The EU's conceptualisation of the rule of law in its external relations : case studies on development cooperation and enlargement

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2 The common elements of the rule of law in legal theory

1. Introduction

In the previous chapter, it was demonstrated that the rule of law is a concept with a core that is 'common to the Member States'. Indeed, it was demonstrated that rule of law serves in the examined states as a restraint of power and is seen as the means to buttressing the preservation of individual liberties. The *Rechtsstaat*, the *état de droit* and the Anglo-Saxon rule of law all demand that the administration acts on the basis, and within the restraints, of the law. Moreover, the rule of law's element of legality is considered to provide various requirements for the validity and quality of law and legal rules. Similarly, it was shown that in the three legal systems, legality presupposes a form of the separation of powers, since it is addressed to the judiciary and the legislature as it sets separate criteria for each of them. Furthermore, it was asserted that within the separation of powers, the three legal systems demonstrate a particular emphasis on the guarantees for judicial independence. It is this particular focus, that also explains the observation that judicial review is found as the common mechanism for safeguarding the rule of law.

In this chapter, these elements will be further tested against legal theory, in order to establish whether, and to what extent, legal doctrine considers the same four features established above crucial for the existence of the rule of law concept. More particularly, since there exists a close connection between the conceptualisation of the rule of law in these Member States and the development of the discussion in legal scholarship (with philosophers such as Dicey, Rousseau, and Locke contributing to the articulation of both), the chapter will focus on examining to what extent the identified rule of law elements are attributed the same weight in the doctrine as in the constitutional traditions of the three Member States.

The chapter begins by asserting that in legal theory the rule of law is first and foremost understood as a way of restraining power – indeed, not only does the rule of law require that rulers govern on the basis of law, the concept presupposes that the government is itself bound by it. Next, it is established that the rule of law's conceptual purpose comports with the way it is understood in the three Member States. The chapter continues by arguing that legal doctrine confirms that the core element of the rule of law comprises the principle of legality. More particularly, it is shown that legal doctrine gives prominence to this element, with scholars such as Fuller and Raz having fleshed out this principle by formulating a number of qualita-

tive formal requirements through which law can attain its aforementioned purpose. It is maintained that there is general agreement that in all legal systems most of these criteria can only be fulfilled to a certain degree and, thus, they cannot all be fully realised at the same time. However, the chapter highlights that the question of minimum thresholds of these elements is insufficiently answered by the doctrine.

In relation to the rule of law's institutional underpinnings, it is further shown that legal theory also relies on the separation of powers as a means of ensuring judicial independence. Just as in the Member States, in theory, the principle of legality presupposes at the very minimum some form of a functional separation of powers, since its requirements are directed at the three different branches of government. More particularly, it is argued that, in relation to the rule of law's theoretical understanding, the debate on the separation of powers revolves around the legal system and its judiciary branch. It is asserted that this can be explained by virtue of the fact that law belongs to a legal system, and that any discussion on the nature and quality of law, inevitably involves an exploration of this system. It is shown that, within this discussion, there is a noticeable emphasis on the core element of judicial independence.

The chapter concludes by asserting that legal theory confirms judicial review as the essential mechanism for safeguarding the rule of law. It is demonstrated that the principle of legality requires that executive action be justified in law and, subsequently, that the judiciary is tasked with safeguarding the rule of law through judicial review of governmental acts that are deemed unlawful. More particularly, it is shown that both legal theory and the national rule of law conceptualisations distinguish between judicial review of executive action and legislation.

On the basis of the analysis of the theoretical understanding of the rule of law, it will be concluded that, even though legal theory is concerned with the extrapolation of a more generic definition of the rule of law as a way to understanding the notion's general nature and purpose,[1] it confirms the four features (purpose, substance, institutional underpinning, and safeguarding mechanism) found in the three Member States, albeit with a an emphasis on some rule of law elements over others.

2. The purpose of the rule of law: restraint of power and the protection of individual liberty

Taking their cue from the historical context in which the concept developed, legal philosophers understand the rule of law as a means of restraining, if not actually taming,[2] power, in a manner similar to the *Rechtsstaat*, état de

1 Sionaidh Douglas-Scott *Law after Modernity* Oxford: Hart Publishing (2013), p. 219.

2 Amichai Magen 'The Rule of Law and its Promotion Abroad: Three Problems of Scope' 45 *Stanford Journal of International Law* (2009), pp. 51-115 at 60.

droit, and the Anglo-Saxon rule of law. As Dicey stated in relation to the latter: 'The rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.'[3] This idea of restraint of government power is further supported in the writings of numerous legal scholars, as demonstrated, for example by Hayek's interpretation of the rule of law: 'Stripped of all technicalities, this means that government in all its actions is bound by rules fixed and announced beforehand – rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge.'[4] Thus, as seen in the practice of the three Member States, the rule of law means not only ruling on the basis of law, or 'rule by law', but it also presupposes that the government is itself bound by it.[5]

Moreover, in the aforementioned definition provided by Hayek, the protection of individual liberty, espoused by Locke,[6] Rousseau,[7] and Hobbes[8] within the context of the development of the national conceptions of the rule of law, is similarly accorded a prominent place. However, where on the national level individual liberty is understood as the protection of citizens against undue interference, whereby the emphasis is on the constraint of those wielding the power, in legal theory, stress is put on the individual and their development. Accordingly, as demonstrated by Hayek's definition, individual liberty is understood as the freedom to act outside of the constraints of the law. In this way, the purpose of the rule of law is to set boundaries in the understanding that outside of those, there is the freedom to pursue one's activities. Thus, the rule of law in legal theory requires that the law by which governments purport to rule should be such that it can guide human conduct,[9] and offer a basis for legitimate expectations, or predictability, which brings with it a feeling of security.[10] In other words, according to legal theory, a legal system underpinned by the rule of law is grounded in an understanding of the obligations of the state *vis-à-vis* the citizens and among themselves, on the basis of which citizens have the legitimate

3 Albert Venn Dicey *Introduction to the Study of the Law of the Constitution* Houndmills: Macmillan (1959), p. 188.

4 Friedrich A. Hayek *The Road to Serfdom* Chicago: University of Chicago Press (1994), p. 80. See also Fuller 'The purpose I have attributed to the institution of law is a modest and sober one, that of subjecting human conduct to the guidance and control of general rules.' Lon Fuller *The Morality of Law* New Haven: Yale University Press (1969 revised edition), p. 146.

5 See chapter 1, section 2.

6 John Locke *Second Treatise of Government* Indianapolis: Hackett Publishing Company (1980), section 202.

7 Jean-Jacques Rousseau *Du Contrat Social (1762)* Paris: Union Générale d'Éditions (1963), book 2

8 Thomas Hobbes *Leviathan* New York: Oxford University Press (1996).

9 Joseph Raz *The Authority of Law. Essays on Law and Morality* Oxford: Clarendon Press (1979), pp. 212-214; Hayek (1994), p. 80; Fuller (1969), p. 146.

10 John Rawls *A Theory of Justice* Cambridge: Harvard University Press (1979), p. 238.

expectations that the law will constrain other citizens and officials of state in ways that they can predict.[11] In this way, legal theory accords the rule of law the same purpose as was demonstrated in the previous chapter, with the slight difference that the protection of individual liberty is not so much understood as the protection of rights from governmental interference, but, rather, as the freedom individuals have to live their own lives, guided by the boundaries of the law.

