



# *What is the Rule of law?*

## In search of a common European value

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# The Rule of law: a great paradox

The expression is frequently on people's lips,  
but there is no commonly agreed definition  
about it.

*Are we sure that all those who use it know  
what they mean or mean the same thing?*



**Rule of law,  
Rechtsstaat, État de droit, Stato di diritto:  
*a look into national theories***

# Rechtsstaat

- **Theoretician:** Robert von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, 1832.
- **Model of organization of a State, in which the power is exercised exclusively within the limits assigned by law.**
- The rules are generally set by the Parliament, respected by the executive power and applied by the judiciary.
- **The fact that the legislative power can be exercised arbitrarily is not really taken into account.**



## *Rule of law*

- **Theoretician:** Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 1885.
- For Dicey, the Rule of law includes:
  - ❖ the principle of equality before the law - in particular with respect to the application of criminal sanctions - regardless of economic conditions and social rank;
  - ❖ the principle according to which no man is punishable except before ordinary (and not special) courts;
  - ❖ the protection of human rights.

## *État de droit*

- **Theoretician:** Carré de Malberg, *Contribution à la théorie générale de l'État*, 1920.
- The purpose of the État de droit is to protect individual rights against the arbitrary exercise of sovereign power.
- The Parliament is not considered as the absolute holder of regulatory power, but as one of the «constituted powers», whose functions must be subject to limits and controls.



# Main differences between the models

- In the continental idea, **individual rights are set by the Parliament, the law is an expression of popular sovereignty, and the judge (only required to apply the law) is extraneous to the democratic process.**
- On the contrary, in the English experience, **the rules that govern social life are rarely the product of voluntarist imposition, because it is the use that generates them. The law is «judge-made» and it consolidates to the extent that it is useful for resolving disputes.**

## Similarities



**Attempt to limit the arbitrary exercise of political power.**

# «Thin» and «Thick» theories

- **Theoretician**: Julius Stahl
- Everyone, including the State itself, is subject to the law.
- Legal rules, whatever their content, must effectively be respected by everyone.
- No intervention is contemplated in the event that political power is exercised unjustly, in violation of fundamental rights.

- **Main exponent** : Ronald Dworkin
- The Rule of law cannot ignore the content of the law;
- Legal norms must respect certain imperatives of justice.



# The Rule of law in the international and European dimension. Some examples.

- Universal Declaration of Human Rights;
- European Convention on Human Rights (ECHR);
- Millennium Declaration;
- 2005 World Summit Statement;
- Statement of 2012 on the Rule of law at national and international level;
- Charter of Paris for a New Europe of 1990;
- Statute of the Council of Europe;
- Treaty on European Union;
- Charter of Fundamental Rights (CFR).

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A NEW PUSH FOR EUROPEAN VALUES

# The *Rule of law* in the EU



«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 whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty».

ECJ, judgment of 23 April 1986, *Partie écologiste "Les Verts" c. Parlamento*, case 294/83, ECLI:EU:C:1986:166, point 23.

# Maastricht Treaty

- **Preamble:** «Confirming their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law».
- **art. J.1, para. 2:** «1. The Union and its Member States shall define and implement a common foreign and security policy, governed by the provisions of this Title and covering all areas of foreign and security policy.  
  
2. The objectives of the common foreign and security policy shall be: [...] to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms».
- **art. 130 U, para 2:** «2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms».

# Amsterdam Treaty

## Art. 6 TEU:

«The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States».

To read in conjunction with Art. 7 and 49 TEU

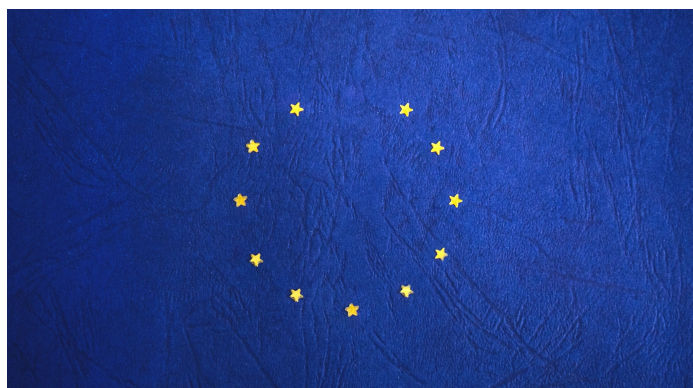
# Lisbon Treaty

## 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».

# Lisbon Treaty



- Condition of accession

Art. 49 TEU



- Requirement for membership

Art. 7 TEU



- External action inspiring principle

Art. 21 TEU

# Attempt Definition & Meaning

# Venice Commission

In the *Report on the Rule of Law*, six elements of the Rule of law are identified:

- Legality, including a transparent, accountable and democratic process for enacting law;
- Legal certainty;
- Prohibition of arbitrariness;
- Access to justice before independent and impartial courts, including judicial review of administrative acts ;
- Respect for human rights;
- Non-discrimination and equality before the law.

