2. The promise of a thick view

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With the rise of the rule of law as a development goal in international co-operation since the 1990s, debates about the meaning of this concept have multiplied. While it is true that jurists and legal philosophers have never agreed on a single definition of rule of law (or the equivalent notions of *Rechtsstaat, état de droit*, etc.), the surge in rule of law programmes sponsored by international organisations such as the World Bank, the IMF and the UNDP has invigorated and broadened the differences of opinion.[1] These debates are not limited to meaning; they also concern such questions as whether the rule of law is a precondition for or a result of social and economic development; how the rule of law can be measured, and how the rule of law can be promoted? Yet, the issue of what the meaning of the rule of law is will always emerge at some point.

At the core of the debates is the opposition between those promoting a 'thin' version of rule of law and those who prefer a 'thick' interpretation. The former believe the concept should focus on the systemic quality of law and the government being bound to it, whereas the latter add ideals about what rights the rule of law should guarantee and/or how the law is made. Legal scholars are divided on this issue. The British rule of law tradition has been marked by the seminal definition of A. V. Dicey, which has often been read as excluding civil rights. Another famous British contribution to the rule of law literature is E. P. Thompson's essay at the end of his historical study *Whigs and Hunters*, which was certainly concerned with a thin version. However, the equally British prominent former justice Tom Bingham squarely advocates a thick version.[2] Similar differences can be seen in rule of law debates in the US. By contrast, in the German and French discourse about their equivalents to the rule of law (the *Rechtsstaat* and the *état de droit*) truly thin versions do not feature; in both cases there seems to be agreement that individual rights and liberties are a fundamental constituent part of the rule of law.[3]

Organisations involved in rule of law development show a strong preference for even 'thicker' versions than commonly found in scholarly literature. In 2004 the UN Secretary-General described the rule of law as:

> a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced

[1] Humphreys, S. (2010) *Theatre of the Rule of Law: Transnational Legal Intervention in Theory and Practice*. Cambridge University Press, 4–5.

[2] Bingham, T. (2011) *The Rule of Law*. Penguin UK, 67, and see the introduction to this volume.

[3] For Germany, see for instance Pierot, B. (2011) 'Historische Etappen des Rechtsstaats in Deutschland', *Jura*, 10, 735 or Schmidt-Aβmann, E. (2015) *Handbuch des Staatsrechtst Band II*, Müller Jur. Verlag, 552–4. For France, e.g., Heuschling, L. (2010) 'Etat de droit', in Auby, J.B., *L'influence du droit européen sur les catégories juridiques du droit publique* Dalloz, 549.

> and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.[4]

The UN's idea of the rule of law consists of a set of components which can be pursued separately, but putting them together has the advantage of suggesting that they possess a coherence. By opting for the term 'international human rights norms' the UN even exceeds the notion of individual rights and liberties, because international human rights norms also include socio-economic rights. On top of that, the listing of 'participation in decision-making' inserts democracy into the UN's rule of law definition. Democracy arguably is an aspect of governance that finds itself at the same level as the rule of law, and it constitutes a broad and complex field of study in itself. The question is whether its inclusion stretches the rule of law concept so far as to be no longer of any use as an analytical tool.

How can we explain the preference for such sweeping lists of rule of law components, or in other words, what is the promise of a thick view of rule of law? This chapter will first address the question of what a thick version of the rule of law is by juxtaposing it to thin versions. I will proceed by demonstrating how the preference for particular thin or thick versions can be explained by the purpose the rule of law concept is to serve. I will also argue that by excluding all substantive elements most of the thin versions are ahistorical in nature, since all rule of law concepts have developed together with the notion of fundamental rights. My conclusion in the end is that the choice for a thick over a thin version of the rule of law is dependent on the purpose for which the concept is deployed: an analytical tool, an aspirational ideal, or something in between.

THIN AND THICK VERSIONS OF THE RULE OF LAW

One may conceive of the rule of law as consisting of different elements, which can be derived from the various definitions in use.[5] Underlying these elements are two functions the rule of law is intended to serve and which are widely agreed upon: to protect citizens against the state, and to protect citizens from their fellow citizens. The first function is the more prominent one and has been central to the development of the rule of law concept in the western world. The second one intends to promote social

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[4] Report of the Secretary-General: The rule of law and transitional justice in conflict and post-conflict societies (S/2004/616).

