the private subjects. The doctrine of legal certainty ensures formal qualities of EU legislations, but displays elements of substantive considerations as well, such as the principle of legitimate expectations. Formal requisites of non-retroactivity, generality, clarity, and stability are not absolute, and for courts to justify or invalidate laws based on these qualities, the CJEU is inevitably obliged to consider substantive standards. The same can be said of the principle of non-discrimination, requiring the CJEU to identify arbitrary discrimination, which cannot be disconnected from substantive evaluation. Review of the compliance with fundamental rights, now codified in the EUCFR, is the conclusive endorsement of a substantive approach to judicial review.

The concept of rule of law that permeates all instances of Union law is evidently substantive, and the discourse of the CJEU appears to support this notion. Nevertheless, cases in which the CJEU has explicitly referred to the rule of law are few and far in between. In *Les Verts*, the term was used in reference to the importance of judicial review of legislative acts, which was relied upon to expand the content of the relevant article beyond its actual phrasing. From this case alone, it is difficult to categorize what rule of law is intended to mean, especially since it could be argued that the concept had no normative value altogether. In *UPA*, the CJEU explicitly connected the concept of the rule of law with fundamental rights, even though the right at stake was that of effective judicial protection, one that, as established in chapter 3.4, is by and large formal, but the correlation between the rule of law and fundamental rights was nevertheless made clear. In *Kadi*, the CJEU also associated the rule of law with fundamental rights. The CJEU proceeded to conduct a proportionality test as regards the right to property and right to a fair hearing. It should be noted that the review did not concern a legislative act.

In summary, it is evident that the CJEU adopts a substantive approach to the rule of law for the purposes of judicial review, but actual references to the concept are limited.

## 5.4 The Rule of Law according to the ECtHR

In areas that fall outside the jurisdiction of the EU, state actions is still subject to a substantive review by the ECtHR, insofar as they may infringe upon (negative) human rights. The ECHR may be said to constitute a supranational “constitutionalisation”, or “positivisation”, of human rights in the legal order of its signatory states. Substantive judicial review is therefore of the essence.

Most of the references made to the rule of law by ECtHR, however, relate to formal aspects, such as matters involving the principle of legality and judicial safeguards. The nature in which the term is used suggests nonetheless a “Dworkian-esque” method of legal reasoning, wherein the rule of law is relied upon as a meta-principle, to justify deviations from a strict application of the law. This was made evident in *Golder*, where the ECtHR found an infringement of Art. 6 ECtHR, despite the article being silent on whether a right to fair trial de facto meant access to court. The reverse outcome would, however, arguably have gone against the spirit of the ECHR, for which the principle of the rule of law served as, in my view, an instrument to ensure that the underlying value of the article was no undermined. Reference to the rule of law as regards the principle of legality is made in the form of a quality control of the particular law that operates as the legal basis for state interferences in individual affairs. In doing so, the ECtHR has transcended the purely formal aspect of legality, since it doesn’t satisfy itself with an analysis of the specific law as it is, but compares it to what it ought to be in a legal order where human dignity is adequately observed.

Chapter 4.2.2 portrays a handful of cases where reference to the rule of law is unambiguously substantive. From these cases we may conclude the following substantive elements: a state governed by the rule of law must include freedom of speech, whereby criminal punishment for defamatory accusations can only be executed if they are proportional, meaning *inter alia* that the truthfulness of one’s accusations cannot be excluded as a defence against prosecution. The concept of the rule of law also requires states to refrain from extraditing alleged criminals to countries where they may suffer torture or inhumane torture, and this includes all states where the death penalty is conceivable as

punishment for the crime in question. The concept of the rule of law requires equality before the law, from which exceptions can be made for “objective reasons”, if the resulting distinctions are proportional. Nevertheless, these distinctions may never be made based on gender or religious belief. It is understood that distinctions specified in laws can only endure in democratic societies. Under exceptional circumstances, people may be convicted of crimes that have not been unequivocally stated in laws in advance. The principle of non-retroactivity can therefore be displaced, provided exceptions are not arbitrary, meaning that the essence of the offense must be reasonably accessed and foreseen beforehand.

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