

Revisiting Modern Approaches to the Rule of Law Understanding: Why the Content of the Rule of Law Matters?

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Abstract

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REVISITING MODERN APPROACHES

TO THE RULE OF LAW UNDERSTANDING:

WHY THE CONTENT OF THE RULE

OF LAW MATTERS?

A common assumption is that the Rule of Law is already not only a simple domestic concept. It reflects content-based legal and moral decisions taken by the international community in order to universalize certain social values. Consequently, multiple viewpoints have been expressed regarding the importance to conceptualize the Rule of Law as the complex legal construction. Thus, it is stressed the Rule of Law has the characteristics of a theoretically normative legal construct. Obtained findings suggest a balancing between the Rule of Law elements and the Rule of Law requirements. It is considered to be necessary for the identification of the spheres, where investigated principles may be implemented.

Keywords: Rule of Law, legal principles, Rule of Law elements, legal constructions, requirements

of the Rule of Law. Introduction: the need to revise existing Rule of Law paradigm. For modern representatives of legal science, it is axiomatic to assert a theoretical failure to offer a comprehensive definition of the rule of law principle. Basically, the main argument is the thesis about the multidimensionality of this phenomenon and its influence on the regulation of individual spheres of social relations. Obviously, such a position does not add to the investigated idea the expected certainty and clarity. The full-fledged operation of the rule of law concept, the determination of the direction of its value-normative regulation primarily requires that recourse has to be made to a constructive study of the principle's internal structure. Identifying the

structural elements of the rule of law will allow us to form a model of its normative structure. Therefore, in the framework of the current paper, focusing on the internal structure of the rule of law principle is considered to be appropriate for several reasons.

First of all, the analysis of the relevant literature has shown that a certain social value or ideological persuasion lies at the core of each author's approach to determining the rule of law essence, which would lead to an unconscious narrowing of the principle's scope. However, it is not worth talking about the futility of such scientific attempts.

Instead, it is necessary to focus on those social, economic and political-legal contexts that individual authors use to make sense of the rule of law principle.

Secondly, it is believed that maximum consideration of such contexts will rationally identify those structural elements of the rule of law, and determine the quintessence of this principle, which create grounds for positioning the rule of law not only as the output of intensive scientific research, but also as the specific set of interrelated legal standards.

Finally, as a final argument, it should be noted that the result of the structural analysis of the rule of law as a multilevel, complex principle will be the comprehensive systematization of the components of the interaction between national and international legal systems, which, in turn, will fill the modern lawmaking activity within a qualitatively new content.

The title of this article demonstrates that the rule of law is the principle of a “system-building” nature, and therefore has the features of a theoretical and normative legal structure. Thus, using the methodological approach to the concept of legal constructions, proposed in due time by O. E. Cherdantsev', the following should be stressed.

Representing a single legal structure, the rule of law principle should be considered in two dimensions: gnoseological and normative. On the one hand, it is directly expressed and enshrined in the ! Черданцев, А.Ф. (2012). Логико-языковые феномены в юриспруденции. Москва: Норма: ИНФРА-М, 131,132, 150.

ISSN 2336-5439 (Print); 2336-5447 (Online) EUROPEAN POLITICAL AND LAW DISCOURSE ® Volume 6 Issue 3 2019 norms of both international and national law. This characterizes the normative aspect of the rule of law principle. In contrast, in the gnoseological terms, the rule of law serves as a method used for cognition of law, that is, a criterion for its evaluation. With reference to this, the normative aspect of the rule of law manifests itself as a factor of the regulatory impact, because its formal textual aspect involves the organization of a certain normative material. Given this, considering investigated principle as a theoretical legal structure, it is worthwhile to appeal to its gnoseological nature. In order to perform its function

as anorm-goal and an as the element of the content of positive law, the rule of law principle serves as a criterion for assessing the social purpose of the law itself, its focus on ensuring natural human rights. In this context, having in most cases a generalized character, the rule of law as a norm-goal serves as a means of analyzing positive law, thereby determining the direction of other legal norms governing certain public relations.

Inevitably, to consider the rule of law principle as the legal theoretical and normative construction, one must, first of all, recognize that it has its own structure of content, that is, an internal form of expression. The content of the rule of law through the prism of its structure. The idea of the rule of law conceptualization as the set of elements (which are closely interrelated with each other) is not new.

Unfortunately, foreign scientific literature is expectedly “gives the dust” to the national theoretical jurisprudence in recognizing the relevance of the suggested research direction. Indeed, as practice shows, the simple positioning of the rule of law as a constitutional principle and one of the basic legal values consciously leads to the appearance of an unclear and loose concept.