3. The core substance of the rule of law: legality

In this section, it will be demonstrated that legal doctrine understands the principle of legality as the core element of the rule of law, in ways similar to the national conceptions of Germany, France, and the United Kingdom. It will be asserted that in legal theory legality is also considered as a means of attaining the rule of law's purpose of restraint of power by law. More particularly, it will be shown that much of the discussion in legal theory revolves around this rule of law element with a number of scholars having formulated both formal and procedural requirements for the validity of law itself and for law to be able to guide human conduct. It will be demonstrated that together with Fuller[12] and Raz,[13] as the major reference points of the theoretical discussion,[14] other legal philosophers such as Finnis,[15] MacCormick,[16] and Waldron,[17] all share the view that there are certain features the law must possess in order to successfully fulfil its function as law and for the rule of law to effectively protect citizens and guide individual behaviour. Since the list of eight requirements compiled by Fuller has been the most influential,[18] this section will take these as its point of departure for providing an insight into the requirements of legality in legal theory.

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11 Martin Krygier 'Rule of Law' in Neil J. Smelser & Paul B. Baltes (eds) *International Encyclopedia of the Social and Behavioral Sciences* New York: Elsevier (2001), pp. 13404-13408 at 13406.

12 Fuller (1969), mainly chapter 2.

13 Raz (1979), mainly chapter 11.

14 Gianluigi Palombella 'The Rule of Law and an Institutional Ideal' in Leonardo Morlino & Gianluigi Palombella (eds) *The Rule of Law and Democracy, Inquiring into Internal and External Issues* Leiden: Martinus Nijhoff (2010), pp. 1-37 at 26.

15 John Finnis *Natural Law and Natural Rights* Oxford: Clarendon Press (1980), pp. 270-276.

16 Neil MacCormick 'Natural Law and the Separation of Law and Morals' in Robert P. George (ed) *Natural Law Theory* Oxford: Oxford University Press (1992), pp. 105-133 at 121-125.

17 Jeremy Waldron 'The Concept and the Rule of Law' 43 *Georgia Law Review* (2008), pp. 1-61.

18 This is confirmed by the fact that all legal philosophers, and many more, have frequently engaged with Fuller's work on this issue. See, amongst others, H.L.A. Hart 'Review of the Morality of Law' 78 *Harvard Law Review* (1965), pp. 1281-1296; Ronald Dworkin 'The Elusive Morality of Law' 10 *Villanova Law Review* (1965), pp. 631-639.

3.1 Fuller's legality requirements

If the rule of law is to attain its purpose of restraint of power by law, it is not sufficient simply to have laws passed in the correct legal manner. After all, law is to also guide one's conduct in order to plan one's life. It is from this that legal philosophers have deduced a number of specific attributes that laws should have in order for them to be in compliance with the rule of law.[19] Accordingly, Fuller submits eight requirements for the validity of law: (1) laws must be general, (2) promulgated and made available to the public, (3) non-retroactive, (4) clear and understandable, (5) non-contradictory, (6) only require action that subjects are capable of performing, (7) relatively stable, and (8) there must be congruence between the rules as announced and their actual application.[20]

The first requirement of generality has two separate aspects: the subjects addressed by the law's norm and the law's norm itself.[21] In relation to the first aspect, it is clear that law can address both particular individuals and groups of people. A rule addresses its subjects mostly by identifying a general feature that sets them apart, which is connected to what the rule prescribes; the purpose of a specific law will be defeated if it does not address itself to the relevant subjects.[22] Closely linked to this is the notion of equality before the law,[23] since generality, at least to some extent, serves as a safeguard against favouritism and partiality and ensures equal treatment of those that subscribe to the same general feature.[24] When the law favours or disfavours a certain class or group of people, surely it may only do so

19 See for example Brian Z. Tamanaha 'A Concise Guide to the Rule of Law' in Gianluigi Palombella & Neil Walker (eds) *Relocating the Rule of Law* Oxford: Hart Publishing (2009), pp. 3-15 at 10-11.

20 Fuller (1969), p. 33-94.

21 Georg H. von Wright *Norm and Action. A Logical Enquiry* New York: Routledge (1963), chapters 1 and 3; Andrei Marmor 'The Rule of Law and its Limits' *USC Public Policy Research Paper* No. 16 (2003), pp. 11.

22 Richard A. Posner 'Corrective Justice' in Christopher B. Grey (ed) *The Philosophy of Law* New York: Garland Publishing (1999), pp. 163-165.

23 H.L.A. Hart *The Concept of Law* Oxford: Oxford University Press (2012), p. 161; Dicey (1959), p. 193.

24 Andrei Marmor *Positive Law and Objective Values* Oxford: Oxford University Press (2002), pp. 147-152.

on the basis of general reasons that warrant differential treatment,[25] such as in the case of racial or religious minorities.[26] Thus, the requirement of generality is addressed not only to the legislature, but also to the judiciary and necessarily includes the requirement of judicial impartiality.

The second aspect of generality is that of the law's norm. The law can prescribe the performance of a particular action or omission thereof, or it can stipulate a general act. The more general the norm, however, the less it is able to actually guide individual conduct, and the greater the judicial discretion in applying and interpreting it.[27] The law's generality is thus a matter of degree. Marmor makes the interesting argument that, while some authors argue that this type of generality raises concerns in the context of the rule of law, these types of legal norms are rarely left to their general and/or possibly vague form;[28] the specification of their content is handed to institutions, like administrative agencies and courts. In present day societies, where law has become very detailed due to an increase in governmental tasks,[29] the legislature is often justified in leaving its specification to qualified agencies and to courts. After all, the rule of law requires that the law be such that it can actually guide human conduct; it is indifferent about who

25 Hayek subscribes to the view that according the rule of law, individuals should be treated equally under general laws, without regard to their particular qualities or circumstances, even though such complete equality might lead to unattainable and undesirable results. He had a bone to pick with the notions of substantive equality and distributive justice, because, if distributive justice contains the notion that there should be a fair allocation of goods in society, this can only be addressed through substantive equality, for unfair distribution often leads to unequal situations which would need to be addressed by taking the inequalities into consideration. According to Hayek, however, the problem is that 'in spite of many ingenious attempts … no entirely satisfactory criterion has been found that would always tell us what kind of classification is compatible with equality before the law.' For this reason, the rule of law produces economic inequality, which however, 'is not designed to affect particular people in a particular way.' Friedrich A. Hayek *The Constitution of Liberty* Chicago: The University of Chicago Press (1960), pp. 209-232; Friedrich A. Hayek *The Political Ideal of the Rule of Law* Cairo: Bank of Egypt (1955), p. 36. Substantive equality is the notion that equality requires treating differently situated people differently in order to account for the inequality in their situations, thus requiring the articulation of principles through which courts can determine whether the application of a rule to a person is compatible with the application of a different rule to another person. See for example Eduard Vierdag *The Concept of Discrimination in International Law* The Hague: Martinus Nijhoff (1973).

26 Rachel Kleinfeld 'Competing Definitions of the Rule of Law' in Thomas Carothers (ed) *Promoting the Rule of Law Abroad. In Search of Knowledge* Washington: Carnegie Endowment for International Peace (2006), pp. 31-73 at 38-39.

27 Marmor (2003), pp. 15-16.

28 *Ibid.*, p. 17.

29 Jacques Chevallier *L'État de Droit* Paris: Montchrestien (2003), p. 98; Henry S. Richardson 'Administrative Policy-Making: Rule of Law or Bureaucracy?' in David Dyzenhaus (ed) *Recrafting the Rule of Law. The Limits of Legal Order* Oxford: Hart Publishing (1999), pp. 309-330 at 309; Edward Rubin 'Law and Legislation in the Administrative State' *Columbia Law Review* (1989), pp. 369-426 at 395.

decides what has to be done, whether it is the legislature, an administrative agency, or the courts.

