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## On the Dilemmas of the Rule of Law

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### 1. Backdrop

I will focus my talk on the dilemmas of the rule of law. Let me first define the rule of law. I take the rule of law as a legal and socio-legal concept. In contrast, most of Europe adopts a very traditional approach to the rule of law. Most of my legal academics and researchers prefer to talk about a state based on the rule of law, in German, »Rechtsstaat«. This is a very traditional approach where you concentrate on sources of law with the Constitution at the top. Then, we have the international treaties and the laws, and all legal subjects must comply with these legal rules. However, in my research and writings, I prefer to take a more Anglo-Saxon approach to the issue of the rule of law, which looks at the notion of power and who holds it in society. My research concentrated on how those who hold public functions in state institutions, are owners of large corporations, or represent influential interest groups in civil societies, influence the state institutions and attempt to bend the rule and process to their often arbitrary interests. I follow the socio-legal approach developed by the Australian socio-legal scientist Martin Krygier of the University of New South Wales in Sydney.<sup>3</sup> He argues the rule of law is more about curtailing arbitrary power among people in the government and the private sector.<sup>4</sup> It is not so much about the rules, but the legal principles and norms are the only tools by which we can limit the power of people in state institutions and society at large.<sup>5</sup> I apply this approach to situation here in Slovenia and Central and Eastern Europe.

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<sup>3</sup> Krygier, Martin, 2012. Why the Rule of Law Is Too Important to Be Left to Lawyers, *Prawo i Wiedza*, 2, Vol. 2., no. 2, pp. 30–52.

<sup>4</sup> Krygier, Martin, 2018, Why the rule of law matters, *Jurisprudence* 9 (1):146–158.

<sup>5</sup> Hart, Henry; Sacks, Albert. 1958, *The Legal Process: Problems in the Making and Application of Law*, Westbury: Foundation Press, 1994.

## 2. Positivist legal versus socio-legal approach to the rule of law

The traditional approach to the rule of law is limited in Central and Eastern Europe. In our region, it is much more appropriate to talk about who has the power, controls the media, and controls powerful corporations. Through that, they can influence public opinion, the electorate, and who is elected in parliamentary elections. Slovenia is a prime example of such practices, and so is the current government. For the first time in history, persons who hold public functions in Slovenia are not only influential because of their public functions or because they are the president of the government or the president of the republic but also because they represent affluent families due to their economic activities. The incumbent Slovenian Prime Minister has been running a semi-state-owned company from which he gathered wealth. On the other hand, the president of Slovenia is married to an affluent businessman.

Who has the power in science and research to make criteria? Who holds the power to make a difference? Since differences between the regions in a particular country may be more minor, who has the power to define what is a community? The brute force approach is widespread, and we can use this approach for many different issues. However, I want to give you a brief overview of the rule of law, which includes three seminal concepts: institutions, regulations and processes.

If institutions are strong, the rule of law will function.<sup>6</sup> For example, rules are often bent in parliamentary sessions of the National Assembly, depending on the party's needs, with the majority in Parliament in a given week. For example, we have a case concerning the competencies of one parliamentary investigative commission that wants to invite the prime minister to testify about alleged meddling by the prime minister in police authority, and the majority party then bent the rules to suit its priorities. Procedures have to be very clear so they can be enforced. However, why are we talking about the rule of law? Bureaucracy is very much connected to the integrity of the proceed-

<sup>6</sup> Letnar Čerňič, Jernej, 2018. Impact of the European Court of Human Rights on the Rule of Law in Central and Eastern Europe. *Hague Journal on the Rule of Law*. 10 (1), 111–137.

ings. Yet, in economic theory, particularly international monetary theory, many papers have been written in past decades which say that the rule of law and strong institutions are criteria to explain why some countries are more successful than others. With some exceptions, why are the most prosperous countries found in Northern Europe?

## 3. The Rule of Law and the Quality of Living

Economists have argued that a strong correlation exists between the quality of institutions and economic performance and GDP per capita.<sup>7</sup> There are some exemptions, such as the Kingdom of Qatar, the Kingdom of the United Arab Emirates, and perhaps Singapore. Generally, China is towards the bottom. The rule of law usually correlates with a high quality of living. There is a correlation because of those attributes. When we talk about the rule of law briefly, the rule of law protects against the arbitrary exercise of power by individuals, the government, and the private sector.<sup>8</sup> It creates stable rules. It also grants access to courts, which in constitutional democracies have to hear cases fairly and impartially. The question is whether the rule of law can prevent or limit social unrest. For example, although it is a country known for strong institutions and the rule of law, France is experiencing social unrest. There is social unrest, and perhaps we can also discuss whether it is true that people who trust state institutions are less likely to resort to protest or go to the streets. Concerning the rule of law, several challenges arise even in the EU when institutions, especially on the regional level, are crucial. There are challenges to the rule of law, particularly in Central and Eastern states like Hungary, Romania, Bulgaria, Poland, Slovenia and Croatia, but the crisis is all around Europe.<sup>9</sup>