An analysis of the doctrinal developments of English-language authors made it possible to single out the following three trends in the division of the rule of law principle into the separate components. Trend 1: Discovering the elements of the Rule of Law via the legal requirements for certain aspects of social regulation. In turn, such requirements may relate to the statute (in the sense of law as legislative enactment) as the main source of law (for example, prohibiting retrospectiveness of a legislative act, the requirement for clarity and generalization of the law, its stability and compliance with the requirements of the time, etc.). In a broader sense, such requirements relate to the rule of law in general, when not only

the textualization of the rules of law are taken into account, but also the special emphasis is focused on the level and effectiveness of the interaction of such forms with the external environment. The proponents of this approach investigate the Rule of Law principle as the set of special sub-rules for the proper exercise of public power” or as the set of certain requirements to the targeted phenomenon of legal reality?.

In contrast to the previous variations, some legal thinkers argue the Rule of Law essentially has its “minimum requirements”. Among them, in particular, the requirement for a generalized legal rule, the requirement for legal certainty of laws, the requirement for separation of powers between the legislative and judicial branches and the

requirement to prohibit the exercise of any actions that are outside the law'. In our opinion, the positions of scientists, such as the one expressed by M. Rosenfeld, narrow to a certain extent the content of the Rule of Law idea for several reasons. First, the formulation of the "minimum requirements" of the rule of law logically needs to suggest the corresponding "maximum requirements" of this principle. Secondly, from

a genetic point of view, the "minimum requirements" of the rule of law envisage the achievement of certain minimum results from the external aspect of legal regulation. Therefore, the question is how to effectively implement the Rule of Law principle in the specific conditions of the socio-political environment. Among the other aspects is the question, whether it is appropriate then to use the minimum requirements of the rule of law in the context of the transformation of national legal systems, because the latter is characterized by purposefulness and structuredness, and therefore should not be characterized as meeting the standards of the minimum level. Let us say, when approving safety and health protection requirements when workers use

production equipment, the legislator cannot establish certain minimum requirements for such use. Instead, he must develop a legal norm, the disposition of which would oblige the employer, when choosing the appropriate production equipment, to take into account not only the specific working conditions but also the risks to the safety, health and life of workers in the process of using such equipment.

! Lord Bingham (2007). The Rule of Law. The Cambridge Law Journal, 66(1), 69-82. 2 Marmor, A. (2004) The Rule of Law and its Limits. Law and Philosophy, 23, 01, 9-38. 3 Rosenfeld, M. (2001). The Rule of Law and the Legitimacy of Constitutional Democracy. SSRN Electronic Journal, 1313.

Trend 2: The materialization of the rule of law constituent parts as interrelated elements. Such elements in their entirety form a logical rule of law construct. With this approach, the authors in most cases offer a list (with reference to its inexhaustible nature) of the relevant units that make up the Rule of Law principle without focusing on their functional orientation. Representing the value parameters that are incorporated into the theoretical and normative construction, these elements are considered as means of achieving the goal coined in the rule of law idea, that its purposefulness or teleological determination. In turn, such a goal is axiomatic and consists in ensuring the realization by person of his/her natural rights, and

also, in case of violation, their just protection. In general, there are several options of the outlined approach. Particularly, in the framework of the first "sub-approach", the authors do not unite structural units of the Rule of Law by a certain category of generic meaning. They provide a simple list of elements with reference to their synthesis within a specific legal situation. R. Fallon, for example, writes that the core idea of the Rule of Law can be revealed with the following five elements: 1) the functionality of legal norms, standards, principles, which allows a particular person to manage his/her actions (people should be able to understand the law and obey its provisions) 2) effectiveness: the law should guide the actions of people in accordance with

the rules of conduct that exist in society 3) stability: the law should be sufficiently stable in order to facilitate planning and coordination of actions, thus creating appropriate conditions for certain predetermined legal results of such actions; 4) the primacy of legal authority; 5) the means by which objective justice is achieved (in particular, judicial institutions must be accessible and use appropriate legal procedures for making legal and fair decisions).

At the same time, the second group of "sub-approaches" tends to use the systematization of the Rule of Law elements as the set of mutually dependent legal principles. This new emphasis on the Rule of Law content would seem initially to conceptualize this idea as the collective principle. Against this backdrop, to underpin the status of the Rule of Law as the "meta-law" principle, it is vital to recognize that it united the autonomous, but interrelated common ideological messages that determine the direction of social relations legal regulation. In the discussions regarding the substance of the Rule of Law, J. Jowell has identified four principles that form its content. Admittedly, among them are:

(1) the principle, according to which the power cannot be exercised arbitrarily; in order to ensure this principle, an important role is played by the informative characteristics of the law (its prospectivity, accessibility and clarity);

(2) the principle, according to which certain legal system recognized the supremacy of the law, which functions in conjunction with the principle of the separation of powers; the symbiosis of these principles is intended to create conditions within which absolutely every person is subject to the law (including the sovereign itself);

(3) the principle, according to which the law applies equally to all persons, offering equal protection without any discrimination; compliance with this principle is predetermined by the presence of a requirement in relation to the general application and compliance with the provisions of the law;

(4) the principle of respect for fundamental human rights and the use of necessary remedies in case of their violation, provided for by international conventions and other treaties of a universal nature'. Continuing this thesis further, some experts in the Rule of Law field provide a list of basic characteristics peculiar to the principles that comprise in their unity the whole principle of the Rule of Law.