The second requirement of promulgation stems from the obvious fact that a law, if it is to guide human conduct, needs to be made publicly available. Accordingly, this public aspect is an essential feature of its normativity, for a norm cannot provide a reason for action or abstention unless its subjects are aware of its existence and regard it as such.[30] However, the extent of promulgation depends on its purpose.[31] From a purely functional perspective, only those parts of the law need to be made public to those addressees whose behaviour it purports to regulate: agencies, individual subjects, to name a few. However, if, from a political perspective, critical debate and public scrutiny of the law are also valued, its promulgation needs to be much wider.[32] Nonetheless, for law to guide conduct, only functional promulgation seems to be required by the rule of law.

Non-retroactivity of law, Fuller's third requirement, can be understood both from a functional perspective – human conduct cannot be guided retroactively[33] – and from a moral perspective – criminalising behaviour retroactively is an affront to human freedom and conflicts with legal certainty.[34] Legal practice shows that there are two exceptions to this requirement, in the form of a court overruling a previous precedent,[35] or by distinguishing cases[36] – a legal method by which a judge can find that the material facts of a case are sufficiently different from a previous decision to warrant a different outcome.[37] *De facto* these judicial actions have a retroactive effect,

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30 Gilbert Bailey 'The Promulgation of Law' 36 *American Political Science Review* (1941), pp. 1059-1084 at 1059-1061.

31 Marmor, (2003), p. 22; Raz (1979), p. 215.

32 According to Fuller, '[i]t is the virtue of a legal order conscientiously constructed and administered that it exposes to public scrutiny the rules by which it acts.' Fuller (1969), p. 158. See also on the value of critical appraisal see for example the second chapter of John Stuart Mill *On Liberty and Other Writings* Cambridge: Cambridge University Press (1989).

33 According to Hayek, laws' predictability - prospective laws give rise to legitimate expectations - is a central function of the rule of law, since predictable, efficient legal system allows businesses to plan, enables law-abiding citizens and businesses to stay on the correct side of the law, and provides some level of deterrence against criminal acts. If a legal system is predictable, it is a viable means for solving disputes. See Kleinfeld (2006), p. 42.

34 This last idea requires some nuance: the German courts found, both after the defeat of the national socialist regime and after the 1989 collapse of the Berlin wall in the cases concerning the wall-shootings, that in both cases the positive law of the legal system at the time could not be deemed to be legally valid because it offended against fundamental principles of justice and the rule of law. See for the latter case BVerfGE 95, 96; 2 BvR 1851, 1853, 1875 and 1852/94, 24 October 1996 and Robert Alexy 'A Defence of Radbruch's Formula' in David Dyzenhaus (ed) *Recrafting the Rule of Law. The Limits of Legal Order* Oxford: Hart Publishing (1999), pp. 15-39 at 15.

35 Raz (1979), pp. 185-189. On the question of retroactive effects of judicial law-making in areas of settled case law see Ronald Dworkin *Taking Rights Seriously* Cambridge: Harvard University Press (1978), p. 82.

36 Raz (1979), pp. 189-192.

37 See generally James L. Montrose 'Distinguishing Cases and the Limits of Ratio Decidendi' 19 *The Modern Law Review* (1956), pp. 525-530.

at the very least for the litigants involved.[38] However, even though it can be argued that the introduction of legal changes is best left to the legislator, flexibility in the application of the law is equally desirable if law is to function as an effective tool of social control.[39] Thus, this requirement places as much emphasis on the legislative branch of government, as it does on the judicial branch.

The fourth requirement that rules need to be clear and understandable is just that: those who need to understand the law should be able to do so. This implies that laws are sufficiently precise, a criterion, which, however, is a matter of degree. After all, clarity of law can also denote rigidity, a feature heavily criticised by scholars pointing out the difference between law-in-the-books and law-in-action.[40] Nonetheless, it is generally understood in legal theory that the required precision of the law depends on the existence of commonly accepted standards, which might have a level of obscurity, but which have been established on the basis of judicial practice.[41]

The fifth requirement establishes that laws may not contradict each other. This entails that the legislature has an obligation to endeavour not to include conflicting provisions within a single law, nor to enact a law that negates a provision, or even objective, of another law. Moreover, the requirement of non-contradiction also acts on a more abstract level of coherence, that of the legal system with its moral-political underpinnings.[42] Accordingly, Dworkin has argued that law is morally incoherent if its underlying justifications and the various prescriptions cannot be subsumed under one coherent moral theory.[43] However, he was well aware of the fact that the laws' moral soundness had to be balanced against the legal system's integrity, thereby allowing for the rectification of possible past mistakes.[44] Thus, this requirement has to be balanced against the functioning of the legal system as a whole.

Fuller's sixth and seventh requirement – laws may not require the impossible and ought to be stable – are straightforward. Law cannot guide behaviour if it prescribes an impossible course of action. While it can be

38 Raz (1979), p. 198.

39 Marmor (2003), p. 32. Fuller (1969), pp. 51-62.

40 Mauro Zamboni *Law and Politics: A Dilemma for Contemporary Legal Theory* Berlin: Springer (2008), pp. 88-89; Karl Llewellyn 'Some Realism About Realism - Responding to Dean Pound' 44 *Harvard Law Review* (1931), pp. 1222-1264 at 1237; Roscoe Pound 'Law in Books and Law in Action' 44 *American Law Review* (1910), pp. 12-36. See also Fuller, who argued that the ossification of laws would make them essentially dysfunctional. Fuller (1969), pp. 60-62.

41 Geranne Lautenbach *The Concept of the Rule of Law and the European Court of Human Rights* Oxford: Oxford University Press (2013), p. 39.

42 Ronald Dworkin *Law's Empire* Cambridge: Harvard University Press (1986), pp. 176-224.

43 Marmor (2003) p. 36.

44 Dworkin (1986), pp. 65-72. For Raz's opinion on this particular point see Joseph Raz 'The Relevance of Coherence' 72 *Boston University Law Review* (1992), pp. 273-321. For the questionability of the argument on moral coherence in light of current pluralist societies, see John Rawls *Political Liberalism* New York: Columbia University Press (2005), pp. 11-14.

argued that there is a nuance in the word 'impossible' – does Fuller mean actual physical impossibility, basic considerations of cost-effectiveness, or do conscientious objections also qualify? – it is a given that the law should prescribe general guidelines with which individuals have to be able to comply. How else is the rule of law to guide individuals' behaviour? The requirement of stability is again one of degree.[45] When law changes too frequently its guiding function is under pressure, however, as argued above, ossification of law is not to be preferred either.

