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ARTICLE

The Rule of Law: A Slogan in Search of a Concept

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Abstract

Regularly invoked but rarely defined, 'the rule of law' has over the last few decades been converted from a legal term of art into one of the most ambiguous slogans of contemporary public policy. Political scientists claim it as a crucial test of a regime's legitimacy. Economists maintain that it provides an essential foundation of a flourishing market economy. Philosophers suggest it captures the essence of the state as a moral association. Historians acknowledge that, even if they might distrust such an abstract notion, the imposition of effective inhibitions on power is an 'unqualified human good'. And lawyers, of course, have treated it as the foundation of their discipline ever since the mid-thirteenth century when Bracton asserted that 'there is no rex where will rules rather than lex'. Those who extend its usage beyond the confines of professional legal discourse commonly give it a positive valence. But the rule of law also has its detractors. These critics assert that it promotes purely formal, individualistic values at the expense of substantive justice, or that it is a smokescreen preventing us from seeing the impact of recent global developments that signal the rule of lawyers. Some anthropologists even denounce it as an imperial ideology that legitimates European conquest and the plunder of the rest of the world. But given the fact that almost every state in the world now claims to act in compliance with the rule of law, these critics seem to have done little to dent its appeal. Yet, the sheer range of views and perspectives that now exist about the meaning, purpose, and value of the rule of law considerably complicates any inquiry into its current standing. In this paper, I will try to bring some clarity to the issue by providing a sketch of the main varieties of ways in which the term is being invoked. The paper comprises five sections, which each address a specific aspect of the term's usage: (1) its coinage in English law, (2) the adoption of a superficially similar terminology in the German concept of the *Rechtsstaat*, (3) the jurisprudential innovations that complicate its meaning, and finally its most recent invocation (4) first in development work and (5) secondly in constitutional rejuvenation.

Keywords Rule of Law · *Rechtsstaat* · Democracy · Aristotle · Montesquieu · Dicey

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1 Introduction

Regularly invoked but rarely defined, 'the rule of law' has over the last few decades been converted from a legal term of art into one of the most ambiguous slogans of contemporary public policy. Political scientists claim it as a crucial test of a regime's legitimacy.[1] Economists maintain that it provides an essential foundation of a flourishing market economy.[2] Philosophers suggest it captures the essence of the state as a moral association.[3] Historians acknowledge that, even though they might distrust such an abstract notion, the imposition of effective inhibitions on power is an 'unqualified human good'.[4] And lawyers, not surprisingly, have treated it as the foundation of their discipline ever since the mid-thirteenth century when Bracton asserted that "there is no rex where will rules rather than lex".[5]

Those who extend its usage beyond the confines of professional legal discourse commonly give it a positive valence. But the rule of law also has its detractors. These critics assert that it promotes purely formal, individualistic values at the expense of substantive justice,[6] or that it is a smokescreen preventing us from seeing that recent global developments signal the rule of lawyers.[7] Some anthropologists even denounce it as an imperial ideology which legitimates European conquest and the plunder of the rest of the world.[8] But given the fact that almost every state in the world – China as well as Chile, Saudi Arabia as well as South Africa – now claims to act in compliance with the rule of law, such critics have done little to dent its appeal.

Yet, the sheer range of views and perspectives that now exist about the meaning, purpose, and value of the rule of law considerably complicates any inquiry into its current standing. In this paper, I will try to bring some clarity to the issue by sketching the main ways in which the term is being invoked. The paper addresses five main issues, each of which addresses a specific aspect of the term's usage: its coinage in English law, the adoption of a superficially similar terminology in the German concept of the *Rechtsstaat*, the jurisprudential innovations that complicate its meaning, and its most recent invocation in development work and constitutional rejuvenation respectively.

[1] See, e.g., Weingast (1997).
[2] See, e.g., North (1990).
[3] See, e.g., Oakeshott (1983).
[4] See, e.g., Thompson (1975).
[5] Bracton (1968), ii., p. 33.
[6] See, e.g. Horwitz (1977).
[7] See, e.g., Hirschl (2004).
[8] See, e.g., Mattei and Nader (2008).