Generally, such characteristics means that Rule of Law elements: a) are the principles of the "second order"; they are general rules that guide and restrict the way how a law of the first order should be created and implemented; they define its overall shape or configuration; b) are systemic and rationally organized in their scope — they are applied in all the basic operations of the legal system in their "complete latitude";

they have rather wide scope of application; c) are formal in their content; in their application, they indirectly serve as the main program benchmarks, principles, that is, they act as the fundamental political and legal values'.

! Fallon, B.H. (1997). "The Rule of Law" as a Concept in Constitutional Discourse. *Columbia Law Review*, 97(1), 1, 7-9. 2 Jowell, J. (2007). The Rule of law and its Underlying Values. In *The Changing Constitution*. Oxford University Press, 18-22.

3 Summers, R.S. (2019). Principles of the Rule of Law. *Notre Dame Law Review*.

<<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1653&context=ndlr>> (2019, May, 09).

ISSN 2336-5439 (Print); 2336-5447 (Online) EUROPEAN POLITICAL AND LAW DISCOURSE ® Volume 6 Issue 3 2019 Trend 3: The cognition of the Rule of Law elements through the application of formal and substantive theories to the perception of its essence. Based on the approach that was successfully suggested by B. Tamanaha, some legalists consider the elemental composition of the Rule of Law in the light of two main scientific theories. Therefore, the Rule of Law is considered as a set of elements that focus on proper sources and forms of legality (formal theories). And within the limits of substantial theories, it is proposed to single out clear criteria for the clear criteria are proposed for defining the content

of the law". The application of this approach is described in detail in the investigation provided by A. Bedner, who has suggested his own unique "elemental model of the rule of law". This model is based on the existence of dichotomy between the formal and material theories, as well as the consistent combination of a narrow and broad understanding of the Rule of Law concept. Therefore, given the basic functions performing by the Rule of Law, its elements can be divided into three main categories: a) procedural elements; b) material elements; c) elements of the control mechanism.

Procedural elements focused on the method of governance and its legality. Among them: 1) the rule by law; 2) state actions are subject to the law; 3) formal legality (the law must be clear and defined in its content, accessible and predictable for the subject and common in its application).

The substantive elements set material standards in order to prevent abuse of power. They include:

- 1) the subordination of the whole law and its interpretations to the fundamental principles of justice;
- 2) protection of the rights and freedoms of the individual; 3) the promotion of social human rights;
- 4) protection of group (collective) rights.

Finally, control mechanisms (institutions ensuring the rights and freedoms of a person and a citizen) provide for the functioning of: 1) an independent judicial system (trias politica principle) 2) other institutions entrusted with the responsibility for ensuring the elements of the legal order".

Some personal thoughts why the content of the Rule of Law really matters. The above trends to determine the composition of the Rule of Law principle undoubtedly have significant practical significance. Nevertheless, trying to isolate certain structural units of the Rule of Law, the authors elaborate different экс formulations in their researches, in particular: "elements of the rule of law", "rule of law requirements", "rule of law sub-principles", "rule of law indicators", "components of the rule of law", etc. At the same time, in our opinion, such a fairly broad multi-variation

of the categorical apparatus, which is used to designate the components of the Rule of Law theoretical and normative construction, may invoke criticism

not only about theoretical and methodological conceptualization, but also practical pitfalls in its implementation. It is therefore not clear on what basis the wording of this type is compared in its basic meaning. We are convinced that using these categories interchangeably is quite erroneous, which indicates a fairly low level of research into the practical effect of the approach used.

Based on the above, we shall make the following intermediate conclusion: the understanding of the content of the Rule of Law components and its sub-principles should not be identical to the understanding of content of its requirements. The latter two, in particular, form the elemental composition of the examined principle. Implementing logical forms of reasoning, it should be stressed that the components of the Rule of Law are the blocks of its elements. Such blocks are combined according to certain characteristics, which by their properties can be either formal or material.

