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# Reflections on The Historical Roots and Contemporary Meaning of the Concept of the Rule of Law

Looking back through history, the concept of the rule of law meant the prohibition of authoritarianism. Even in the Middle Ages, no king could do everything. At least not easily when it came to the nobles. And unlike slaves in antiquity, serfs couldn't be sold as chattel. The aim of the struggle against the arbitrary rule of the ruling class was to democratise power. This ideological struggle is where the concept of the rule of law first emerged.

The term 'rule of law' is often translated in Hungarian law as 'Rechtsstaat'[1], which is the German word for a 'state, based on law abidance'. (A mirror translation in Hungarian would be 'law-state'.) A similar concept is the French a 'État de droit'.[2] This certainly suggests a close connection between the law and state. 'Law' as an adjective defines the state, as the entire functioning of the constitutional state is governed by law. (The hallmark of the concept of law, in relation to all norms, is its enforceability by the state.[3]) There is, therefore, an inseparable unity between the two.

*There is a dual requirement that law must both correspond to the interests and will of society (this is the external context on the part of the state) and correspond to its own internal context, as this, too, serves the long-term interest of society.*[4] The literal translation of the term "rule of law" might be "the supreme power of law". This implies, through indirect logic, that the law rules, not the people. People, regardless of their office, are equal under the law. A person can decide a matter not because they are inherently 'superior' but because they hold the authority in that particular case. (Hence the prohibition against the arbitrary removal of competency, which is also linked to the issue of separation of powers.)

[1] For the content of the two concepts see. Péter, Szigeti: A jogállam társadalomtörténeti változatai, in Péter, Takács (ed.): *Államelmélet*, Miskolc, Bíbor Kiadó, 1997, 152–169., ill. 162–168.

[2] The English, German and French terms are similar, but they do not have the same meaning. See Ákos Bence, Gát: *Az európai uniós jogállamiság-közpolitika kialakulásának átfogó jogi és politikatudományi elemzése*, Doktori értekezés, Budapest, Nemzeti Közszolgálati Egyetem, Közigazgatás-tudományi Doktori Iskola, 2021, 11.

[3] The now-evident thesis that law is an abstract rule is rooted in the European "people's conception of law". Even in casuistic Roman law, the written law, e.g. the laws of Table XII, was applied to the particularities of the case according to the praetorian evaluation (and jurisprudential opinion). It was only from the imperial period that law became an abstract norm, and from then on the fiction of the continuity of law was used. Since then, the distinguishing features of law have been authority, the intention of universal application, obligation (i.e. the bilateral nature of the relationship) and sanction. See Csaba, Varga: *A jog mint folyamat*, Budapest, Osiris Kiadó, 1999, 150.

[4] The former aspect is manifested in the system of popular representation and the corresponding state legislation and is therefore more tangible. The latter content filter is more subjective and can be approached objectively through constitutionalism.

A constitution's legitimacy can stem either from the will of the people as a whole or from legal continuity.[5] (Ideally, the former would involve every citizen voting on each provision of the constitution.) The latter connects to the formal rule of law. But how far back can this continuity be traced? In many Central and Eastern European states, regime change occurred on based on legality and legal continuity. This raises the question: how far can the formal rule of law be traced back? What is the legal basis if the starting point was a system that was substantively questionable one? After all, the predecessors of any state developed on the basis of legal continuity, from today's perspective, were undemocratic.

Given these challenges to the formal rule of law, the substance of the rule of law could serve as a standard, but its subjectivity could poses a problem.[6] *The rule of law is not a goal in itself, but a tool. It is* a tool to ensure that society should continue to exist, and its will shall be carried out (this is the foundation of the state), including the guarantee of human rights (this serves as the foundation of law).

In legislation, two competing trends can be identified: the exemplary (a principled model) and the casuistic (an enumerated model of regulation). Their appropriateness varies across legal domains and is quite different in criminal law, in administrative law (which also imposes sanctions), and in civil law.[7] (While the choice of regulatory style is not only a question of legality but also of expediency, this decision should be made by consulting a legal expert. The legal profession is important, but the system must not become a 'juristocracy'.[8] A risk of subjectivity arises when the internal context of the law is used to question legitimate state legislation or the application of the law. To address this, it is recommended that the most important legal principles be enshrined in a constitution with strong legitimacy.)