2 The Invention of 'the Rule of Law'

The rule of law is a phrase that if not coined then certainly first popularized by the English constitutional lawyer, Albert Venn Dicey. Dicey invoked the term in 1885 to explain the constitutional significance of the values of regularity, formal equality, and individual liberty that he maintained were implicit in the English common law and which provided the essential underpinnings of the British constitution.[9] The British constitution, he asserted, is a judge-made constitution, and its general principles are nothing more than abstracts of judicial precedents determining the rights of the citizen which had been articulated, elaborated and enforced in a concrete legal practice extending over several centuries.

For Dicey, the rule of law expressed the superiority of the English way of governing. His rhetorical point was that, contrary to the modern ambition of drafting written constitutions in which rights are assumed to derive from that document, English rights and liberties are made secure by virtue of being incorporated in the ordinary common law. Modern constitutions might outline liberal schemes of government which are designed to be limited by fundamental constitutional law but if, as is commonly provided, basic rights can be suspended in times of emergency, one could hardly claim that the rule of law is firmly embedded in the regime. In England, by contrast, the rule of law 'is part of the constitution because it is inherent in the ordinary law of the land'.[10] And once so rooted, the rule of law 'can hardly be destroyed without a thorough revolution in the institutions and manners of the nation'.[11]

Dicey's claim draws on a narrative concerning the vital work undertaken by common lawyers to ensure that the powers of the ruler could be kept within the bounds of the law. In this task, they drew on works such as Bracton's, who had stated that the 'king must not be under man but under God and under the law, because the law makes the king' and from which it followed that the king 'must temper his power by law, which is the bridle of power'.[12] Yet it was not the grand statements of principle announced by Bracton or such other leading jurists as Coke and Hale in the seventeenth century that was decisive. 'General propositions … as to the nature of the rule of law', noted Dicey, 'carry us but a very little way'.[13] Rather, it was the achievements of a cloistered body of lawyers, employing a distinctive methodology that moved from precedent to precedent, that was determinative in establishing the judicature as an independent authority beyond the competence and control of the crown. Maintaining a strong sense of the dignity of their role, these lawyers felt able to assert that, rather than being an expression of the sovereign's command, the law comprised a type of 'artificial reason' that required 'long study before a man can attain to the cognizance of it'.[14] And this for Dicey captured the essence of the rule of law.

[9] A.V. Dicey (1915), ch. 4.
[10] Ibid. 197.
[11] Ibid. 197.
[12] Bracton (1968), vol. ii, p. 33.
[13] Dicey (1915), p. 199.
[14] Sir Edward Coke, *Prohibitions del Roy* (1607) 12 Co. Rep. 63.

But by the time he wrote even Dicey had to acknowledge that 'the dominant characteristic' of the British constitution was that of parliamentary sovereignty: that is, that the highest expression of law was the will of the Crown-in-Parliament. He sought to reconcile these twin principles of the British constitution – parliamentary sovereignty and the rule of law – by emphasising three basic points. First, that Parliament could act only through a formal procedure involving its three constituent parts (of crown, lords and commons); secondly, that Parliament (especially the Commons) 'has looked with disfavour and jealousy on all exemptions of officials from the ordinary liabilities of citizens or from the jurisdiction of the ordinary Courts'; and, thirdly, that Parliament has always sought 'to protect the independence of the judges'.[15]

The emergence of sovereign legislatures across Europe during the late-nineteenth century might appear to be a relatively common practice. But Dicey was at pains to explain that any similarity with the British experience is superficial. Although the French National Assembly (his main comparative point of reference) bears a 'considerable resemblance' to the British Parliament, it is 'influenced by a different spirit'.[16] Specifically, it does not 'look with special favour on the independence or authority of the ordinary judges', and it 'shows no disapprobation of the system of *droit administratif*' that 'leaves in the hands of the government, wider executive and even legislative powers than the English Parliament has ever conceded either to the Crown or to its servants'.[17] The British system, by contrast, does not recognize the existence of administrative law and, indeed, 'the rigidity of the law constantly hampers (and sometimes with great injury to the public) the action of the executive'.[18] The British system is founded on powers 'being exercised in a spirit of legality' and it is this culture that ensures the harmony of parliamentary sovereignty and the rule of law.

