The Concept of The Rule of Law as a Rule of Human Rights Law

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Abstract

It is important for the concept of rule of law to be precisely identified or identifiable, not only, and even not primarily, for the sake of legal theory, but also for practical reasons. This is due to the fact that the requirement for the state, legal order or societal (supra)national order to be ruled by law is currently universal, i.e. this is required of every legal order, every state or union of states, and even regional or universal international communities, so in every society, in the entire world, and especially in Europe. The rule of law is also a constitutional imperative in some contemporary constitutions, for instance, in Serbia.

In this paper, the author for the first time elaborates on her concise definition of the rule of law as a rule of human rights law, which – as a conception – has already been introduced in her previous papers, and developed for decades. She achieves this, on one hand, by linking the understanding of the rule of law as a rule of human rights law to other concepts (and phenomena, respectively) relevant for the assessment of the (in)existence of the rule of law in individual, specific legal orders, and on the other hand, by comparing her own understanding of the rule of law as a rule of human rights law to some of the most widely accepted or influential views on the rule of law in this millennium.

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1. Introduction

The demand for a country, legal, societal and (supra)national order to be a rule of law is a requirement that is presently universally established, which is to say imposed upon every legal order, every state and community of states, and even regional international communities, as well as the universal one, hence, upon every society worldwide. This requirement is especially evident in Europe, and not only in the legally most developed European states or within the European Union but also in relation to the Council of Europe member states. In Serbia, for example, it is even a constitutional imperative.

In order to illustrate and prove the aforementioned stances plainly, it suffices to mention the Declaration of the High-level Meeting held on 24 September 2012 at the 67th Session of the United Nations General Assembly on the rule of law at the national and international levels. Then, it should be recalled that the Preamble of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms refers to the European governments which, being like-minded and having a common heritage of political traditions, ideals, freedom and the rule of law, have been resolved (since 1950) to take the first steps for the collective enforcement of certain rights asserted in the UN Universal Declaration of Human Rights. And finally, just exempli gratia, it could be quoted what the Constitution of Serbia of 2006 states in its First Part containing the constitutional principles, and more precisely, in two paragraphs of Article 3, dedicated entirely to the rule of law principle: "Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights./ The rule of law will be exercised through free and direct elections, constitutional guarantees of human and minority rights, separation of power, independent judiciary and observance of the Constitution and Law by the authorities."

So, if the demand for the respect of the rule of law is really imposed so broadly, universally upon all national, supranational and international orders, then it becomes clear why it is so important for the notion of the rule of law to be precisely determined or determinable not only – and not even primarily – for cognitive, legal theory's sake, but also for practical legal purposes. However, as it will be demonstrated in this paper as succinctly as possible, this has not been the case in the legal theory for a long time, nor even today.

This current state of affairs in the field of defining the concept of the rule of law has determined the structure of this paper. After the Introduction (which, we believe, clarifies why it is so important to determine clearly and accurately what the rule of law is) comes the Second section of the paper that shows where and how the notion of rule of law has remained undetermined in newer, recent literature. Then in the Third section, our understanding of the rule of law as a rule of human rights law is explained contextually in detail. And the Fourth section is dedicated to the comparison of our concept of the rule of law as a rule of human rights law to some other relevant definitions or determinations of the rule of law in newer, more recent literature, in order to enable the critical consideration and assessment of our understanding of the rule of law as a rule of human rights law and its potential benefits and gaps.

2. The Concept of The Rule of Law Undetermined

The concept of the rule of law may be undetermined in different ways: (1) simply, by saying nothing on the rule of law, or (2) by saying something that cannot be entirely relevant for legal practice, because it cannot be legally operationalized for legal assessment, or (3) by saying something true but quite insufficient, either theoretically or practically, for understanding what the rule of law is. Let us take a closer look at how these objections manifest themselves.

2.1. Not a Word About the Rule of Law

It is interesting to note that the famous comprehensive The Oxford Handbook of Jurisprudence and Philosophy of Law, counting 1,050 pages, where the most eminent Anglo-American authors have elaborated 24 topics, besides not dedicating a single of those 24 chapters to the rule of law, does not contain this concept even in its index (Coleman, Shapiro 2002, pp. vii–viii, 1041–1050).

But this seems neither strange, nor a rare exception. In his book Lawyering for the Rule of Law: Government Lawyers and the Rise of Judicial Power in Israel, Yoav Dotan does not explain the concept of the rule of law even though it is right there in the title, nor does it appear in the index as a separate item (Dotan 2014, pp. ix, 208–214), although the book does contain some valuable insights regarding specific legal solutions for election of judges and prosecutors.

The same can be said for Philosophy of Law by Andrei Marmor: it does not include a chapter or sub-chapter on the rule of law, and does not even have an index (Marmor 2010, pp. 1–184). At first glance, this seems even stranger, knowing that Marmor has elaborated on his concept of the rule of law in his article "The Rule of Law and Its Limits" (Marmor 2003), which he then repeatedly republished in both physical or digital form, and which in itself indicates that he attaches importance to the views expressed therein and has not revoked them (for the sake of example, see Marmor 1/2004; 2007).

2.2.1. Fuller as the First Aid Provider in Determining the Rule of Law

When Marmor's aforementioned article "The Rule of Law and Its Limits" is analyzed in greater detail, it becomes clear that its author sees the rule of law similarly as German authors saw the Rechtsstaat from its first theoretical definitions until the beginning of the post-Second World War era, or as Lon Fuller sees the internal morality of law (Fuller 1969 [19641]): as ruling by general, publicly communicated, non-retroactive, clear, non-contradictory, implementable, stable, and consistently applied laws (see, for example, Marmor 2003, especially pp. 6–47).

2.2.2. However, Too Much of the Rule of Law Can Be Bad!?!

Such a conception of rule of law explains why Marmor can begin his elaboration on the rule of law with a view that equates the rule of law with legalism per se, in a narrow sense, and declare "even if the rule of law is a good thing, too much of it may be bad" (Marmor 2003, p. 2). This leaves us speechless only following an initial shock. But, when one considers that opinion (in line with Spinoza's advice "non ridere, non lugere, neque detestari, sed intelligere," i.e. "not to ridicule, not to lament, or detest, but to understand"), one can notice two things: First, if the rule of law can be reduced to legalism per se, then the rule of law is an unnecessary concept from the aspect of both legal theory and legal practice, since the concept of legality per se then suffices, where it – in a wider sense – includes constitutionality per se and legality per se in a narrower sense, thus making the concept of the rule of law redundant because it represents only a different name for already familiar and identified legal concepts and phenomena of constitutionality and legality. The second important thing that can be noticed in Marmor's aforementioned opinion is that Marmor's concept of rule of law is devoid of any content, though it is a well-known fact that world views and ideologies – primarily political ideologies – are determinative and decisive for legal order, so that they may lead to completely different applications of even identically formulated legal provisions, as it has been demonstrated and proven in many relevant studies (Djordjević, Pürner 2/2019). According to Marmor's understanding of the concept of the rule of law, different applications of identically formulated legal provisions are legally acceptable in different legal orders that can still be conceived and labelled as rules of law. While according to our understanding of the rule of law, e.g. the Nazi jurisprudence regarding the