Democratic elections are of paramount importance for the legitimacy of the law. This includes preventing fraud and establishing a proper electoral system. States have considerable leeway in designing their electoral systems. *However, it is crucial to emphasize that the*

[5] Because then the will of society can be traced back to the creation of the state itself. On the continuity of law see. Zoltán József, Tóth: Egyes észrevételek az Alaptörvény értelmezéséhez, *Polgári szemle*, 2013/1-3, 13–40.

[6] According to some approaches, some people can explain their own subjective will into the malleable concept of the rule of law at will. Cf. Zs. András, Varga: *Eszményből bálvány? - A joguralom dogmatikája*, Budapest, Századvég Kiadó, 2015, 228.

[7] Furthermore, if the legislator regulates in an area using only abstract standards, then the legislators themselves will start to fill in the gaps with more precise rules. Béla, Pokol: *A jurisztokratikus állam*, Budapest, Dialóg Campus Kiadó, 2017, 117.

[8] The essence of juristocracy is the "rule of jurisprudence" instead of democracy, i.e. legislative activity wrapped up in a dysfunctional way in the application of law. In other words, making unauthorised (subjective) expediency decisions instead of lawfulness decisions. See Pokol: *A jurisztokratikus állam* 160.

*minority must not prevail over the majority. This principle is upheld partly by a sound electoral model and partly by a system of legal remedies with guaranteed elements.* Otherwise, democracy becomes merely a formality. Furthermore, it is essential to establish constitutional requirements, such as the provision that changing the electoral system immediately before elections without sufficient preparation time constitutes a violation of legal certainty.[9]

*It is essential that the general rules established by law be the best possible for society. However, it has its individual victims.* In legislative terms, this occurs as a result of loopholes. A legal loophole exists when there is no rule governing a specific situation, but a rule should exist based on a higher principle or norm. According to Larenz, a hidden legal loophole occurs when a rule exists, but a higher-level provision or legal principle would justify a more specific law (*lex specialis*). In such cases, applying the general rule may be problematic. *''The loophole here consists in the absence of the imposition of a limitation.''*[10] The legitimate interests of those adversely affected by such loopholes must be protected by law. Additionally, we cannot ignore the fact that legislation can be 'flawed'. Whether due to a typographical error or poor drafting, a law's effect may differ from its intended purpose. (We will not address 'deliberate errors' arising from personal interests, though, it is not always easy to distinguish between an unintentional mistake and a deliberate legislative act that disregards certain interests.)

This may be attributable to:

- The legislators themselves.

- The codification of legislation. It is a sociological fact that, especially with law containing hundreds of paragraphs, the drafters become quasi-decision-makers.

- The emergence of loopholes. These can be either original or ex post, depending on when they arise. In the former case, the legal loophole had already existed at the time the legislation was drafted; the latter occurs when social, technical, or scientific developments necessitate regulating an area that previously did not require regulation. This was the case when criminal codes still usually punished the counterfeiting of coins; when paper money suddenly became widespread in Europe and began to have a high value, the principle of *'nullum crimen sine lege'* meant that the most serious offenders could not be punished. (It is less common for a rule to be repealed in an area that was originally regulated. This is most conceivable with a detailed rule

[9] Obviously, this raises the issue of adequate preparation time. For an excellent general discussion of the latter, see. Péter, Tilk – Ildikó, Kovács: Gondolatok a kellő felkészülési idő számításának kezdőpontjáról, *Jogtudományi Közlöny*, Vol. 70., No. 11. (2015), 549–555.
[10] Béla, Pokol: *Jogelmélet*, Budapest, Századvég Kiadó, 2005, 143.

in a complex legal relationship. One long law is replaced by another long law - and one legal relationship is not thought of.) For this reason, there is a constant need for correction.