[5] Bedner, A. (2010) 'An elementary approach to the rule of law'. *Hague Journal on the Rule of Law*, *2*(1), 55. The basis for this approach can be found in Tamanaha, B. Z. (2004) *On the Rule of Law: History Politics, Theory.* Cambridge, Cambridge University Press, and Peerenboom, R. (2004). 'Varieties of rule of law: An introduction and provisional conclusion'. In: Peerenboom, R. *Asian Discourses of rule of Law.* London, Routledge Curzon, 4. Note that Peerenboom uses a slightly different classification than Tamanaha, including democracy under the substantive elements. On this point, I follow Tamanaha 2004 (see below).

order,[6] and has received particular attention in the framework of global rule of law promotion, notably in addressing concerns about security and 'repairing' dysfunctional states.[7]

It is important to see that there is a tension between these two functions. Whereas protecting citizens against the state demands limitations on the latter's power, protecting citizens against one another requires a strong state. Nick Cheesman has therefore argued that the second function should be considered separately, and that the rule of law should not be conflated with 'law and order'.[8] In other words, he proposes a thin version of the rule of law already at the level of function. However, few have followed this suggestion, probably because they see a link between the two functions. Peter Rijpkema – for instance – holds that these functions ought not to be separated because both have as their ultimate aim to 'enable people to live their lives as responsible persons in accordance with their plans'.[9] To achieve this, citizens need protection both against the state and against their fellow-citizens.

One finds other variations on the two functions the rule of law is to serve,[10] yet for the purpose of the present chapter this matter is only of secondary importance. All the elements I will discuss below are relevant for a rule of law concept that is based on the first function alone. It is only in determining the weight the different elements carry that the distinction between the functions one ascribes to the rule of law becomes important.

Since it takes function as its point of departure, the approach to distinguish thin from thick conceptions is 'teleological' rather than 'anatomical' in nature. It is concerned in the first place with what the rule of law tries to achieve and not with the specific institutions or features that are its constituent elements.[11] In other words, the 'anatomy' of the rule of law depends on the purpose and not the other way around.

Turning our attention now from functions to elements, we can distinguish thick and thin versions of the rule of law as they are commonly understood: the more elements the rule of law definition encompasses, the thicker it is. There is, however, not a straight line from the thinnest to the thickest rule of law concept. While 'rule by law' is the starting point for any version of the rule of law, one cannot neatly stack 'legal formality', an independent judiciary, fundamental rights, etc. one onto the other to build a thicker rule of law. The reason is that some authors add certain elements to their definition which others leave out. Likewise, some authors use the notion of rule *by* law as the antithesis to

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6 Bedner 2010, 50–52.

7 Cf. Møller and Skaaning, who argue that order 'could be termed a "result-oriented" dimension, as the point is whether the law effectively keeps anarchy at bay in the societal relations between individuals and groups', Møller, J. and S. Skaaning (2012) 'Systematizing thin and thick conceptions of the rule of law'. *Justice System Journal*, *33*(2), 141.

8 Cheesman N. (2014) 'Law and order as asymmetrical opposite to the rule of law'. *Hague Journal on the Rule of Law*, *6*(1), 107-112.

9 Rijpkema, P. (2013) The rule of law beyond thick and thin. *Law and Philosophy*, *32*(6), 813.

10 To Krygier, for instance, the central objective of the rule of law is reducing the arbitrary exercise of power (Krygier, M. (2012) 'Rule of law'. In: Rosenfeld, M. and A. Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law*. Oxford: Oxford University Press, 241–2).