Dicey thus gives us the first precise account of the concept of the rule of law. It must be understood, above all, to be a singular feature of the English system of government. It is a product of a common law method that worked not only to keep the executive in place, but specifically to reject both the idea of administrative law and any notion of 'reason of state'. It is, wrote Sir William Holdsworth in 1938, 'the most distinctive, and salutary, of all the characteristics of English constitutional law'.[19]

The problem with his account, however, is that from the moment of its formulation, Dicey began to express concern that the precious values of this tradition were in danger of being eclipsed. These doubts reached their climax in the 1915 edition of his book, *The Law of the Constitution*. There he argued that the 'ancient veneration for the rule of law' was suffering 'a marked decline', a tendency which he attributed to 'the use of lawless methods for the attainment of social or political

[15] Dicey (1915), p. 405.
[16] Ibid., pp. 405–6.
[17] Ibid., p. 406.
[18] Ibid., p. 406.
[19] Holdsworth (1938), vol. 10, p. 647.

ends'.[20] The rule of law was being undermined by an extended franchise, a growing use of legislation to attend to social conditions, and the consequential growth in the powers of government. The great strength of the English tradition of the rule of law, he had maintained, was that it could not be destroyed 'without a thorough revolution in the history and manners of the nation'. But this is precisely what the coming of democracy was bringing about.

Dicey's analysis reveals the truth of Hegel's insight that philosophers always come too late to the scene. We grasp the meaning of a distinctive way of life only when it is already passing. Dicey's account of the rule of law expresses 'a shape of life grown old'.[21] He was able to clearly formulate its meaning just as the conditions for its workings were fast disappearing.

3 The Doctrine of the *Rechtsstaat*

Dicey was the first to popularise the phrase but, or so some might claim, the values implicit in the rule of law had already been enunciated by German jurists long before Dicey's usage of that term. Those values were implicit in the concept of the *Rechtsstaat*, a term invoked by liberal jurists in the vanguard of the 1848 revolution. Influenced by Enlightenment ideals, they asserted that the modern state could be legitimated only by erecting a formal system of differentiated powers that could guarantee the protection of liberty, security, and property. The *Rechtsstaat* expresses the idea of 'the rule of law state'.[22]

The efforts of these liberal reformers was greatly influenced by the work of Immanuel Kant who, impressed by the drama of the French Revolution, speculated on whether a state founded on rational political principles might be established. Rejecting the orthodox claim that the state is an entity formed by drawing together the national forces of a people, Kant was obliged to present it purely as a postulate of reason. Further, the constitutional principles he devised were formulated as universal moral laws. The state (*civitas*) should first be conceived simply as the 'union of a group of persons under the laws of justice'.[23] He then maintained that each state must contain three essential powers: legislative power embodied in the person of the lawgiver; executive power embodied in the person of the ruler; and judicial power embodied in the person of the judge. Finally, he argued that these three powers must be likened to the three propositions in a practical syllogism: the major premise lays down the universal law of a will, the minor formulates the command applicable to an action in accordance with that law, and the conclusion contains the judgement of right pertaining to the case under consideration.

In providing an abstract formulation of 'the sovereignty of law', Kant can be identified as the original theoretician of the German doctrine of the *Rechtsstaat*.

[20] Dicey (1915), at p. xxxviii.
[21] Hegel 1952), at pp. 12-13.
[22] Krieger (1957), esp. at pp. 252-61, 458-60; Böckenförde (1991).
[23] Kant (1999 [1797]), § 45 (p. 118).