<sup>7</sup> North, Douglass C., 1990. *Institutions, Institutional Change and Economic Performance*. of *Political Economy of Institutions and Decisions*. Cambridge: Cambridge University Press, 1990; Berkowitz, Daniel, Pistor, Katharina; Richard, Jean-Francois, 2003. Economic development, legality, and the transplant effect, *European Economic Review*, Elsevier, vol. 47(1), pages 165–195.

<sup>8</sup> Craig, Paul P., 1997. *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, *Public Law*, 467–87; Tamanaha, Brian Z., 2004. *On the Rule of Law: History, Politics, Theory*, Cambridge: Cambridge University Press.

<sup>9</sup> Avbelj, Matej, Letnar Čerňič, Jernej, Justinek, Gorazd, 2020. *The impact of European Institutions on the Rule of Law and Democracy in Slovenia*. Oxford: Hart.

They also challenge the stability of existing legal frameworks in those countries traditionally known for strong institutions and a strong rule of law. Another development is that ideological divisions could hamper the legislative process and effective governance. One of the primary questions debated in the literature is whether ideological divisions can hamper the rule of law. There are also opinions that political divisions are natural to democracies and can function in a democracy without endangering it. We also talked about artificial intelligence. The question is: does artificial intelligence endanger existing legal frameworks around the principle of the rule of law? There is much discussion about whether artificial intelligence merits its legal subjectivity. Most commentators argue that artificial intelligence should not have legal personality because it does not generate reflective content and cannot produce intelligent outputs.

Undoubtedly, the question of conspiracy theories has been present in Europe, from radical political ideas to conspiracy theories about the Russian Federation's aggression against Ukraine, the Palestine and Gaza Israel conflict, and COVID-19 conspiracy theories. They also lead to a disregard for the law and the judiciary. We have seen this in many countries, and our research on COVID-19 shows that conspiracy theories can undermine the rule of law and strong institutions, notably in countries where there is no focus on collective rights and the collective is perhaps secondary to individual rights. The breakdown of societal norms also means the breakdown of values in society, the rise of youth movements, the weakening of the rule of law in certain groups, and the creation of a separate state for these groups within broader society. We also discussed bureaucracy in science and research and how bureaucratic procedures can undermine the legal principles of transparency, predictability, certainty and accessibility.

#### 4. Thin and thick conceptions of the rule of law

One question: Is the rule of law sufficient to prevent social crises even in states with strong institutions and clear rules? We see considerable social unrest among farmers, civil society, far-right groups, criminal gangs, and also protests against migrants. Another question is wheth-

er it can address economic inequality, energy conflicts, and political instability. One thing the rule of law does not do is eliminate wealth inequality.<sup>10</sup> It could work towards eradicating income inequality, but not wealth inequality.<sup>11</sup> Yet another question is whether it can address underlying social causes or social discontent or if the rule of law is just a tool for limiting power. In theory, we usually discuss thin and thick conceptions of the rule of law.

The thin perception of the rule of law only concentrates on limiting the power of the government, corporations, and civil society. The thick perception of the rule of law takes a broader approach and considers the role of social unrest and its causes. Another question: can the government use the rule of law as a guise to suppress dissent and criticism, thereby causing social unrest? The latter brings in the concept of rule by law, a characteristic of totalitarian and authoritarian regimes.<sup>12</sup> The rule of law refers to the absence of arbitrariness in state institutions and the private sphere. In contrast, rule by law refers to situations where rules, institutions and processes are abused for arbitrary purposes benefits.<sup>13</sup> During COVID-19, Germany and Slovenia also discussed whether assemblies and protests against the government should be allowed. In Slovenia, most protest leaders had permission from the authorities, whereas in Germany, most court decisions prohibited assemblies.

#### 5. Local and global approaches to the rule of law

Can the rule of law be used to suppress dissent? Some countries argue for a local approach to the rule of law by considering traditions, cus-

<sup>10</sup> See, for example, Barriola, Illan; Deffains, Bruno; Musy, Olivier, 2023. Law and inequality: A comparative approach to the distributive implications of legal systems, *International Review of Law and Economics*, Vol. 75, pp. 106–139; Bhagat, Sanjai, *Economic Growth, Income Inequality, and the Rule of Law* Harvard Business Law Review, 18 November 2020, <https://journals.law.harvard.edu/hblr/2020/11/economic-growth-income-inequality-rule-of-law/>.

