UCLouvain
Faculté de droit et de criminologie

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Droit, Entreprise et Société

The concept of the rule of law and global governance: Theoretical perspectives

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Contents

1. What is the rule of law

- A set of philosophical, political and legal principles essential to democracy, to a good public governance and to the quality of the legal system
- Elements of the rule of law
  - Legality and legal certainty: legal rules are adopted democratically; they are clear, transparent, precise, stable, publicly available
  - All legal subjects and public authorities are bound by the law and effectively respect the law
  - Public action is not arbitrary; decisions of public authorities are subject to judicial review
  - Courts are independent and impartial (separation of powers); courts decide in accordance with the law and their decisions are implemented and enforced; citizens have an effective access to courts at a reasonable cost
  - Equality before the law: all legal subjects are treated equally
  - The rule of law has strong links with democracy and fundamental rights

1. What is the rule of law

- Rule of law (Etat de droit – Rechtsstaat) is a principle of western legal systems, albeit with variations
- But (at least some of its) components also form part of other legal systems
- The rule of law is not either present or absent; it is a matter of degree

EU Commission, Rule of law report 2020 : The rule of law is enshrined in Article 2 of the Treaty on European Union as one of the common values for all Member States. Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts, effective judicial review including respect for fundamental rights; separation of powers; and equality before the law.

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2. Legal sources of the rule of law

- Usually not codified in a single legal provision
  - National constitutions
  - International (human rights) provisions: e.g., art. 6 ECHR
  - Investment treaties and other treaties
  - Various legal provisions
- In UE law : e.g. art. 2 and 19 TEU, art. 47 Charter of Fundamental Rights
- Case-law – important role of EU and national judges

Art. 2 TEU: The Union is founded on the values of respect for human dignity, freedom, democracy, equality, **the rule of law** and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

3. The rule of law is part of the EU commercial policy

Art. 207, para. 1 TFEU: The common commercial policy shall be conducted in the context of the principles and objectives of the Union's external action.

Art. 21, para. 1 TEU: The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, **the rule of law**, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.
2. The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to: […]
(b) consolidate and support democracy, **the rule of law**, human rights and the principles of international law;

3. The rule of law is part of the EU commercial policy

- ECJ – Opinion 2/15 (Singapore FTA) – exclusive or shared competence of the EU – reasoning concerning sustainable development
  - Para. 143:The European Union has the obligation to integrate those objectives and principles into the conduct of its common commercial policy.
  - Para. 147: The objective of sustainable development henceforth forms an integral part of the common commercial policy.

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4. Why is the rule of law important for trade and investment?

- 3 main functions of (economic) law
  - Allocate rights and make exchange of rights possible (property and contracts)
  - Promote an efficient functioning of markets (transparency and information, competition, reduction of transaction costs, correction of market failures, implementation and sanctions)
  - Redistribute the profits of economic cooperation (tax, social security, legitimacy)

4. Why is the rule of law important for trade and investment?

- Some elements of the rule of law have little impact on economic activity
- Other elements are important to limit the risks associated with international trade and investment
  - Non-discrimination of foreign traders or investors
  - Respect of the rules by public authorities (esp. rules of economic or tax law)
  - Absence of corruption
  - Legal certainty

Art. 3.2 WTO-DSU. The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members […], and to clarify the existing provisions of those agreements […]

4. Why is the rule of law important for trade and investment?

- But: little respect for the rule of law can (or should) be considered as a risk, and therefore be incorporated in prices

CJEU, FIAMM (C-120/06)
Para. 139. The Council contends that […] the alleged damage falls within the normal risks which an exporter must assume given the current arrangements for world trade.
Para. 145. The Commission too submits that […] Involvement in international trade is, whatever the product market concerned, accompanied by the risk that an importing country will adopt decisions affecting trade for the most diverse reasons.
Para. 186. An economic operator whose business consists in particular in exporting goods to the markets of non-member States must therefore be aware that the commercial position which he has at a given time may be affected and altered by various circumstances and that those circumstances include the possibility […] that one of the non-member States will adopt measures suspending concessions in reaction to the stance taken by its trading partners within the framework of the WTO.

5. Internal and international dimensions of the rule of law

- Rule of law implies obligations of the state under national law
- The concept can also be applied in international relations
  - Respect of international law
  - Existence of international courts or dispute settlement mechanisms, impartiality and independence of judges
  - Legal certainty
  - Equal treatment of states
  - Rule-based vs power-based
- But international law is specific
  - States are not individuals
  - There is no sovereign of the international realm
  - Access to justice is limited to states and IO (except in investment law)
  - In the international sphere, the importance of law is less marked than in domestic law, in favour of greater deference to politics and power (see history of GATT/WTO).
  - lack of direct effect prevents the domestic judge to verify if international law complies with the principles of the rule of law

5. Internal and international dimensions of the rule of law

- Many treaties contain provisions related to internal rule of law and/or aim at improving the rule of law within the parties
- Domestic law may also impose to respect the rule of law in treaty provisions (ECJ Opinion 1/17, § 190)
- Both the internal and the international dimensions are important in international matters

Art. 41 TRIPS
2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions […]

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Thank you

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