Yet his elaborate thought experiment made no reference to the political conditions required for its realisation. Kant's *Rechtsstaat* rested on an assumption that somehow an already existing authoritarian state could become the agency for the realisation of political freedom. Whatever else this entailed, it implied that 'the state' – the institution that for Dicey was corrosive of the rule of law – should play a leading role in determining those basic citizenship rights which are consonant with the realisation of duties.

With the failure of the 1848 revolution, this liberal notion remained a remote aspiration and during the latter half of the nineteenth century it was replaced with a more conservative variant. If we cannot have liberal democracy, jurists argued, we should at least insist that governmental powers be exercised according to law. This conservative version expressed a formal principle which sought the elimination of arbitrariness in governmental action by regularising governmental powers through formal legal means. In the vanguard of this movement was Rudolf Gneist, who advocated the creation and extension of a system of administrative courts to adjudicate on the growing number and range of issues that were arising between citizen and administration.[24] The establishment of such a formal administrative jurisdiction, which for Dicey amounted to the destruction of the rule of law, was treated by Gneist and his colleagues, by contrast, as the fulfilment of the *Rechtsstaat*'s potential.[25]

Following the collapse of the *Kaiserreich* and the declaration of the German republic, the Weimar Constitution, borrowing from the various liberal ideas that had been advanced since 1789, effected an uneasy compromise between a democratic state and a *Rechtsstaat*. This tension was expressed in the two main parts of the Constitution, which conferred governmental powers and listed basic rights respectively. The relationship between the two parts was the subject of an intense and rather fruitless juristic debate, one that left Franz Neumann complaining that the *Rechtsstaat* term had become 'as worn out as a coin whose relief has become almost unrecognizable through daily use'.[26] It was left to Carl Schmitt to observe in 1932 that the term had come to mean 'as many different things as the word "law" [*Recht*] itself and, moreover, just as many different things as the organizations connoted by the term "state" [*Staat*]'.[27]

With the collapse of the Republic following the Nazi *Machtergreifung*, many recognized that the concept had no value in the new world order that seemed to be emerging. And the fact that certain Nazi jurists even sought to rework the *Rechtsstaat* as a national icon that could be invoked in furtherance of Germanic values merely revealed the degree to which it had indeed become an empty vessel.[28]

[24] Gneist (1879).
[25] See also Bähr (1961).
[26] Neumann (1987), at p. 67.
[27] Schmitt (2004 [1932]) Press, at p. 14.
[28] See Meierhenrich (2018), ch 5.

4 The Coming of Democracy and Administrative Government

During the early twentieth century, the frailty of the liberal concept of the rule of law was clear for all to see. Across the western world, the coming of democracy and the growth of administrative government brought about a paradigmatic shift in the relationship between law and government.[29] Resting on the belief that law is a practice attended to by a cloistered judiciary, the English conception of the rule of law articulated by Dicey was revealed as an anachronism. But the liberal idea of the *Rechtsstaat*, requiring the institution of a system of rule-bound, limited government, was similarly up-ended by the widespread practice of conferring broad discretionary powers on officials for the purpose of delivering the public good.

During this period, the German notion of the *Rechtsstaat* had been successfully exported through direct translation into a number of European languages, and even beyond. But although the terminology had been borrowed, this was mainly because it provided a convenient formulation rather than articulated a common concept. The phrase had become one of considerable flexibility that could readily be adapted as necessary to meet particular local requirements.[30]

To the extent that the rule of law and its analogous expressions retained a certain core meaning, it was more accurately rendered as 'rule by law': that is, as a requirement that all public authorities must be able to identify a legal basis for their action. Important though this is, it is a purely formal principle. And in regimes in which governments effectively are making the laws by which they will be bound, it constitutes a minimal restraint on conduct. The rule of law might require that public authorities do not exceed their legal powers, but it owes little to the liberal values of its nineteenth-century advocates. In fact, many progressive activists of the period welcomed this diminution of the term to a relatively empty formalism, arguing that the more elaborate expressions of the rule of law's meaning were simply myths invented by classical liberals to entrench the bourgeois values they held dear.

