

M U N I
L A W

No Arbitrary Power

Rule of Law and Rechtstaat

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Rule of Law, Liberty and Legitimacy

- Arbitrary power vs. Rule of Law.
- Rule of Law as a *guarantee of political liberty* (one of the core conceptions of *constitutionalism as limited government*, a necessary condition of legitimacy).
- Rule of **Law** as opposed to Rule by **Men** (the old English notion of higher law that limits even the monarch).
- State is bound by (its) law, it can only do what the law positively permits as opposed to the individual (inherent liberty).
- All these dimensions are considered a basic building block of *liberal democracy*.

Rule of Law: What is Law?

- Dworkin's question. Was the „Law“ of the Third Reich „Law“ in a proper sense? Is any rule/command backed by state enforcement „Law“ in a proper sense? (cf. Dworkin's „Law's Empire“).
- Fuller's 8 principles of legality (principles of law's inner morality):
1) *Generality*, 2) *Promulgation (accessibility)*, 3) *Prospectivity (non-retroactivity)*, 4) *Clarity*, 5) *Non-contradictory nature*, 6) *Laws must not ask the impossible*, 7) *Constant nature* and 8) *Congruence between what written statute and enforcement*.
- => Legal certainty: one should know what his/her legal position is, what right and obligations does he/she have.

Political ideal or practical legal concept?

- *Rule of law* (or *Rechtstaat*) can be considered a political ideal.
- At the same, it is a concept that is entrenched in many constitutions.
- Various methods of protection (as a general concept; through more concrete aspects).

Law must be general

- Generally accepted as a core of rule of law (highlighted by many authors including F. A. Hayek).
- Key aspects of non-arbitrariness.
- Problem of „individual laws“.
- Closely connected to separation of powers in the modern state (law-making vs. application).

Law must be accessible

- Problem of promulgation.
- Shift from oral to written (official collection of laws) to electronic and „advanced“ information systems.

Law must not be retroactive

- One of the key components of legal certainty.
- Generally accepted by legal orders around the world
- Especially strong in criminal law.
- Problematic cases: Transitional Justice (Shooters on the Berlin Wall, the Nurnberg Dilema etc.).

Law must be clear; Law cannot be contradictory

- Problem of legal language vs. natural language
- Inherent problem „open texture“ of law, legal principles, purposive vagueness
- Methods of interpretation (conflicts between rules, conflicts between principles)

Law must be fairly constant

- One of the key problems of modern law-making.
- Frequent novelisations and amendments.
- Especially problematic when combined with other aspect (accessibility).

Law in books should equal law in action (congruence)

- Two problems: overenforcement and underenforcement.
- Overenforcement is a clear flaw of a rule of law system, state oversteps its boundaries.
- Underenforcement or selective enforcement raises many questions, most notably the problem of discrimination (cf. city ordinances that forbid the use of alcohol in public spaces), but note the problem of selective underenforcement vs. *discretion*.
- No enforcement weakens the legal consciousness.

Substantive values in Rule of Law?

- More contested.
- Overlap with other constitutional values/principles.
- Fairness, Lack of brutality (torture), Acceptation of natural rights, General right to vote etc.
- These aspects are contested at the political-philosophical level (discuss the general right to vote).

Rechtstaat vs. rule of law

- Rechtstaat: a fairly independent concept developed mainly in continental Europe.
- Connected to the concept of *State* which is not so central to the common law tradition (cf. Krygier in the IS).
- *Formal vs. substantive* conceptions of Rechtstaat.
- Rule of law is more generally applicable, various forms of „legal state“ are more closely tied to the specifics of a given state (Germany, France etc.).
- Recently, the ideals of RoL and RS have been converging.

Substantive „Rechtsstaat“

- Incorporates many substantive values of constitutionalism, blurs the distinction between rule of law/Rechtsstaat and other constitutional values.
- Problematic as a justiciable concept.
- Less feasible as general framework; tied to values of a certain (type of) political community.

Some basic featured of substantive Rechstaat (in the German sense)

- Supremacy of national constitution.
- Constitutional rights for its citizens, constitutional rights limit even the democratic processes.
- Civil society is an equal partner to the state.
- Separation of powers.
- Transparency of state acts.
- (Public) reason for all state acts.

Some basic featured of substantive Rechstaat (in the German sense)

- Review of state decisions and state acts by independent organs.
- Hierarchy of laws and the requirement of clarity and definiteness.
- Protection of past dispositions made in good faith against later state actions, prohibition of retroactivity.
- *Proportionality* of state action principle.