The eighth and final requirement prescribes the congruence between rules and their application. For law to function properly various law enforcement agencies and the judiciary must apply it, while simultaneously preventing a discrepancy between the rules as declared and as they are actually administered.[46] Only if deviations from the rules are treated as such, can rules guide human conduct and will individuals stick to the rules. For this reason, application mechanisms are of crucial importance. However, even though according to the doctrine of the separation of powers this task is chiefly entrusted to the judiciary – thereby placing the responsibility of the law's correct application in practised hands, it makes the correction of abuse dependent upon the willingness and (more often than not) financial abilities of the affected party to litigate a case.[47]

It should be noted that these requirements say nothing about how laws are made – by democratic process or other – and say nothing about the substantive standards the law must satisfy. These requirements, however, provide benchmarks for legal systems in order to regulate both private coercion and violence among citizens themselves, as well as government action. Thus, the rule of law as legality is essentially a negative value involving a formal delimitation of government action so that the power of every authority is exercised in accordance with law. By forcing public authority to follow legal forms and, as it will be demonstrated further below, legal procedures, law operates to reduce the possibility of government to excessively coerce or unreasonably interfere with the life, liberty, and property of citizens.[48]

3.2 Further fleshing out of legality's requirements

As outlined above, Fuller has given an elaborate and sophisticated account of legality, setting quality requirements to law. He has outlined eight requirements of legality, that need to be fulfilled at least to a substantial degree in order for the rule of law to fulfil its primary function of guiding the behaviour of citizens. On the basis of this list a number of other eminent legal philosophers have compiled and outlined their own thoughts on the

45 Fuller (1969), pp. 70-79.
46 *Ibid.*, p. 81.
47 *Ibid.*, pp. 81-82.
48 Ivor Jennings *The Law and the Constitution* London: University of London Press (1959), pp. 45-66.

rule of law.[49] In *The Authority of Law*, Raz, starting from the same premise of law's capability of guiding the behaviour of its subjects,[50] outlines similar requirements:[51] laws should be prospective, open and clear; relatively stable; and the making of particular laws should be guided by open, stable, clear, and general rules.[52] In the same vein, MacCormick includes promulgation, generality, stability, and non-retroactivity as the requirements for law to properly function as law.[53] This set of requirements, also found in the works of Hayek[54] and Unger,[55] is generally regarded as standard statements of the dominant formal versions of the principle of legality within the rule of law.[56]

However, the exact number of requirements of legality and their precise content has remained undecided and open for discussion. What if a legal system does not meet all requirements as indicated in Fuller's list? Would this lead to the conclusion that there is no rule of law at all? It seems that there is some confusion on this point in the literature, not in the least because of Fuller's statement on what he termed, the 'inner morality of law' in combination with the requirements he outlined. Fuller argued that his eight legality requirements constitute the inner morality of law, in the sense that they are intrinsic to the law itself; compliance with all requirements leads to fair laws. It is a 'morality' because it provides standards for evaluating official conduct. Fuller furthermore emphasised that the principles underlying legality are so profound that deviation or lack of one of them would not merely result in a bad system of law, but it would result in something that can not properly be called a legal system at all.[57]

The confusion lies in the fact that morality is easily equated with more substantive principles such as justice. However, this cannot have been

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49 See, for authors not mentioned in the text, for example Fallon, who argues for the following five principles: the capacity of legal rules, standards or principles to guide people in the conduct of their affairs (1), efficacy (the law should actually guide people) (2), stability (the law should be reasonably stable in order to facilitate planning and coordinated action over time) (3), supremacy of legal authority (the law should rule officials, including judges, as well as ordinary citizens) (4), impartial justice (courts should be available to enforce the law and should employ fair procedure) (5). Richard Fallon '"The Rule of Law" as a Concept in Constitutional Discourse' 97 *Columbia Law Review* (1997), pp. 1-56 at 8-9. Also see Robert S. Summers 'The Principles of the Rule of Law' 74 *Notre Dame Law Review* (1999), pp. 1691-1712.

50 Raz (1979), pp. 214.

51 Unlike Fuller's universal claim on the nature of laws, Raz's non-exhaustive list is presented as context dependent, in so far as these principles 'depend for their validity or importance on the particular circumstances of different societies.' Raz (1979), p. 214.

52 *Ibid.*, pp. 210-229

53 Neil MacCormick 'Der Rechtsstaat und die Rule of Law' 39 *Juristenzeitung* (1984), pp. 65-70 at 68.

54 Hayek (1960); Hayek (1994).

55 Robert Unger *Law in Modern Society* New York: The Free Press (1976), pp. 176-181.

56 Brian Z. Tamanaha *On the Rule of Law. History, Politics, Theory* Cambridge: Cambridge University Press (2004), p. 93.

57 Fuller (1969), p. 39.

the intended outcome of Fuller's analysis of legality since he himself has insisted that in presenting the analysis of law's inner morality, legality is 'over a wide range of issues, indifferent toward the substantive aims of law and is ready to serve a variety of such aims with equal efficacy.'[58] Lyons has criticised Fuller's use of the term 'morality' as misleading, since none of the eight requirements have a regular connection to substantive principles. Instead, according to Lyons, Fuller's requirements concern the *effectiveness* of law.[59] This conclusion is also supported by Dworkin, who has noted that '[f]ailure to produce a law is not in itself a moral fault.'[60] Accordingly, if Fuller's requirements are viewed along the lines of effectiveness, it can be argued that failure to satisfy one of them, does not necessarily lead to a negative result, it will just be a less effective legal system. This argument is furthermore supported by Raz's writings. According to Raz, there is little point in enumerating a definitive list of legality's requirements, since many requirements depend for their validity on the particular circumstances of the different societies.[61] Thus, it is enough to articulate some common elements of legality, which might occur in any combination, at any given point in time. Such a flexible approach in relation to legality and to the rule of law is preferable, especially considering the various ways in which legal systems are organised,[62] but also because of the specific nature of some areas of law.[63] With regard to criminal law, for example, legality's requirements are especially important, since government interference has a very strong impact on individuals' lives in this particular area. Thus, it is not surprising that the requirement of non-retroactivity is a central tenet of criminal law and codified in most national and international legal systems.[64]

However, after having established that most legal scholars agree on the formal elements of the rule of law – generality, promulgation, clarity, stability, non-retroactivity, non-contradictory – one question still remains on the table. In the previous section it was argued that fulfilment of the requirements mentioned is considered to be a matter of degree. If this is accepted, what then is the minimum threshold for their realisation? It seems

58 *Ibid*., p. 153.

59 David Lyons *Ethics and the Rule of Law* Cambridge: Cambridge University Press (1984), p. 77.

60 Ronald Dworkin 'Philosophy, Morality, and Law - Observations Prompted by Professor Fuller's Novel Claim' *University of Pennsylvania Law Review* (1965) 113, pp. 668-690 at 675.

61 Raz (1979), pp. 214-218.

62 According to Palombella, the requirements for the validity of law can be matched at different times and in different contexts by a variety of institutional arrangements. Palombella (2010), p. 31.

63 Fuller (1969), p. 93.

64 Dov Jacobs 'International Criminal Law' in Jörg Kammerhofer & Jean D'Aspremont (eds) *International Legal Positivism in a Post-Modern World* Cambridge: Cambridge University Press (2014), pp. 451-474; Kenneth S. Gallant *The Principle of Legality in International and Comparative Criminal Law* Cambridge: Cambridge University Press (2009), p. 241.

that most scholars have refrained from addressing this issue,[65] or when they do address it, they have only managed to vaguely sketch the outlines of a minimum threshold.[66] Mostly, the literature has identified rule of law elements in an inarticulate way as, for example, 'fairly generalised' rule through law, a 'substantial amount' of legal predictability, or 'widespread' adherence to the principle that no one is above the law.[67] However, the question of thresholds still remains.

Consider for example the requirements of generality. In the modern day state, law has increasingly become detailed and, oftentimes, technical. This is due to the rise of the administrative welfare state, which has seen the proliferation of sub-governmental bodies and has called for more government interference resulting in specific regulations.[68] Moreover, as the executive power has progressively acquired law-making power,[69] next to those of the parliament, the requirement of generality has become increasingly concerned with questions of the scope and extent of delegation of law-making power to that branch of government. This brings with it the problem of discretionary powers:[70] legality requires laws to be general, but at the same time, modern-day society leaves law-making and its application to administrative agencies,[71] who apply discretion in deciding how to apply the law in a specific case.[72] However, not only does such discretionary power appear to run counter to the idea of law's generality, it also potentially counteracts law's predictability. What, then, should the minimum level of generality be? Maybe Raz offers the clearest solution. He recognises the importance of generality, while at the same time acknowledging that a legal system must also have more specific rules. Thus, the requirement of generality does not imply that all laws must be general in nature. Rather, it is the making of more particular rules that should be guided by more general ones.[73]

In sum, it has been demonstrated that legal theory, like the rule of law in its national manifestations, recognises legality as the rule of law's central element. It has been shown that, in order to fulfil the rule of law's primary

65 See for exceptions for example Adriaan Bedner 'An Elementary Approach to the Rule of Law' 2 *Hague Journal on the Rule of Law* (2010), pp. 48-74 and the work undertaken by Randall Peerenboom.