- This is primarily the purpose of the creation of *'lex specialis'* – the creation of specific rules alongside general ones. In this context, feedback from citizens, practitioners and the legal profession becomes particularly important. (In addition to the strict legality reviews, the ombudsman's legal protection offers a form of correction for legality. This is most relevant to our subject in relation to administrative acts. The ombudsman investigates abuses of fundamental rights; they can draw attention not only to unlawful but also to 'unfair and objectionable' rules.)

- Constitutional review, particularly genuine constitutional complaints, also serves to protect the victims of legal loopholes.

- In a certain sense, the protection of individual interests is also a means of control exercised by the head of state, such as the right of veto and the right to pardon.[11]

*It should be pointed out that democracy is not just the rule of the majority, but the rule of the majority with the protection of minority interests*. Attentive legislation indirectly protects the interests of minorities, but autonomy remains the most powerful instrument for the national minorities. *The motto of all this should be: law for the people, not the people for the law!*

Democratic deficits, which the literature tends to mention mainly in the context of the European Union, can cause significant problems.[12] However, in my view, the concept can also be of great importance for individual states.

We must also stress that the rule of law means that the law cannot leave people unprotected. Where necessary, it must intervene in social relations. Otherwise, some people could maintain some dysfunctional 'rule' over society instead of upholding the law. Here, we must refer to the many infringements freely committed on the Internet as a pressing problem of our time.

A 'Laboratory-level clean' rule of law exists only in theory, in legal literature. Compared to the ideal, it is possible to find fault with the norms of any state, both as an outsider and as a

[11] Presidents of the republic may have a number of such powers by international standards, for example to release irrecoverable state claims and (in a quasi-extension of the right to pardon to other areas of law) to grant derogations from the general application of the law. See Géza Kilényi: A köztársasági elnöki tisztség a nemzetközi jogösszehasonlítás tükrében, *Magyar Közigazgatás*, Vol. 44., No. 10. (1994) 577–584.; valamint Géza Kilényi: A köztársasági elnöki tisztség a nemzetközi jogösszehasonlítás tükrében II., *Magyar Közigazgatás*, Vol. 44., No. 11. (1994) 641–648.

[12] See for example András, Körösényi: Demokráciadeficit, föderalizmus, szuverenitás, Az Európai Unió politikaelméleti perspektívából, *Politikatudományi szemle*, Vol. 13., No. 3. (2004) 143–161.

suffering citizen. Furthermore, it must be said that ideas of constitutional law 'independent of time and space' are very difficult to adapt to concrete situations. The legal continuity of a country–, i.e., its existing rules and legal culture – largely determines the direction of any reforms. Moreover, law is very difficult to separate from its social context, specific sociological conditions, and the political situation.

The literature on the internal logic of law (even legal doctrine), the professional criteria that determine staff training are often universal. It is precisely the non- contradictory dogmatics of constitutional law that is lacking in some literature, in comparison with civil or criminal law.[13] In other words, the legitimacy of jurist-professional expectations that supersede substantive law may be called into question on several occasions, especially if those expectations are of international origin and diverge from the will of the electorate in the country concerned. A legal thesis can only be regarded as uncontroversial if it is presented consistently in all relevant textbooks and monographs and if there is no authoritative professional opinion to the contrary. (In case of doubt, of course, the authoritative character would be disputed by some...)

To sum up, we must categorically distinguish between decisions of expediency and decisions of legality. The *former must be legitimized, and this can only be done at the highest level of the state based on popular sovereignty*. In this spirit, general norms are created in the interests of society as a whole – with the interests of the minority being protected. The primary means of protection are human rights. (This does not include, for example, regulations within the framework of laws as 'detailed rules of expediency'. The framework for this is, however, freely defined by Parliament.) Here, the internal logic of the law and the personnel of the legal profession are particularly important.[14] The application of the law must not be biased, especially when it has to be decided between opposing parties.

However, the above-mentioned corrective mechanism can (also) play a role here if a 'legal error' occurs. In a broad sense, this could also include cases where the legislator did not take into account the legal interests of the persons concerned in a specific situation. In this case, there is an ad absurdum possibility of what is, very worrying in the application in continental law: namely, the application of the law in a *contra legem* manner. (The Constitutional Court may use this instrument when ruling on a constitutional complaint.)