In 2016, the Commission also elaborated a Rule of law checklist which develops the points of the Report and prepares a detailed series of benchmarks in which each principle translates.



# Rule of Law Framework

«The precise content of the principles and standards stemming from the rule of law may vary at national level, depending on each Member State's constitutional system.

Nevertheless, case law of the Court of Justice of the European Union («the Court of Justice») and of the European Court of Human Rights, as well as documents drawn up by the Council of Europe, building notably on the expertise of the Venice Commission, provide a non-exhaustive list of these principles and hence define the core meaning of the rule of law as a common value of the EU in accordance with Article 2 TEU.

Those principles include legality, which implies a transparent, accountable, democratic and pluralistic process for enacting laws; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review including respect for fundamental rights; and equality before the law».

# Rule of Law Framework

- The Rule of law is described as «a constitutional principle with both formal and substantive components» intrinsically linked to respect for democracy and for fundamental rights.
- Compliance with the Rule of law is not only a prerequisite for the protection of all fundamental values listed in Article 2 TEU. It is also a prerequisite for upholding all rights and obligations deriving from the Treaties and from international law.

# Communication from the Commission to the European Parliament, the European Council and the Council

## «Further strengthening the Rule of Law within the Union - State of play and possible next steps»

«[The Rule of Law] is the basis of the democratic system in all Member States, necessary to ensure the protection of fundamental rights. It is also central to making the European Union work well as an area of freedom, security and justice and an internal market, where laws apply effectively and uniformly and budgets are spent in accordance with the applicable rules».

# Communication from the Commission to the European Parliament, the European Council and the Council

## «Further strengthening the Rule of Law within the Union - State of play and possible next steps»

«[...] Given its importance for the confidence of citizens in the Union and the effective delivery of its policies, the rule of law is of central relevance to the future of Europe. [...] If the rule of law is not properly protected in all Member States, the Union's foundation stone of solidarity, cohesion, and the trust necessary for mutual recognition of national decisions and the functioning of the internal market as a whole, is damaged. Rule of law related deficiencies can also have an impact on the economy, just as effective judicial systems and robust anti-corruption frameworks are crucial for a well-functioning business environment and sound public finances».

# Rule of Law Mechanism & Rule of Law Reports

The Rule of law is conceived as based upon four Pillars:

- The justice system;
- The anti-corruption framework;
- Media pluralism;
- Other institutional issues related to checks and balances.



# Regulation EU/Euratom 2020/2092

## Art. 2:

«The rule of law refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU».

## ECJ contribution to a definition: from *Associação Sindical dos Juizes Portugueses* case...

- Article 19 TEU, which gives concrete expression to the value of the Rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals.
- Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil the duty of ensuring that in the interpretation and application of the Treaties the Rule of law is observed.

# ...to judgment of the Court (Full Court) on the conditionality regulation

- The values contained in Article 2 TEU define the **very identity** of the European Union as a common legal order. Thus, the European Union must be able to defend those values, within the limits of its powers as laid down by the Treaties.



# The very essence of the Rule of law

“For a person to be realistically able to retain and nurture independence of thought, to be able to manage his or her life as he or she wishes, to be able to strive for happiness, success and inner peace, all fundamental elements of human existence, it must conceptually be of paramount importance that the society in which that person lives is in reality, and not only fictitiously, governed by law. The law must be transparent, stable, foreseeable and allow for mechanisms of dispute resolution that are independent and impartial. Moreover, law must not only apply to the people, but also, and even more crucially, to those that hold the reins of power at any given moment. No man, not an emperor, not a king, no Prime Minister, no President, no one is above the law”.

*R. Spano, The rule of law as the lodestar of the European Convention on Human Rights: The Strasbourg Court and the independence of the judiciary, in European Law Journal, 1/2021, p. 3.*

**Thank you!**