66 For a notable exception combining both a conceptual and benchmark approach see Nicolas Hachez & Jan Wouters 'Promoting the Rule of Law: A Benchmark Approach' LCGGS Working Paper No. 105 (2013)

67 Michel Rosenfeld 'The Rule of Law and the Legitimacy of Constitutional Democracy' 74 *Southern California Law Review* (2001), pp. 1307-1351 at 1313.

68 Edward L. Rubin, 'Law and Legislation in the Administrative State' 89 *Columbia Law Review* (1989), pp. 369-426 at 395.

69 Rubin (1989), p. 391.

70 Eoin Carolan *The New Separation of Powers. A Theory for the Modern State* Oxford: Oxford University Press (209), p. 119.

71 Brian Z. Tamanaha 'The History and Elements of the Rule of Law' *Singapore Journal of Legal Studies* (2012), pp. 232-247 at 242.

72 MacCormick (1984), p. 68.

73 Raz (1979), pp. 215-216.

function of guiding the behaviour of citizens, scholars have formulated a number of requirements and qualifications for the validity of law. More particularly, it has been asserted that most of the requirements mentioned by Fuller have been confirmed by similar accounts of legality of other legal philosophers. Furthermore, it has been demonstrated that there is general agreement on the fact that most of the requirements can only be fulfilled to a certain degree and on the fact that not all of them need to be fully realised at the same time. Thus, it was shown that according to legal doctrine, it is enough to articulate legality's elements, in the understanding that they can occur in any combination in a particular society, at any given point in time. However, it was also demonstrated that the question of minimum thresholds, or, in other words, the question what the minimum conditions are for each particular requirement, has not been sufficiently answered by legal theory.

4. The institutional underpinnings of the rule of law: emphasis on the legal system and judicial independence

The focus of this section will be to demonstrate that in legal doctrine, the rule of law's core element of legality is underpinned by a form of the separation of powers, in ways similar to the national conceptions of the rule of law. More particularly, it will be asserted that since the requirements of legality address the three different branches of government, this common element of the rule of law thus presupposes some functional separation of governmental power. However, it will be demonstrated that legal scholars have restricted their analysis almost exclusively to the judicial branch. It will be shown that this is the consequence of the fact that the discussion on the rule of law concentrates on the question of the nature and validity of law, including the aforementioned requirements of legality. With this comes the belief that one of the further defining features of law is that it functions in an institutionalised legal system. It will be shown that, following this point of view, legal theory has emphasised the legal system and the norm-applying institutions within it.

From the above *exposé* of the rule of law's core principle of legality it has become clear that legality is understood as having both a systemic as well as an adjudicative dimension. Along the lines of the latter, legality is promoted by courts that enforce rights of individuals on the basis of past political decisions by the legislature and/or executive. This will be discussed in more detail in the next section. Along the lines of the former, legality, in its function as a power-restraining mechanism, is served by the existence of tools, judicial and non-judicial alike, that check undue governmental interference[74] Accordingly, legality's requirements are directed at the dif-

74 Dimitrios Kyritsis *Shared Authority. Courts and Legislatures in Legal Theory* Oxford: Hart Publishing (2015), p. 105.

ferent branches of government, and thus, imply some form of functional separation of power.

For example, clarity and stability are directed at the legislature as norm-creator, since these requirements are concerned with the form law should take. To the extent that the executive has rule-making power, the requirements of legality that determine the validity of law should also be taken into account.[75] As already demonstrated above, the requirement of generality is directed at both the legislature and the judiciary, as it is concerned with the subject that are addressed by the norm and the way the norm is subsequently applied by norm-applying institutions such as courts and tribunals. Furthermore, both the executive and the judiciary should heed Fuller's eighth requirement, which demands congruence between the law and official acts.[76] It not only requires that administrative power should adhere to the law, it also demands that the judiciary prevent abuse of the law through acts of government. Legality, thus, also requires some form of judicial review. On the basis of the foregoing, it is proven that the systemic dimension of legality is supported by the doctrine of the separation of powers, both through considerations pertaining to the proper division of government power – government power is divided on the basis of certain institutional arrangements, and through considerations pertaining to checks and balances – institutional mechanisms that monitor the exercise of government power in order to prevent abuse. In this way, the rule of law – in the form of the principle of legality – is underpinned by the separation of powers in the same way, and for the same reasons, as the notion is buttressed in the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law.

However, in light of the fact that in legal doctrine the rule of law debate is concentrated on the requirements for legality and the validity of law, it is not surprising that, for its institutional underpinnings, the discussion focuses mostly on the functioning of the system in which the law is applied: the legal system.[77] The court-centric emphasis of the debate,[78] in combination with attention being paid to the norm-creating institutions,[79] has come at the expense – and almost total exclusion – of the role of the executive.[80]

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75 Lautenbach (2013), p. 42.

76 Fuller (1969), p. 81.

77 After all, Finnis has argued that the rule of law is 'the name commonly given to a state of affairs in which a legal system is legally in good shape.' John Finnis *Natural Law and Natural Rights* Oxford: Clarendon Press (1980), p. 270. Further see Joseph Raz 'The Institutional Nature of Law' 38 *The Modern Law Review* (1975), pp. 489-503; Hart (2012). Also see Dicey (1959), pp. 195-196; Joseph Raz *The Concept of a Legal System* Oxford: Clarendon Press (1970).

78 Richard Bellamy (ed) *The Rule of Law and the Separation of Powers* Dartmouth: Ashgate (2010), p. xi.

79 For a good example of theoretical interest in the nature and purpose of legislative intent see Richard Ekins *The Nature of Legislative Intent* Oxford: Oxford University Press (2012).

80 On legal theory's neglect of the executive branch of government see Peter Cane 'Public Law in *The Concept of Law*' 33 *Oxford Journal of Legal Studies* (2013), pp. 649-674.

For, by understanding the rule of law as legality and by focussing on the question of what 'law' is and what its features consist of, legal scholars privilege the judicial perspective.[81] More particularly, legal scholars are in agreement that the rule of law is supported by judicial independence, thereby echoing the emphasis put thereon in the national conceptions.[82]

Judicial independence has been considered paramount historically, through the works of Locke and Montesquieu. According to the former, established laws with the right to appeal to independent judges are essential to a civilised society, since '[w]ant of a common judge with authority, puts all men in a state of nature.'[83] As already demonstrated above,[84] Montesquieu argued in favour of an independent judiciary branch because, if the judiciary power were not separate from the legislative and executive, the life and liberty of individuals would be exposed to arbitrary control or exposed to oppression.[85] Raz also considered 'independent courts' an element of the requirements of the rule of law.[86] After all, citizens can only be guided by the law if the courts apply it correctly and independently from the interests of both the government and the parties in the dispute. Furthermore, for the law to rule, it must be respected and followed, both by those in power as well as individuals. In many ways, the judiciary controls this aspect of the concept, in its role as 'guardian of the law' on the basis of its 'objectified position of neutrality'.[87] Since, without impartiality and independence of judges, adjudication could not exist.[88] Thus, judicial

81 Kyritsis (2015), p. 115; Hart (2012); Hans Kelsen *General Theory of Law and State* (transl. A. Wedberg) Clark, New Jersey: The Lawbook Exchange (1999); Hans Kelsen *Pure Theory of Law* Ney Jersey: The Lawbook Exchange (2002); Finnis (1980); Dworkin (1978); Geoffrey MacCormack '"Law" and "Legal System"'42 *The Modern Law Review* (1979), pp. 285-290; Raz (1970); Jeremy Bentham *Of Laws in General* (H.L.A. Hart ed) London: The Athlone Press (1970); John Austin *The Province of Jurisprudence Determined* New York: The Noonday Press (1954).