5 Conversion into a Universal Value

We are left with a conundrum. If during the first half of the twentieth century the concept was widely acknowledged as an anachronistic expression of classical liberalism, how to explain the fact that the rule of law is now universally endorsed?

One answer is that, having ceased to be the peculiar patrimony of a particular regime, the phrase has been transformed into a universal placeholder of thoroughly indeterminate meaning. It quickly acquired a pan-European status after the Second World War, when the founding treaty of the Council of Europe (1949) required that its members, now numbering 46 states, 'must accept the principles of the rule of law'.[31] Similarly, following the evolution from a common market into a federal

[29] See Hayek (1944); Friedmann(1972), ch 16; Jones (1958).

[30] See, e.g., Heuschling (2021).

[31] Statute of the Council of Europe, London, 5 May 1949, Preamble.

project, the European Union has claimed the rule of law as one of its 'founding principles'.[32] And since 1993 it has required all candidate countries to show they have stable governmental institutions guaranteeing democracy and the rule of law.[33]

Since 1989, however, the 'rule of law movement' has extended its influence beyond Europe. It has begun to acquire a universal valence. Among the key drivers of this development have been International Financial Institutions (including the World Bank, the International Monetary Fund and the Asian Development Bank), which have spent well over a billion dollars on what they call 'rule of law projects', investments that assist developing countries to establish institutions that advance justice according to law.[34] In 2008, Alan Greenspan, then chair of the US Federal Reserve Board, even claimed this initiative as an essential condition of economic growth: 'Short of a few ambiguous incidents', he stated, 'I can think of no circumstances where an expanded rule of law and enhanced property rights have failed to increase material prosperity'.[35]

Over the last few decades, then, the rule of law has acquired a global significance. It is as close as the world has come to elevating a political principle into a universal value. But it is an ideal whose ubiquity is matched by its ambiguity. It has emerged as a core legitimating principle of contemporary government across the world, but only as an abstract criterion of vague meaning. Its meaning has certainly been transformed since Dicey elaborated it as a concept that indicated the superiority of an English common law tradition that not only rejected the notion of administrative law but also of the idea of the state itself. But even the German tradition of the *Rechtsstaat* has been effectively abandoned; postwar German jurists no longer extol the *Rechtsstaat* as such but tend to refer to an abstraction called the *Rechtsstaatsprinzip*, which as a German scholar has recently claimed, draws on 142 components – extending from legal certainty and non-retroactivity to the validity of basic rights and importance of local self-government – for its meaning.[36] The rule of law, it would appear, has become a slogan in search of a concept.

6 In Search of first Principles

The phrase evidently requires further exegesis, but once we search for first principles, a disconcerting thought presents itself. As a formal principle, the rule of law can be read as an expression of *the* fundamental question that has animated scholarly inquiry since the birth of political thinking. First formulated by the ancient Greeks, the theme was eloquently expressed by Rousseau. Putting 'the law above man', he stated, is a problem in politics analogous to that of 'squaring the circle

[32] Treaty on European Union, art.2.

[33] This refers to the so-called 'Copenhagen criteria', criteria defined by the European Council at their meeting in Copenhagen in 1993 that all countries seeking admission to the EU must meet.

[34] Ohnesorge (2007).

[35] Alan Greenspan, 'Markets and the Judiciary', 2.10. 2008: http://patentlyo.com/media/docs/2009/03/Greenspan.pdf

[36] Sobota (1997)

in geometry'. If it can be done, we have achieved the rule of law. If not, 'it will be men who will be ruling'.[37]

Yet even in classical thought there was ambivalence about what that entailed. For Aristotle, the rule of law meant the rule of reason.[38] This has no connection to democracy or to modern ideas of political equality; it simply imposes an ethical obligation on the governing class, and specifically on the judiciary, to maintain a balanced disposition and act according to the requirements of practical wisdom. But when Plato discussed the idea of a state ruled by law in which 'law is the master of the government and the government is its slave', we sense he was appealing to broader considerations.[39] These differences were not fully exposed until the modern era, since when its meaning has been advanced along two distinct tracks.