If we consider the Rule of Law as a combination of these formal and material elements (the so-called "sub-principles"), which are interrelated with each other, then it is fair to argue that such-like elements form a certain integrity of the theoretical and normative composition of the investigated construct. Consequently, taking into account the methodological principles developed in the framework of a systematic approach to the legal phenomena cognition, it is extremely important to take into account the existence of a correlation in internal relations within the theoretical and normative structure of the Rule of Law. In our opinion, this relationship is based mainly on hierarchical interfaces. Specifically, the latter in the structure of the Rule of

Law principle means the presence of decomposition of its construct. That is, each formal or material component of the Rule of Law can be considered as a system of interrelated elements (sub-principles). Selection of elements of the Rule of Law as the subdivisions that are part of its theoretical and normative structure, in turn, provide for the specification of their content. It occurs through the formulation of certain ! Tamanaha, B.Z. (2010). On the rule of law: History, politics, theory. Cambridge: Cambridge Univ. Press, 107.

2 Bedner, A. (2010). An Elementary Approach to the Rule of Law. Hague Journal on the Rule of Law, 2(01), 48-74. doi:[10.1017/s1876404510100037](https://doi.org/10.1017/s1876404510100037), 56-70.

requirements, which later acquire their materialized form in the disposition of a specific legal rule. The stated position is also supported by the arguments of many reputable researchers regarding the fact that in modern conditions of globalization and active processes of regional integration, the Rule of Law requires a detailed elaboration of its content by formulating separate sets of objectives in the sphere of regulating public legal relations.

Conclusive remarks and prospects for the further academic findings in the Rule of Law domain. The requirements of the Rule of Law in their functional orientation are much narrower than its sub-principles (they establish the components of the Rule of Law). They can acquire individual manifestations within a specific sub-principle of the Rule of Law. That is, the actual occurrence of a list of the Rule of Law requirements, in any case, depends on the contextualization of its particular sub-principle.

In terms of content, the Rule of Law requirements are addressed to the prospects for the development of such a sub-principle. Admittedly, it is due to the dynamics of their teleological action in legal relations. They form an idiosyncratic request for rethinking the goals and objectives of legal regulation, as well as the tasks pursued by the national legal system (or its separate part). Objectively, they arise from the specific Rule of Law sub-principle and act as a kind of axiological reference points in the interaction of national legal systems with the legal system of the international level. Therefore, by their legal nature, the principles of the Rule of Law are prescriptive, that is, those that form the internal structure of the Rule of Law as a

construct of a regulatory nature. In contrast, the requirements are essentially descriptive, that is, they are systematically written out from the content of a separate Rule of Law sub-principle. Systemic development of the Rule of Law dynamic aspects requires the elimination of certain unsystematic and chaotic in the drafting of its structural parts. In this regard, it is necessary to talk about the functional links between the Rule of Law sub-principles (and, accordingly, its requirements), since in the process of their action they are characterized by complementarity.

References

1. 1. Bedner, A. (2010). An Elementary Approach to the Rule of Law. *Hague Journal on the Rule of Law*, 2(01), 48-74.
2. doi:[10.1017/s1876404510100037](https://doi.org/10.1017/s1876404510100037). [in English].
3. 2. Cherdancev, A.E. (2012). Logiko-jazykovye fenomeny y jurisprudencii [Logic and linguistic phenomena in jurisprudence]. Moscow: Norma: INFRA-M. [in Russian].
5. 3. Fallon, K. H. (1997). "The Rule of Law" as a Concept in Constitutional Discourse. *Columbia Law Review*, 97(1), 6. 1. doi:[10.2307/1123446](https://doi.org/10.2307/1123446). [in English].
7. 4. Jowell, J. (2007). The Rule of law and its Underlying Values. In *The Changing Constitution*. Oxford University Press. [in English].
9. 5. Lord Bingham (2007). The Rule of Law. *The Cambridge Law Journal*, 66(1), 67-85.
10. doi: <https://doi.org/10.1017/S0008197307000037>. [in English].
11. 6. Marmor, A. (2004) The Rule of Law and its Limits. *Law and Philosophy*, 23, 01, 1-43.
12. doi: [10.1023/B:LAPH.00000004356.03016.d5](https://doi.org/10.1023/B:LAPH.00000004356.03016.d5). [in English].
13. 7. Rosenfeld, M. (2001). The Rule of Law and the Legitimacy of Constitutional Democracy. *SSRN Electronic Journal*. doi:[10.2139/ssrn.262350](https://doi.org/10.2139/ssrn.262350). [in English].
15. 8. Summers, R.S. Principles of the Rule of Law. *Notre Dame Law Review*.
16. <<http://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=1653&context=ndlr>> (2019, May, 09). [in English].
17. 9. Tamanaha, B.Z. (2010). On the rule of law: History, politics, theory. Cambridge: Cambridge Univ. Press.
18. [in English].

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