82 Raz (1979), pp. 214-215.

83 Locke (1980), section 19.

84 See section 2.2.

85 Montesquieu (1777), Book II, Chapt. 3.

86 Raz (1979), p. 216.

87 Tamanaha (2012), p. 244. See, for the counter-argument Kyritsis, who writes that: 'Conversely, it is not necessarily the case that judicial enforcement is always preferable or even particularly effective. We should not forget that, despite their independence, courts are not external to the political regime. They have particular features, strengths and weaknesses, and in light of those they interact with the other state institutions in certain ways and not others. This does not mean that it is never warranted for them to take on the other branches of government. But it does mean that whether they should will vary. Although in some areas separation of powers will dictate that an issue be decided by a court of law – criminal charges are a good example –, in others it will encourage institutional cooperation, competition and checks and balances without need for judicial intervention.' Kyritsis (2015), p. 115.

88 Robert S. Summers 'Legal Institutions in Professor H.L.A. Hart's Concept of Law' 75 *Notre Dame Law Review* (2000), pp. 1807-1828 at 1814.

independence is a necessary element in order to uphold the integrity of the judicial process and the integrity of the law.[89]

Furthermore, legal theory is in agreement on the fact that the separation of powers, and thus, also, judicial independence, requires formal organisation.[90] However, even though it cannot be effectively implemented 'merely as an agreed and solemnly declared desideratum',[91] there is no commonly agreed-on institutional design.[92] Considering the differences between common law and civil law systems, and the variations within these,[93] this is not surprising. It means that in relation to its institutional underpinnings, the rule of law allows for a great many institutional alternative arrangements. This conclusion is further reinforced by the multiple institutional semantics[94] of the concept of judicial independence:[95] it may refer to the

89 Anthony Bradley, Keith Ewing & Christopher Knight *Constitutional and Administrative Law* Harlow: Pearson Education (2014), p. 370.

90 Krygier (2001), p. 13404.

91 Summers (2000), p. 1814.

92 Krygier (2001), p. 13404.

93 In their article on judicial independence in comparative perspective, Helmke and Rosenbluth differentiate between two types of institutional explanations for judicial independence: historical legacy, as in common law systems, and a-historical delegative models, in which politicians have reasons to tie their own hands *vis-à-vis* an independent judiciary, commonly found in civil law systems. Accordingly, common law countries charge courts with developing and interpreting a body of case law that supplements statutory law, with trained judges who can think about and create the bridges between pieces of legislation. In civil law countries independence is ensured through intentional institutional walls against political intervention in judicial decisions. Gretchen Helmke & Frances Rosenbluth 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' 66 *Annual Review of Political Science* (2009), pp. 345-366 at 349.

94 Peter Russell 'Toward a General Theory of Judicial Independence' in Peter Russell & David O'Brien *Judicial Independence in the Age of Democracy* London: University Press of Virginia (2001), pp. 1-24 at 1.

95 There are a great number of studies on the concept of judicial independence. However, such studies are usually undertaken within the field of political science rather than legal theory, and focus on the concept itself in a given polity or on its development within the context of democratisation, rather than its exact relation with the rule of law. See for example Shimon Shetreet & Christopher Forsyth (eds) *The Culture of Judicial Independence. Conceptual Foundations and Practical Challenges* Dordrecht: Martinus Nijhoff (2012); Daniela Piana 'Beyond Judicial Independence: Rule of law and Judicial Accountabilities in Assessing Democratic Quality' in Leonardo Morlino & Gianluigi Palombella *Rule of Law and Democracy* Leiden: Brill Publishing (2010), pp. 65-89; Tomaz Wardynski & Magdalena Niziolek (eds) *Independence of the Judiciary and Legal Profession as Foundations of the Rule of Law: Contemporary Challenges* Warsaw: LexisNexis (2009); Gretchen Helmke & Frances Rosenbluth 'Regimes and the Rule of Law: Judicial Independence in Comparative Perspective' 12 *Annual Review of Political Science* (2009), pp. 345-366; Bernd Hayo & Stefan Voigt 'Explaining de facto Judicial Independence' 27 *International Review of Law and Economics* (2007), pp. 269-290; Markus Zimmer 'Judicial Independence in Central and Eastern Europe: The Institutional Context' 14 *Tulsa Journal of Comparative and International Law* (2006-07), pp. 53-87; John E. Finn 'The Rule of Law and Judicial Independence in Newly Democratic Regimes' 13 *The Good Society* (2004), pp. 12-16; Shimon Shetreet & Jules Deschênes (eds) *Judicial Independence: The Contemporary Debate* Dordrecht: Martinus Nijhoff (1985).

institutional conditions under which judges adjudicate; it can relate to the behavioural independence of individual judges; it might refer to the degree to which judges are autonomous within courts; or it may be associated with the degree to which judicial institutions are separated from the executive and legislative branches of government.[96] However, it is apparent that in order to be free from extraneous pressures and independent from all authority save that of the law, there are rules that need to be present across all legal systems. These include, amongst others, rules concerning the method of appointing judges, their security of tenure, and budget autonomy.[97] Thus, differences in relation to the organisation of the judiciary and the extent of its powers to review governmental acts are all compatible with the rule of law.

In sum, it was shown that the requirements of legality presuppose some form of a functional separation of powers, since they are directed at the three different branches of government. Furthermore, it was demonstrated that within the discussion on the separation of powers in legal theory, the debate revolves around the judiciary branch and the legal system. It was asserted that this can be explained by virtue of the fact that law necessarily belongs to a legal system, and that any discussion on legality and the nature and quality of law, will inevitably involve an exploration of its institutionalisation. More particularly, it was shown that there is a noticeable emphasis on the element of judicial independence. Individual behaviour can only be guided by law – the prime purpose of the rule of law next to the restraint of power – if independent courts correctly apply it. It follows from this that judicial independence is a crucial element for the law to be respected, and, thus, for the law to rule. It was demonstrated that in this respect, the doctrine of the separation of powers underpins the rule of law in much the same way as it is relied on in the three conceptualisations of the rule of law in Germany, France, and the United Kingdom.

5. The safeguarding mechanisms of the rule of law: judicial review and other procedural elements

In the previous section mention was made of judicial review as a requirement which flows from legality, since the latter not only demands that the administration adheres to the law, but also commands the judiciary to prevent abuse of the law through its powers of review. Thus, legal theory is concerned with providing safeguards for the rule of law in ways similar to the three national conceptions, discussed in the previous chapter. It was also demonstrated that the judicial-centric focus of the rule of law-debate in legal theory is explained by the fact that if one wants to know about the content of the law, it is natural to turn to those institutions and the officials

96 Russell (2001), pp. 2-24.
97 Raz (1979), p. 216; Helmke & Rosenbluth (2009), p. 349.

within them whose job it is to interpret it.[98] From the outset, it should be made clear that the aim of this section is not to provide an in depth analysis of the areas of the debate on judicial review in both common and civil law systems – and all their variations – since this would go far beyond the ambit of the present study.[99] Rather, the purpose of this section is to show that in legal doctrine there is agreement on the fact that at least marginal judicial review of both executive action and legislation, is a necessary component for upholding the rule of law. It will be demonstrated that the doctrine of the separation of powers sets certain limits to review of the executive, preventing judicial scrutiny of certain more political acts of government. In relation to judicial review of legislation, it will be asserted that the judiciary's powers can be limited due to democratic concerns, even though it will be shown that formal legality and formal democracy are, in some ways, mutually reinforcing concepts. More particularly, it will be demonstrated that legal doctrine, just as the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, requires at least some form of judicial review of legislation in order to safeguard individual rights. As a final point, a number of review-related procedural rule of law elements, such as access to court, and fair and impartial hearings will be highlighted.

