

re:constitution

COMPONENTS OF THE RULE OF LAW IN THE EUROPEAN UNION: A PRIMER





In a world divided by differences of nationality, race, colour, religion and wealth [the Rule of Law] is one of the greatest unifying factors (...). It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.


- Tom Bingham

re:constitution Exchange and Analysis on Democracy
and the Rule of Law in Europe

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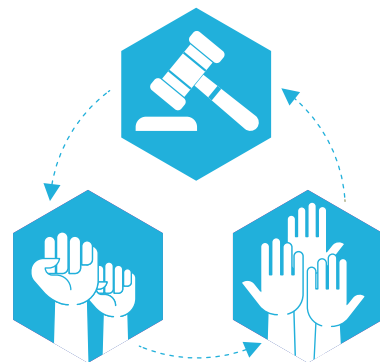
What is the rule of law?

The rule of law, a recurring theme in the news, is expressed differently across European Union (EU) countries with different legal cultures. While there are varying definitions of the rule of law, it includes a few core elements.

The rule of law means that people live under a clear framework of applicable and enforced laws, but it goes beyond the fact that laws are in place and followed. The rule of law also means that laws are introduced following a democratic process and **respect human rights**.

Recently there has been some debate on whether governments may give more importance to democracy at the expense of the rule of law. This is a false debate.

Democracy works through legal procedures. There are no elections without election laws and no parliaments without rules of procedure. Democracy needs the rule of law - and vice versa. By ratifying various international treaties and conventions, European governments have confirmed the connection between **the rule of law, democracy and human rights**, and committed to respecting all three. If the connection is broken, there is no rule of law.



The core elements of the rule of law listed here are based on agreed standards and supported by contributions from the Court of Justice of the EU, the European Court of Human Rights and the Venice Commission, the Council of Europe's advisory body on constitutional matters:

- Legal certainty
- Prohibition of arbitrariness
- Legality
- Independent and impartial judiciary
- Respect for human rights
- Non-discrimination and equality before the law



Legal certainty means that laws and judicial decisions should be as clear as possible and accessible to everyone. Ambiguity is inherent in most texts but should be reduced as much as possible. An accessible law would be in plain language and take into account the needs of different individuals, such as people with disabilities and those who do not have easy access to the internet. Laws should also be predictable and not be altered on a whim. Major revisions to critical laws should be announced in advance and introduced in a manner that allows individuals to adjust and adopt to the new legal situation without difficulties.

Example

The introduction of an extraordinary procedure that enables the review and overturning of previous final judgments of courts based on unclear criteria would undermine legal certainty. People would no longer be confident that court decisions are final and would be left living in constant doubt that what was seemingly clearly and finally decided by a court could be suddenly altered.



Prohibition of arbitrariness requires that the government refrains from acting towards individuals in a manner which follows the letter of the law but is ultimately not grounded in any substantive reasons and goes against the spirit of the law.

Example

Repeated investigations by tax authorities into the same business or the same individual because of their political beliefs, even though they did not violate any tax laws. This type of selective law enforcement may not be formally unlawful but is a prime example of arbitrary treatment.



Legality means that all actions taken by public authorities are grounded in established law. This may seem obvious, but it is one of the major achievements of modernity. It would have seemed absurd to many rulers in the past that they need to follow any laws when they were the ones setting them. Established law also means that the authorities should not be creating laws “on the fly” to provide formal legal cover for their actions. In addition, individuals should be free to take any action which is not explicitly forbidden by law.

Example

Surveillance, wiretapping and interception of communications are frequently necessary in order to fight crime and prevent terrorism. However, these tools should only be used under strict rules by governments, subject to control by courts and with clear procedures on what happens to all the information gathered after investigations are over. Failing to do so exposes individuals to limitless surveillance that is not legally grounded, one of the biggest threats to privacy in the digital age.



Independent and impartial judiciaries are a necessary component of the rule law. Only a fully functional judiciary can ensure checks and balances on the executive and legislative branches. Independent and effective courts, as well as similar dispute resolving mechanisms, put in practice the right to fair trial, a core human right. Inefficient courts with slow and costly proceedings can dissuade individuals from pursuing the protection of their rights and force people who were arrested to wait years before their case is reviewed. The judiciary may come under undue influence from both governments, which appoint or remove judges based on political reasons, and private actors which can attempt to buy favourable court decisions through corruption. Even without such impediments, the effectiveness of the judiciary can be affected by lack of staff, equipment and funding.

Example

A law that lowers the mandatory retirement age for judges seems like a technicality, and perhaps even a boon for overworked veterans of the court, but becomes a threat to the independence of the judiciary if the actual motive behind the law is to remove the senior leadership of a court and replace them with judges who support the government or private interests.



Respect for human rights provides the rule of law with substantive content. While governments around the world pursue different political, social, cultural and economic agendas, human rights remain universal. States around the world have committed to uphold them. Respect, protection and fulfilment of human rights is critical in ensuring that the rule of law does not become a hollow, procedural concept. Ignoring human rights leads to rule by law, not rule of law. A country might observe the principles of legality, legal certainty, judiciary independence and have effective courts, but it is not respecting the rule of law if it disrespects human dignity and core civil, political, economic, social and cultural rights and freedoms.

Example

A developed country which has an independent, effective and timely judiciary but at the same time fails to observe fundamental human rights, such as freedom of association and assembly or religious freedoms cannot be considered as fully respecting the rule of law. Proper procedure and due process, while important, are not a value in itself if they aren't used to safeguard freedoms and rights.



Finally, the observance of all the above elements of the rule of law should follow the general principle of **equal treatment and non-discrimination**. Even the soundest legal framework established towards respecting the rule of law fails if it results in the unequal treatment of individuals, no matter the reason. Similarly, such a framework fails if courts or dispute resolution mechanisms tasked with safeguarding the rule of law discriminate against any segment of population. The prohibition of discrimination is not absolute, and in some cases, positive discrimination might be necessary to address deficits in the rule of law, for example when ensuring that minorities are represented in the judiciary. However, equal treatment of all is an integral part of the rule of law.

Example

Across the EU, various groups face discrimination and unequal treatment which impacts many aspects of their life, including their ability to seek justice before courts and benefit from the rule of law. Roma and Sinti people face targeted discrimination, while people with disabilities struggle with discrimination which frequently is a result of their needs being neglected. A courthouse that lacks elevators and other facilities needed by wheelchair using people is a facet of discrimination, even if such unfair treatment was never the intent of authorities in charge of organising the judiciary.

The rule of law and the EU

All the elements presented above are core components of the rule of law in the EU as enshrined in Article 2 of the Treaty on European Union. However, judicial independence and efficiency have become particularly important in the EU in recent years. The EU's legal system rests on the mutual recognition of judgments and decisions, which in turn relies on mutual respect for common values. If all EU countries respect the rule of law to a similar degree, the mutual recognition system works. If even one state fails to respect it, the system breaks down. Trust between member states, a cornerstone of legal cooperation in both civil and criminal matters, is essential for a more effective union. Thus, issues with the rule of law in one state are a pressing matter for all EU member states and their citizens.

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