[13] See Pokol: *Jogelmélet* 80.
[14] For this see. ibid.

The cornerstones of what we have outlined are:

- The separation of powers, which guarantees that decisions are taken in accordance with the rule of law, separately from legislation.

- To achieve the former, the judiciary must be independent and unbiased.

- As well as a broad constitutional judiciary, but one that does not become dysfunctional. In other words, it does not create the possibility – because of the lack of social legitimacy – of making expediency decisions instead of lawful decisions.

(- And all of this is based on an electoral system that validates the real popular will.)

The binding force of law does not only derive from the fact that it is formally expressed as law (as a law, as a decree, in the usual form, with the legal concepts that are regularly used.) This support can, of course, only be challenged – in the spirit of the rule of law – through the appropriate procedure. The *law speaks to the people*, so they need to be able to understand it; it needs sufficient preparation time and clear, unambiguous language. *On the other hand, law is for the people*, so it must also meet the abstract standards of human rights that have evolved organically over centuries.

The greater the separation of powers (especially regarding bodies independent of the government), the more the rule of law is guaranteed.[15] From the perspective of our topic, the more independent bodies established in a state, the more certain that no dysfunction – i.e., no operation outside the internal logic of law – will occur. It is easy for a body, or in particular a single leader, to 'go astray' and fall under the influence of certain political forces. If power is shared between several bodies, there is a greater guarantee of independence. However, the wider the division of power, the less effective its operation. As in constitutional law in general, the instruments of effectiveness (the strengthening factors) compete with the guarantees (the weakening factors). The two aspects must be balanced, and this is a free choice for the state concerned. Since, in many cases, there is no separation of powers between government and parliament, and in many states the ordinary courts are constitutional judges, I believe that the following should be stated as a minimum international requirement: the greatest danger is the subjective decision of exact legal questions by political influence. The separation of powers

[15] Some experts analyse independent bodies in the executive branch, such as the Media Council. And although they have both a dispute adjudication and a legislative function, they do indeed have the functions originally attributed to the executive. See Lóránt Csink: *Mozaikok a hatalommegosztáshoz*, Budapest, Pázmány Press, 2014, especially 72–80.

between political power and judicial power must be upheld. In other words, let us separate the bodies at the highest level that decide on expediency and legality! And within the judiciary branch, the independence and impartiality of individual judges should be guaranteed!

In my view, one of the most important components of the rule of law today is judicial independence.

To analyse this complex subject, we are launching a series of research projects. Due to space limitations, the independence of regular courts will only be touched upon in passing during the upcoming study; this topic is also richly developed in academic literature, primarily due to Attila Badó's efforts. The institution of the constitutional complaint is of especial importance.[16] It is to be emphasised that if the European Court of Human Rights (ECHR) classifies national constitutional courts as „effective courts of appeal", then it unequivocally places them within the realm of the traditional justice system.[17] It stands to reason that if the „groundbreaking" Constitutional Court in Germany, with its own constitutional complaint procedure,[18] was given such a status, then the same should be afforded to its counterpart in Hungary.[19]

It is very difficult to pass objective, national-level judgment on the impartiality and allegiances of the many legal personnel providing justice at independent local courts. The most purist understanding of impartiality would technically deem all Constitutional Court justices 'partial' because they are nominated and elected by members and factions of the parliament.

Other than showcasing the traditional judicial functions of the Constitutional Court,[20] the cases mentioned in the publication are important for the following reasons.[21] *The relationship between constitutional courts and the question of impartiality is made even more relevant because the Constitutional Court does not only judge its own cases,[22] but through constitutional complaint procedures, it also evaluates questions of impartiality in the regular court system.*