11 Krygier, M. (2008) 'The rule of law: legality, teleology, sociology.' In: Palombella, G. and N. Walker (eds) *Re-locating the Rule of Law.* Oxford: Hart Publishers.

rule *of* law. By contrast, for most authors rule *by* law is the first element of the definition of the rule *of* law.[12] In short, there exists no agreed upon sequence of rule of law elements. However, most authors who have written on the subject follow similar lines of reasoning, which allows us to distinguish a common pattern.[13]

One generally made distinction that plays an important role in the thin-thick discussion is the division between procedural and substantive elements of the rule of law. Procedural elements refer to the way in which the authorities exercise power, as well as to the quality of the law. Substantive elements, by contrast, set standards for the contents of the law itself. They are not so much concerned with the effectiveness and procedural fairness of the legal system, but rather with guarantees to ensure that the legal system produces fair outcomes for citizens.

Since certain procedural elements are part of all rule of law definitions, whether thin or thick, we may start by listing those first:

- rule by law (law is used as an instrument of rule);
- rule of law (all state actions are subject to law);
- formal legality (law must be clear and certain in its content, accessible and predictable for the subject, and general in its application).

These three procedural elements are present in even the thinnest rule of law definitions. Most of those championing a thin version add to this that the law should be applied by an independent judge. This requirement is ontologically different from the procedural elements above: the focus is on the quality of a particular *actor* (the judiciary's independence) rather than on a *situation* (general rules are used as a tool of government) or on the *quality* of those rules (formal legality). For this reason it makes sense to subsume an independent judiciary under a third category, i.e., 'mechanisms' for implementation.[14] I will return to this third category below.

The next element in the procedural category takes us far beyond a thin conception:

- consent determines or influences the content of the law and legal actions.

This refers to forms of democracy, or the existence and operation of particular procedures to determine the content of rules. Habermas considers this element as essential for any rule of law system: 'From the standpoint of *legal theory* the modern legal order can draw

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[12] E.g. Peerenboom 2004, 2; Rajah, J. (2012) *Authoritarian Rule of Law: Legislation, Discourse, and Legitimacy in Singapore*. Cambridge, Cambridge University Press, 4. For a discussion of the relation between rule of law and rule by law, see Cheesman, 2014, 103–7.

[13] Møller and Skaaning, 2012, take this point even further, by speaking of asymmetrical relations between rule of law components in their exploration of the relation between rule of law and law and order.

[14] See also Summers, R. S. (1993) 'A formal theory of the rule of law'. *Ratio Juris*, *6*(2), 128–9. Carl Schmitt made a similar distinction: procedural elements are deduced from the so-called 'distributive principle' (*Verteilungsprinzip*), mechanisms from the 'organisation principle' (*Organisationsprinzip*). The first one is connected to the nature of laws (acts of parliament), the second to the division of powers (Schmitt, C. (1954/1928) *Verfassungslehre.* Berlin: Duncker & Humblot, 126–7).

its legitimacy only from the idea of self-determination: citizens should always be able to understand themselves as authors of the law to which they are subjects as addressees.'[15] Yet, Habermas did not *include* democracy in his rule of law concept, but considers the two as mutually constitutive.[16] Carl Schmitt, when he wrote about the rule of law in a democratic state (the Weimar Republic), even juxtaposed the two: democracy represents the 'political' in a constitution, the rule of law (*bürgerliche Rechtsstaat*) serves to contain the tyranny of the majority.[17]

The next category consists of *substantive* rule of law elements, which refer to the contents of the law instead of to its use, its clarity, or its provenance. This category is composed as follows:

- all law and its interpretations are subject to fundamental principles of justice;
- individual rights and liberties are recognised and protected;
- socio-economic rights are guaranteed and promoted;
- group rights are recognised and protected.

These substantive rule of law elements have their origin in natural law theory.[18] They build on the assumption that there are fundamental principles of justice and rights, which are universal and which no human being can be denied.[19] These principles can be articulated in the form of 'the common law' – as in the British tradition – or in a bill of rights, as in the American and the continental European traditions. According to Dworkin, they are implicit in the legal system itself.[20] If we look at the main function that the rule of law is supposed to serve – to protect citizens against the state – principles of justice as well as individual rights and liberties play a central role. In the liberal rule of law tradition individual rights are key to constraining the powers of majoritarian rule in a democratic system.[21] Group rights are a more recent invention, but they are similarly constituted as individual rights and therefore not difficult to fit into this model.