Montesquieu was first to acknowledge this.[40] Recognising the importance of upholding 'the spirit of the laws', he maintained that in the modern world Aristotle's rule of aristocratic reason must take second place to the establishment of a system of institutional checks that prevent the use of governing powers for private advantage so that 'the rule of rules' is able to flourish. Montesquieu's pioneering mid-eighteenth century work evidently influenced later jurists. In placing his faith in the rule of judicature, Dicey was following the Aristotelian track and appealing to the spirit of the laws as articulated by a judicial aristocracy, while the ambition of the liberal *Rechtsstaat* follows the second, institutionally orientated, track.

Each track has recently been reworked. The rule of law as the rule of judicature has been revitalised by a jurisprudential revolution that conceives law not as a system of rules but as a regime of rights. Asserting that individuals are bearers of rights, liberal jurists now promote the rule of law as an expression of justice founded on equal respect for rights holders. The judiciary is elevated into the role of guardian of fundamental rights.[41] At the same time, the institutional track has been advanced in a more rigorous, scientific idiom by game theorists who conceive the rule of law as an elaborate co-ordination mechanism, the object of which is to institute a stable regime that advances order, security, liberty, and human flourishing.[42]

It is along these two tracks that the two predominant contemporary conceptions of the rule of law have been formulated and that the most rigorous attempts to convert the rule of law from a slogan into a concept of practical significance have been devised.

[37] Rousseau (1997), vol. 2, pp. 177-260, at p. 179.
[38] Aristotle (1976), p. 188.
[39] Plato (1970), p. 715.
[40] Montesquieu (1989) [1748].
[41] See Dworkin (1985), ch.1.
[42] See, e.g., North and Weingast (1989); Hardin (1999).

7 The Rule of Judicature

The significance of the rule of judicature has been transformed by a global 'rights revolution'.[43] Over the last few decades, the oversight role of courts has dramatically extended, mainly fuelled by an ever-expanding concept of rights. No longer limited to a set of special interests that protect a zone of individual freedom from governmental action, almost any human interest can now be expressed as a right. As evaluators of these competing rights claims, courts have effectively become the arbiters of all governmental action.

Since the Second World War there has been a dramatic rise in constitutional review, spearheaded by more than sixty special constitutional courts newly formed across the world. Constitutional litigation now extends over a range of politically contentious questions that a generation ago would have been widely considered to be beyond their remit. Montesquieu had acknowledged that the rule of law was special precisely because, among the three governmental powers, the power of judging was 'null'. Dicey extolled the virtue of the rule of law because judges were bound by precedents and a strict conception of formal legality. Today, however, the rule of judicature invests judges with the contentious task of determining the values on which the regime rests its authority. Once it is assumed that many of these values remain implicit, forming part of what by Laurence Tribe called the 'invisible constitution',[44] the judiciary's role in enforcing the rule of law, as the rule of superlegality, is transformed. This has become an issue of political contention in many regimes.

Consider, for example, the case of Israel. When it was established in 1948, Israel did not adopt a modern constitution. In its place, the Knesset has incrementally passed nine Basic Laws. Through the work of its Supreme Court, however, these Basic Laws have been converted into an 'invisible constitution', and Israel's system of government thereby transformed from parliamentarism to constitutionalism. Since 1995, the Court has not only filled in the silences of these texts; it has engaged in innovative interpretation to convert a partial list of rights prescribed in the Basic Laws into a comprehensive charter of rights, thereby reworking the Basic Laws as though forming a coherent body of higher-order law.[45] In the name of 'the rule of law' the character of the political regime has been reordered by judicial action. This serves its purpose so long as the judiciary can convince not just the general public but also the political branches of government of the importance of these ideals. But as we have seen from recent governmental proposals, this has led to a backlash marked by an authoritarian response.[46]

Political controversies generated by judicial activism have become a prominent feature of many regimes, often resulting in similar types of response from the political branches of government. These commonly present a threat to the independence

[43] Ignatieff (2000)
[44] Tribe (2008), p. 7.
[45] Porat (2018).
[46] See, e.g. Weill (2023).

of the judiciary, which is a mainstay of all conceptions of the rule of law. But it should be emphasised that this threat to judicial independence has often emerged following the judiciary's innovative work in representing the rule of law as the rule of super-legality.