[16] Péter, Darák: Az alkotmányjogi panasz bírói szemmel, *Alkotmánybírósági Szemle*, No. 1. (2012) 70–72.
[17] See: Péter, Paczolay: Az alkotmányjogi panasz mint hatékony jogorvoslat, *Alkotmánybírósági Szemle*, No. 2. (2017) 91–95.
[18] See: Balázs, Arató: Alkotmányjogi panasz a német jogrendben, különös tekintettel a befogadhatóság kérdésére. In Anon (ed.): *Az Alaptörvény érvényesülése a bírói gyakorlatban II.: Alkotmánybírósági panasz – hatáskörrel kapcsolatos kérdések*, Budapest, HVG-ORAC, 2019.
[19] Balázs, Schanda: Kérdések az Alkotmánybíróság és az Európai Emberi Jogi Bíróság kapcsolatához, *Alkotmánybírósági Szemle*, No. 2. (2017) 101.
[20] See also: László, Trócsányi: Az alkotmánybíráskodás és az igazságszolgáltatás kapcsolatának egyes kérdései, *Alkotmánybírósági Szemle*, No. 1. (2010) 120–126.
[21] Cf.: András Zs., Varga: Az egyedi normakontroll iránti bírói kezdeményezések eljárási feltételei, *Eljárásjogi szemle*, No. 1. (2016)
[22] See also: Péter, Smuk: Az Alkotmánybíróság "önvédelmének" lehetséges irányai, in István, Ambrus (et al.) (eds.): *Dikaiosz logosz - Tanulmányok Kovács István emlékére*, Szeged, Pólay Elemér Alapítvány, 2012. 107–113.

*When discussing decentralised constitutional courts, the matter of regular judicial impartiality is inherently connected to the core tasks of a constitutional court. The impartiality of the institutions dealing with international justice would also make for an interesting research topic.*[23]

The categories of impartiality and independence are often invoked inaccurately in the academic literature available on the topic. They are sometimes deemed synonyms, sometimes jointly defined as 'twin principles'.[24] According to the 'six-pack theory', the attributes necessary for judges to fulfil the moral obligations of their profession are the appropriate perception of their roles, courage, impartiality, independence, the pursuit of justice[25] and temperance.[26] Possessing the virtue of 'impartiality', judges can distance their own personal lives and opinions from the case at hand. Impartial judges can detect and ignore their interests, prejudices, anger and various subjective entanglements. 'Independence' is closely connected to courage, referring to the independence of judges from external factors and pressure. This attribute gains especial importance when a case faces heavy moral judgment from society or when its parties are considerably powerful.[27] Therefore, judicial independence is a right and obligation of judges to rule according to the law only, without the fear of criticism or reprisals, no matter the difficulty or the sensitivity of the case.[28] Impartiality, on the other hand, means that the basis of judicial rulings can only be objective circumstances. Rulings that are biased, prejudiced or deliberately favouring the interests of one party are to be avoided.

In Hungary, Act CLXII of 2011 on the status and benefits of judges mandates a general psychiatric and psychological assessment of judge aspirants. This law defines twenty different attributes and competencies – such as decision-making ability, integrity, independence, objectivity, etc. – that must be taken into account when evaluating such applications.[29]

[23] Iván, Halász: Nemzetközi bíráskodás, in Péter, Pásztor (et al.) (eds.): *Magyar politikai enciklopédia*, Budapest, Mathias Corvinus Collegium - Tihanyi Alapítvány, 2019, 417–418.
[24] According to Article XXVIII (1) of the Fundamental Law of Hungary: Everyone shall have the right to have any charge against him or her, or his or her rights and obligations in any litigation, adjudicated within a reasonable time in a fair and public trial by an *independent and impartial court* established by an Act.
[25] Cf.: Attila, Varga: Az igazságtól az igazságszolgáltatásig, *Korunk*, Vol. 23., No. 7., 102–110.
[26] Iris van Domselaar: Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship, *Netherlands Journal of Legal Philosophy*, No. 1. (2015) 24–46.
[27] Above-quoted.
[28] Lili, Barna (et al.): Milyen a jó bíró? *Miskolci Jogi szemle*, Vol. 13., No. 1. (2018) 84–98.
[29] Above-quoted.