It merits attention at this point that, as demonstrated in section 2 of the present chapter, since 'the rule of law is preferable to that of any individual', the idea of rule on the basis of law follows the Aristotelian adage of 'government of law, not men'.[100] It can be recalled that at the core of the notion lies the conviction that law provides the most secure means of protection both from arbitrary government involvement and from other individuals.[101] In this sense, according to Allan, the law is a bulwark between the governing and the governed, shielding the individual from hostile discrimination on

98 Dworkin (1986), p. 413.

99 For analyses of judicial review see Harry Woolf, Jeffrey Jowell *et al*. *De Smith's Judicial Review* London: Sweet & Maxwell (2014); Trevor R.S. Allan 'Judicial Deference and Judicial Review' 127 *Law Quarterly Review* (2011), pp. 96-117; Christopher Forsyth *et al*. *Effective Judicial Review: A Cornerstone of Good Governance* Oxford: Oxford University Press (2010); Jeremy Waldron 'The Core of the Case Against Judicial Review' 115 *The Yale Law Journal* (2006), pp. 1346-1406; Trevor R.S. Allan 'The Constitutional Foundation of Judicial Review: Conceptual Conundrum or Interpretive Inquiry?' 61 *Cambridge Law Journal* (2002), pp. 87-125; Mark Elliot *The Constitutional Foundations of Judicial* Review Oxford: Hart Publishing (2001); Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000); Paul Craig 'Ultra Vires and the Foundations of Judicial Review' 57 *The Cambridge Law Journal* (1998), pp. 63-90; John Laws 'Illegality, the Problem of Jurisdiction' in Michael Supperstone & James Goudie (eds) *Judicial Review* London: Butterworths (1997), 4.12-4.16; Christopher Forsyth 'Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, Sovereignty of Parliament and Judicial Review' 55 *The Cambridge Law Journal* (1996), pp. 122-140.

100 Aristotle *Politics* (transl. by Benjamin Jowett) Kitchener: Batoche Books (1999), p. 76.

101 In his *Politics* Aristotle famously wrote that '[h]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.' Aristotle (1999), p. 77.

the part of those with political power.[102] Legal liberty exists when citizens understand and follow the law. This is what Hayek meant when he wrote that when citizens obey the law, in the sense of general abstract rules laid down irrespective of their application to them, they are not subject to another man's will and are therefore free.[103] In line with the requirement of legality, actions of the executive branch of government should be justified in law. It might also be recalled that, in relation to the Anglo-Saxon rule of law, Dicey stressed that 'every man, whatever be his rank or condition, is subject to the ordinary land of the realm and amenable to the jurisdiction of the ordinary tribunals.'[104] Thus, in order to ensure the rule of law's aims and purposes,[105] the judiciary has been tasked to review governmental acts that are deemed unlawful.

Judicial bodies ensure that public bodies do not misuse or abuse the powers invested in them. Judicial review thus plays a key role in ensuring that the executive only acts in accordance with promulgated laws – that public officials properly implement the instructions of the legislature – and that a society is therefore based on the rule of law.[106] Judicial review is not concerned with the end result of the decision made by the public body; it is merely concerned with determining whether or not the right procedures were followed in arriving at the decision.[107] Whereas the principle of legality requires that public activity be submitted to judicial control, the doctrine of the separation of powers prevents judicial review of each and every act of government. Fundamental political decisions, for example, are prevented from judicial scrutiny, as this belongs firmly to the sphere of executive action. However, the rise of the administrative state and the ensuing amount of legislation as well as the heightened involvement of the executive branch, has led to a more prominent role for courts, described by Cappeletti as 'the 'third giant' to control the mastodon legislator and the leviathan administrator'.[108] This rise to prominence has come accompanied by a renewed debate on the limits of judicial review.[109] The answer to the question about how far the powers of the judiciary should reach in

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102 Trevor R.S. Allan 'Legislative Supremacy and the Rule of Law: Democracy and Constitutionalism' 44 *The Cambridge Law Journal* (1985), pp. 111-143 at 113.

103 Hayek (1960), p. 153.

104 Dicey (1959). p. 202.

105 Mark Elliot 'The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 83-110 at 85-87.

106 See generally David Dyzenhaus 'Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 141-172.

107 John Laws 'Judicial Review and the Meaning of Laws' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 173-190, p. 173

108 Mauro Cappelletti *The Judicial Process in Comparative Perspective* Oxford: Clarendon Press (1989), p. 19.

109 See for example Trevor R.S. Allan 'Deference, Defiance, and Doctrine: Defining the Limits of Judicial Review' 60 *University of Toronto Law Journal* (2010), pp. 41-59.

relation to those of the executive depends on the specific form given to the separation of powers in a particular polity; conformity to the rule of law by ensuring judicial review of acts of the executive remains therefore one of degree.[110] However, according to the influential writing of philosophers such as Bingham, Waldron, and Allan, the rule of law requires that the judiciary can review actions of public bodies at least in a marginal sense.[111] On the basis of the foregoing, it is evident that legal theory considers judicial review of executive action to be a *sine qua non* condition for upholding and guaranteeing the rule of law; it is one of the checks and balances of the separation of powers. This understanding of judicial review as a safeguard to the rule of law is in line with its function in the national legal systems.[112] As it was shown in the previous chapter, the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, require judicial review as a tool for upholding the rule of law

The link between the rule of law and judicial review of legislation, and, more specifically, statutory legislation,[113] is, however, less tenable and raises democratic concerns. Parliamentary laws are rooted in a democratic legitimacy the judiciary, however independent, will always lack. To have unelected officials rule on laws made by representatives of the people is, from a democratic perspective, problematic. Judicial review of legislation thus sits at the heart of the juxtaposition between rule of law and democracy, for, as Forsyth has noted, 'to shift the ultimate constitutional power from the hands of the elected representatives into [the judges'] own hands has to be offensive to the democratic heart.'[114]

Interestingly, democracy and legality are mutually reinforcing concepts. Since formal democracy informs the process through which laws are framed, this, in and of itself, contributes to the requirements of formal legality. In this way, formal democracy aids the rule of law's purpose of control of power. *Vice versa*, for democracy to be effective, it relies on legality and the institutional underpinning of the separation of powers.[115] To put it differently, without formal legality, democracy can be circumvented (officials can undercut the law), whereas without democracy, formal legality loses its legitimacy (the law has not been determined by legitimate means).[116]

110 Allan (1985), p. 113.

111 Tom Bingham *The Rule of Law* London: Penguin Books (2010), p. 61; Lautenbach (2013), p. 42; Waldron (2006), p. 1354; Allan (1985), p. 114.

112 See to this point also the comparative study on judicial review of executive action in many of the EU Member States, Susana Galera (ed) *Judicial Review. A Comparative Analysis inside the European Legal System* Strasbourg: Council of Europe Publishing (2010).