8 A new World Order

Alongside the growth of a rights discourse that extends judicial power, we have seen a massive global investment designed to strengthen governing institutions. In 1998, Thomas Carothers noted that the rule of law was being commonly touted as a solution to the world's troubles: 'Whether the task is to rebuild trust after civil war, to assist regimes making the transition to democracy, or to find a policy that might reconcile trading imperatives with human rights abuses, the answer remains the same. The rule of law had become a foundation stone of "the new world order".'[47] If the rule of judicature now conveys the triumph of superlegality, the rule of rights, this second track remains wedded to the rule of formal rules. Its objective has been to consolidate an institutional system to support neo-liberal reform programmes designed to strength market economies. Alongside the privatization of public services and deregulation of economic activity, rule of law programmes institute rule-based orders to protect contract and property rights, build courts and prisons, and train judges and lawyers.

This type of rule of law promotion is a top-down process pioneered by international institutions through aid schemes, and aimed at putting pressure on governments to establish the type of stability and accountability that international investors require. Redrafting laws is relatively simple. Achieving basic institutional reforms is more difficult. Convincing political leaders that they too are bound by law is altogether more challenging. As Ivor Jennings noted many years ago, if the people come to believe that the key to happiness and national unity is to be found in the rulings of a wise and beneficent leader, the rule of law 'is a pernicious doctrine'.[48] In this developmental vein, the rule of law is generally conceived as 'rule by law', and it remains susceptible to the criticism of treating the rule of law as a piece of technology that can be made available for export.

It is in this guise that institutions come to believe that adherence to the rule of law is susceptible to measurement and comparison. Many bodies are now engaging this activity, including the Bertelsmann Foundation, Freedom House, the Fraser Institute, and the International Bar Association. The latter's World Justice Project, for example, gathers data from 140 countries to generate a world league table of rule of law compliance and, with Denmark at the pinnacle and Venezuela propping up the bottom, yielding relatively predictable results.[49] Whatever the

[47] Carothers (1998).

[48] Jennings (1959), p. 46.

[49] *World Justice Project, Rule of Law Index 2022*: https://worldjusticeproject.org/rule-of-law-index/global/2022

transparency and accountability benefits, the rule of law has become a tool of modernisation, an instrument through which global leaders promote a specific model of rule.

9 Critical Appraisal

It now seems clear that, having acquired its global prominence only since the end of the cold war, the ambitions of the rule of law have been advancing along two quite different tracks. In advanced economies this has been through a rights revolution and in developing economies the rule of law has been promoted as a technique of modernization. Despite considerable progress in advancing these agendas, over the last 10–15 years many of these initiatives can be seen to have faltered, with the World Justice Project in 2022 registering a decline in the rule of law in three-quarters of states since the previous year.[50]

The number of countries classified as constitutional democracies has almost doubled since 1989, but from 2006 that trend has gone into reverse.[51] The cause has not generally been coups d'état. Rather, regimes have commonly retained their formal institutional trappings, but have increasingly been flouting the norms on which democracies adhering to the rule of law are based. This has arisen through the consolidation in power of authoritarian leaders or fundamentalist movements that formally adhere to the existing rules while actually eroding their authority. The reasons in each case are varied and complex, but the common pattern of development has exposed the fragility of a global movement that elevates the rule of law into a formal principle while paying little attention to the cultural preconditions of its realization.