## BIBLIOGRAPHY

ARATÓ Balázs: Alkotmányjogi panasz a német jogrendben, különös tekintettel a befogadhatóság kérdésére. In Anon (ed.): *Az Alaptörvény érvényesülése a bírói gyakorlatban II.: Alkotmánybírósági panasz – hatáskörrel kapcsolatos kérdések*, Budapest, HVG-ORAC, 2019.

BARNA Lili (et al.): Milyen a jó bíró? *Miskolci Jogi szemle*, Vol. 13., No. 1. (2018)

CSINK Lóránt: *Mozaikok a hatalommegosztáshoz*, Budapest, Pázmány Press, 2014.

DARÁK Péter: Az alkotmányjogi panasz bírói szemmel, *Alkotmánybírósági Szemle*, No. 1. (2012)

DOMSELAAR, Iris van: Moral Quality in Adjudication: On Judicial Virtues and Civic Friendship, *Netherlands Journal of Legal Philosophy*, No. 1. (2015)

GÁT Ákos Bence: *Az európai uniós jogállamiság-közpolitika kialakulásának átfogó jogi és politikatudományi elemzése*, Doktori értekezés, Budapest, Nemzeti Közszolgálati Egyetem, Közigazgatás-tudományi Doktori Iskola, 2021.

HALÁSZ Iván: Nemzetközi bíráskodás, in Pásztor Péter (et al.) (eds.): *Magyar politikai enciklopédia*, Budapest, Mathias Corvinus Collegium - Tihanyi Alapítvány, 2019.

KILÉNYI Géza: A köztársasági elnöki tisztség a nemzetközi jogösszehasonlítás tükrében, *Magyar Közigazgatás*, Vol. 44., No. 10. (1994)

KILÉNYI Géza: A köztársasági elnöki tisztség a nemzetközi jogösszehasonlítás tükrében II., *Magyar Közigazgatás*, Vol. 44., No. 11. (1994)

KÖRÖSÉNYI András: Demokráciadeficit, föderalizmus, szuverenitás, Az Európai Unió politikaelméleti perspektívából, *Politikatudományi szemle*, Vol. 13., No. 3. (2004)

PACZOLAY Péter: Az alkotmányjogi panasz mint hatékony jogorvoslat, *Alkotmánybírósági Szemle*, No. 2. (2017)

POKOL Béla: *A jurisztokratikus állam*, Budapest, Dialóg Campus Kiadó, 2017.

POKOL Béla: *Jogelmélet*, Budapest, Századvég Kiadó, 2005.

SCHANDA Balázs: Kérdések az Alkotmánybíróság és az Európai Emberi Jogi Bíróság kapcsolatához, *Alkotmánybírósági Szemle*, No. 2. (2017)

SMUK Péter: Az Alkotmánybíróság "önvédelmének" lehetséges irányai, in Ambrus István (et al.) (eds.): *Dikaiosz logosz - Tanulmányok Kovács István emlékére*, Szeged, Pólay Elemér Alapítvány, 2012.

SZIGETI Péter: A jogállam társadalomtörténeti változatai, in Takács Péter (szerk.): *Államelmélet*, Miskolc Bíbor Kiadó, 1997.

TILK Péter – Kovács Ildikó: Gondolatok a kellő felkészülési idő számításának kezdőpontjáról, *Jogtudományi Közlöny*, Vol. 70., No. 11. (2015)

TÓTH Zoltán József: Egyes észrevételek az Alaptörvény értelmezéséhez, *Polgári szemle*, 2013/1-3.

TRÓCSÁNYI László: Az alkotmánybíráskodás és az igazságszolgáltatás kapcsolatának egyes kérdései, *Alkotmánybírósági Szemle*, No. 1. (2010)

VARGA Attila: Az igazságtól az igazságszolgáltatásig, *Korunk*, Vol. 23., No. 7. (2012)

VARGA Csaba: *A jog mint folyamat*, Budapest, Osiris Kiadó, 1999.

VARGA Zs. András: Az egyedi normakontroll iránti bírói kezdeményezések eljárási feltételei, *Eljárásjogi szemle*, No. 1. (2016)

VARGA Zs. András: *Eszményből bálvány? - A joguralom dogmatikája*, Budapest, Századvég Kiadó, 2015.