113 Waldron (2006), p. 1353; Raz (1979), p. 217.

114 Christopher Forsyth 'Heat and Light: A Plea for Reconciliation' in Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000), pp. 393-409 at 394.

115 John C. Reitz 'Export of the Rule of Law' 13 *Transnational Law & Contemporary Problems* (2003), pp. 429-486 at 443.

116 Tamanaha (2004), p. 99.

However, according to scholars such as Allan, whereas courts should loyally enforce the legitimate requirements of statutes, at the same time, they should defend and enforce the fundamental principles of law, especially those defining constitutional rights.[117]

There are a variety of practices that can be grouped under the heading of judicial review of legislation, each dealing with the tension between democratic principles and the rule of law in their own particular way, thereby shifting the balance towards the one or the other.[118] Thus, in a system of strong judicial review, courts have the authority to decline to apply a statute in a particular case, or modify its effects to make its application in conformity with human rights.[119] By contrast, in a system of weaker judicial review, courts may scrutinise legislation for conformity with human rights, but they may not decline to apply it.[120] The type of judicial review will furthermore depend on the place of individual rights in the constitutional system (written or not); *a posteriori* review – which takes place in the context of a particular case, and *ex ante* review – whereby a specifically set up constitutional court conducts an abstract assessment of legislation in the final stages of its enactment; and the existence of specialised courts.[121] Given the existing varieties, it would go beyond the scope of the present study to give a detailed account of the theoretical and practical implications of judicial review of legislation in all of them.[122] The point here is merely to indicate that, according to the literature, irrespective of democratic concerns setting certain limits to the judiciary's powers of review, in order to fulfil the rule of law ideal, at least a weak form of judicial review of legislation is necessary. For this reason, legal theory confirms the existing practices of review in the three Member States discussed previously.

In conclusion to this section, it should be pointed out that, according to the literature, the rule of law demands a number of related additional requirements. The judiciary's task of judicial review and the application of the law brings with it questions of institutional access. This issue was highlighted by Dicey, when he stated that 'where there is no remedy, there is no right'.[123] Moreover, since in a complex and political society no system

117 Allan (2010), p. 41.

118 For the role of the principle of *ultra vires* in the bridging of the gap between democratic and rule of law related concerns (especially in the United Kingdom) see, amongst others, the work undertaken by Forsyth, Elliot, Craig, and Allan mentioned in this section, and particularly Christopher Forsyth (ed) *Judicial Review and the Constitution* Oxford: Hart Publishing (2000).

119 Mauro Cappelletti & John Clarke Adams 'Judicial Review of Legislation: European Antecedents and Adaptations' 79 *Harvard Law Review* (1966), pp. 1207-1224 at 1222.

120 Waldron (2006), p. 1356.

121 *Ibid.*, pp. 1354-1359.

122 Generally, see Harry Woolf, Jeffrey Jowell *et al. De Smith's Judicial Review* London: Sweet & Maxwell (2014); Trevor R.S. Allan 'Judicial Deference and Judicial Review' 127 *Law Quarterly Review* (2011), pp. 96-117; Forsyth *et al*. (2010); Waldron (2006); Allan (2002).

123 Albert V. Dicey *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* London: Macmillan (1914), p. 487.

of law can be so perfectly drafted (or judge-made), as to leave no room for dispute, access to court as a provision for resolution of disputes is indispensable.[124] Judicial bodies stand as mediators between the government and its citizens, seeking to ensure that any powers claimed by the executive are properly authorised and that individuals can safely rely on the relevant laws in formulating their plans and deciding on the scope of their liberties.[125] Accordingly, accessibility of courts is of crucial importance to the rule of law in order to ensure that the rule of law's legality requirements can be effectuated. On a more practical note some further sub-requirements are distinguished in legal theory, such as the absence of long delays and excessive costs, since these may effectively turn law to a dead letter and frustrate one's ability to be guided by the law.[126]

In addition to access to courts, in order for the judiciary to fulfil its function under the rule of law, it must apply minimum procedural principles of fairness and impartiality.[127] Principles, in the words of Hart, that are 'designed to secure that the law is applied to all those and only to those who are alike in the relevant respect marked out by the law itself.'[128] Thus, open and fair hearings, absence of bias and the like, are essential to the correct application of the law, and therefore part and parcel of the rule of law.[129] It should be recalled that it was already shown that the requirement of equality before the law is inherent in the requirement of generality, discussed above.[130]

To this list of procedural rule of law elements – designed to ensure that the 'legal machinery' of enforcing the law should not deprive it of its ability to guide through distorted enforcement – Raz has included one further requirement, namely, that the discretion of the crime-preventing agencies should not be allowed to pervert the law.[131] Due to the aforementioned court-centric focus of most legal scholars, the role and importance of other parties involved in the legal system have been largely ignored. However, not only judges can subvert the law, the actions of police and prosecuting authorities are equally a part of the legal system and corruptible. Prosecutors are as much under pressure in high profile cases as other officers of the court. Moreover, if the police were allowed to steer its crime prevention

124 Elliot (2000), p. 103; Fuller (1969), p. 56.

125 This point was stressed by Lord Diplock in the case *Black-Clawson Ltd.* v *Papierwerke A.G.* where he held that '[t]he acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says.' *Black-Clawson Ltd.* v *Papierwerke A.G.* [1975] A.C. 591, 613G.

126 Raz (1979), p. 217.

127 Wade & Forsyth (2009), p. 402.

128 Hart (2012), p. 160.

129 Raz (1979), p. 217.

130 See section 3.1.

131 Raz (1979), pp. 217-218.

efforts in a certain direction, or to only detect certain crimes or prosecute certain classes of people, that would certainly be against the idea of the rule of law.

In sum, it was demonstrated that, according to legal scholarship, at least marginal judicial review of executive action and of legislation is an essential element for safeguarding the rule of law. It was asserted that the legality requires that executive action should be justified in law and that the judiciary has subsequently be tasked with safeguarding the rule of law through judicial review of governmental acts that are deemed unlawful. It was furthermore shown that judicial review of executive action, as well as judicial review of legislation encounter limitations set by the doctrine of the separation of powers and democratic concerns, respectively. Furthermore, it was asserted that the element of judicial review has given rise to a number of related procedural rule of law elements, such as access to courts and principles of impartiality and fairness. Moreover, it was highlighted that individuals should be protected from distorted enforcement by the other forces in the legal system, such as the police and the prosecutor.

6. Conclusions

In this chapter it was examined whether, and to what extent, the rule of law's four common features found in the *Rechtsstaat*, *état de droit*, and the Anglo-Saxon rule of law, comport with the way the notion is understood in legal theory. It was shown that with regard to the rule of law's purpose, substance, institutional underpinning, and safeguarding mechanisms, the doctrine mirrors to a large extent the way the notion is understood at the national level. More particularly, it was established that the theoretical understanding of the rule of law allows for a number of elemental and institutional variations. It was shown that in legal theory, the rule of law's main purpose is to restrain power and to protect individual liberty, thereby allowing individuals to plan and shape their own lives, guided by the boundaries of the law.

The chapter continued by pointing out the fact that legal scholarship has focussed on the notion's core element of legality by enquiring into its requirements. It was demonstrated that for the principle to operate, not all of these requirements need to be fully realised all the time. Similarly, the way the rule of law is underpinned by the separation of power may differ, as long as, at a minimum, judicial independence is guaranteed. Finally, it was established that the element of judicial review is the mechanisms through which the rule of law is best safeguarded. More particularly, it was shown that legal theory identifies judicial review of executive action and of legislation, which, for the rule of law to function, should both exist at least in a marginal sense.