Yet, the weakness of the rule of law is not confined to the institutional track. Following the rights revolution, the role of the judiciary in making value-based decisions on contentious topics has politicized the institution in ways that now threaten its legitimacy and its efficacy. Some argue that this point has been reached in the United States, a regime founded on the principle of the rule of law,[52] but in which the Supreme Court, now seen by many liberals as under the control of what they call MAGA Justices, is simply regarded as another site of political conflict.[53] In this situation, argues Yale professor Paul Kahn, the rule of law – on which the ideology of US constitutionalism rests – 'no longer stands apart from political contest'.[54]

The fragility of the rule of law is most dramatically exposed, however, in those situations where the two tracks have been drawn together in ambitious constitution-building projects. This has been the challenge faced by eastern European post-communist regimes. Here, the aim has been to establish simultaneously an independent

[50] *World Justice Project, Rule of Law Index 2022*: ibid.

[51] Freedom House, *Freedom in the World 2022*: *The Global Expansion of Authoritarian Rule:* https://freedomhouse.org/report/freedom-world/2022/global-expansion-authoritarian-rule

[52] Kahn (1977)

[53] Mark Tushnet and Aaron Belkin, 'An Open Letter to the Biden Administration on Popular Constitutionalism': https://balkin.blogspot.com/2023/07/an-open-letter-to-biden-administration.html.

[54] Kahn (2022).

nation-state, a democracy operating according to the rule of law, a vibrant civil society, and a market-based economy. This ambitious task has generally been promoted through EU membership, and therefore by privileging a technocratic mode of government imposed by the EU's economic constitution and policed by an active judiciary. As the recent experiences of many of these countries indicates (Hungary, Poland, Czechia, Slovakia, Romania), the rule of law seems increasing to be seen domestically as a tool of the new capitalist entrepreneurs,[55] and so-called 'illiberal democracy' is now touted in some quarters as a response to two decades of 'undemocratic liberal' reforms.[56]

10 Conclusion

We might conclude that 'the rule of law' is so commonly endorsed because it is a resonant but vacuous phrase that expresses whatever values the heart desires. Resonant because no one could be opposed to the notion of 'a government of laws and not of men'[57]; vacuous because, *pace* Martin Krygier,[58] we still need reminding that 'ruling' involves action, and it is 'men' not laws that possess that capacity. The rule of law is a phrase born of the need to reconcile freedom and government, but its ubiquity stands as an emblem of contemporary political ambiguity. What 'freedom' means in today's world has perhaps never been more uncertain, and this fuels doubt about the meaning, purpose and value of 'the rule of law'.

Although the rule of law has many connotations, two themes come closest to capturing its contemporary meaning: the rule of judicature and the formation of a robust institutional order. The former was conceived as a means of protecting classical liberal values against the growing powers of the modern state but has since been embraced by rights advocates. Yet the rights explosion has politicized not just rights discourse but also the institution through which those rights are enforced. No longer standing above the fray, the judiciary is increasingly treated as suspect, operating at the service of contentious political forces. A similar fate confronts the rule of law as institutional order. The intention of establishing a well-calibrated political machinery so that legislative, executive, and judicial institutions might check the excesses of one another and create a machine that, in James Russell Lowell's words, 'would go of itself' is laudable when it evolves from local practice.[59] But when imposed by international agencies, then rather than advancing a regime of political freedom, it must surely signify its eclipse.

Ruling by means of law remains a noble cause, but its achievements have invariably been the product of local political struggle. Since the emergence of a post-1989 'new world order', however, the rule of law has been elevated into a universal,

[55] *See* Parau (2018); Auer (2022), ch. 5.
[56] See, e.g., Sadurski (2019); Halmai (2018).
[57] Adams (1856), p. 106.
[58] Krygier (2016), at p. 206.
[59] Lowell (1888), p. 312.

abstract, and indeterminate notion whose meaning it is, in many parts of the world, increasingly felt to have been determined not as an expression of local self-government but by the decisions of new hegemonic powers.

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