<sup>11</sup> Ibid.

<sup>12</sup> Letnar Černej, Jernej, 2018. *Slovenija na razpotju: geneza varstva človekovih pravic v slovenski družbi*. Kranj: New University, Faculty of Government and European Studies; Uzelac, Alan, 2010. Survival of the Third Legal Tradition? *Supreme Court Law Review*. 49 (2), 377–396.

<sup>13</sup> Waldron, Jeremy, *The Rule of Law*, *The Stanford Encyclopedia of Philosophy* (Fall 2023 Edition), Edward N. Zalta & Uri Nodelman (eds.), <https://plato.stanford.edu/archives/fall2023/entries/rule-of-law/>.

toms and culture. However, those countries are ranked low regarding the rule of law. The rule of law cannot be localised. It is not adaptable to different levels. When we talk about the European crises, one characteristic is a weak rule of law. On a global level, we have a globalised society but no effective international rule of law to prevent conflicts like in Ukraine. Although there are laws, they are not enforced. It is a global crisis of law. If we have a jungle, chaos ensues.

We have different legal traditions in our region. In post-socialist legal traditions, approving the authority of the law prevails without debate. In Anglo-Saxon traditions, there is a more discursive approach to the law. It is similar in levels of the rule of law but in legal traditions. We must understand European political and national circumstances to confront and respond to the challenges together. Slovenia, Croatia and Hungary face challenges with the rule of law due to their authoritarian legal traditions.<sup>14</sup> The rule of law was not internalised through centuries of arguing before the courts, such as in England and Scotland, where individual rights became important. The rule of law has yet to become fully embedded in Central and Eastern European societies. Implementation must consider traditions and culture, not simply the formal written rule of law. Implementation is vital. It is difficult to translate the rule of law into life. It is connected to the integrity of the judiciary and state government. The EU attempts to exercise its influence on the member states. These reforms are often financed with EU money, leading to a crisis in enforcing the rule of law. There are better solutions than this mechanism of repeating reforms.

## 6. Conclusions

The European Union is built on the rule of law. Integration is closely based on economic integration. In the last couple of years, there have been many judgments concerning the independence and impartiality of the judiciary, particularly against Poland and Hungary. The supervision of the European Court of Justice has been efficient.

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<sup>14</sup> Blokker, Paul, 2012. *New democracies in crisis: a comparative constitutional study of the Czech Republic, Hungary, Poland, Romania and Slovakia*. New York: Routledge.

However, the Council of the European Union has yet to adopt any final decision(s) against Hungary and is reluctant to adopt any stricter sanctions. Many commentators argue that Hungary disregards the basic principles of the rule of law, but the question is: What is the agenda of European institutions and the European Commission? Some years back, I wrote a book with a colleague about the impact of the European institutions on the rule of law in Slovenia and beyond. We found a double standard approach in the practices of the European Institutions concerning Slovenia.<sup>15</sup> The European Commission concentrated very much on Poland and Hungary. Still, it was not as strict in Slovenia, Croatia and Bulgaria. Its conduct might, at times, be ideological. As a result, the law is not equally applied across the member states. There is the challenge of making it equally applicable in all member states and how to make them immune from political meddling on the European level. All in all, the rule of law requires strong institutions and clear and transparent legal norms and processes to protect state institutions and societies from variations of arbitrary interests and agendas.

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<sup>15</sup> Avbelj, Matej, Letnar Čerňič, Jernej, Justinek, Gorazd, 2020. *The Impact of European Institutions on the Rule of Law and Democracy in Slovenia*. Oxford: Hart.

## Literature

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## Civil society between pluralism and cultural hegemony

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### 1. Introduction

This paper focuses on the issue of civil society in contemporary society, specifically the civil society–democracy relationship. We present the state of civil society in Slovenia, especially looking at the politically interested part of civil society organisations. Developments in recent years reveal that different understandings of civil society exist. The way in which a significant number of CSOs have operated before and after the 2022 parliamentary elections points to a need to rethink the two approaches to civil society: pluralist and hegemonic. Another question refers to an avant-garde self-understanding of part of civil society. The paper concludes by describing three challenges for future research and/or social action.

### 2. About civil society

#### 2.1 What is civil society?

There is no universally agreed theoretical understanding of civil society (Kaene 1998; Jobert and Kohler-Koch 2008; Gawin and Glinski 2006). We follow an approach that places civil society between the state and families or friendship groups and outside the for-profit sector of the economy.

Many consider that voluntary associations and organisations are a central part of civil society. According to Slovenian legislation, civil society includes voluntary associations, private institutes and foundations (with NGO status), humanitarian organisations, professional

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