This is different for socio-economic rights. Such rights impose a duty on the state to provide welfare; in this case the state is not something a citizen needs to be protected against, but quite the opposite: the state is a political entity that has the obligation to act for the benefit of its citizens, not to refrain from interfering in their actions. Underlying the promotion of socio-economic rights is the fear that elites will turn the state into a vehicle for serving their private interests, instead of focusing on the 'common good'

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[15] Habermas, J. (1997) *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.* John Wiley & Sons, 449.

[16] See for instance Habermas, J. (1995) 'On the internal relation between the rule of law and democracy', *European Journal of Philosophy*, 12-20.

[17] Schmitt, 1954/1928, 201. This distinction is often made in Germany and other continental countries where it is common to refer to the '*demokratische Rechtsstaat*' (democratic state under the rule of law).

[18] Tamanaha, 2004, 107.

[19] See on this point Palombella, G. (2010) 'The rule of law as institutional ideal', *Comparative Sociology*, 9, 9–39.

[20] Dworkin, R. (1978) *Taking Rights Seriously.* London: Duckworth.

[21] See e.g., Tamanaha's discussion of the liberal tradition (2004, 38) and the making of the US Constitution (2004, 54–5).

or the well-being of the less privileged. By formulating entitlements to proper living conditions, social-economic rights offer a basis for redistribution of goods and limit the sanctification of private property rights associated with a libertarian or (neo-)liberal approach.

The first and second substantive elements – all exercise of law is subject to basic principles of morality and individual rights and liberties are guaranteed – are included in most rule of law definitions. Socio-economic rights do not really 'fit', and indeed are seldom explicitly referred to. Some theorists, starting with Dicey, have even argued that the welfare state is fundamentally incompatible with the rule of law. Continuing this line of thought, Hayek rejected any form of coercive redistribution of goods and the related attribution of legislative powers to administrative agencies because this would undermine the rule of law's core of procedural elements.[22] Yet, because socio-economic rights fall under the notion of 'human rights norms' they are at least *implicitly* included in many rule of law definitions, including the one from the UN quoted above. The same applies to group rights: in as far as these can be subsumed under 'human rights standards' they are automatically part of the many rule of law definitions that refer to such standards.

As a preliminary conclusion we may say that the watershed between thin and thick versions of the rule of law depends on the inclusion of one or two elements. The first is the procedural element of democracy, the second the substantive one of human rights. Although there seems to be a correspondence between 'thin = procedural elements' and 'thick = all procedural elements + substantive elements', this distinction does not hold: many rule of law definitions do include human rights, but they exclude the procedural element of democracy.[23]

The final category of rule of law elements concerns mechanisms of enforcement. As I already mentioned, these mechanisms are sometimes listed as procedural elements, but they deserve to be treated separately. The importance of this 'institutional side' of the rule of law has been emphasised by Ugo Mattei in his proposal to reconfigure legal families for the purpose of comparison. Mattei introduces the distinction between the 'rule of traditional law, the 'rule of political law' and the 'rule of professional law'. Central to the distinction between the latter two is the development of the institutional aspect of the legal system, with an independent judiciary at the centre of the rule of professional law.[24]

The elements in this category can be summarised as follows:

- there exists an independent judiciary charged with the administration of justice;
- there are other, specialised institutions to protect citizens' rights.

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[22] Hayek, 1976/1944, 59–60. See also Tamanaha, 2004, 63.

[23] Differently Tamanaha, 2004, 102.

[24] Mattei, Ugo (1997) 'Three patterns of law: taxonomy and change in the world's legal systems', *The American Journal of Comparative Law* 45.1, 30–31. Mattei adds other requirements for legal autonomy, such as availability of legal literature and adequate distribution of judicial opinions. What this indicates is how each element of the rule of law brings along a whole set of prerequisites and associated problems which impinge on the functioning of that particular element of the rule of law. This is not only true of an independent judiciary, but also applies to other elements. See also Bedner, 2010.

The requirement of an independent judiciary is included in all rule of law definitions in the western liberal tradition. This excludes from the rule of law list those states whose organisation is not based on the *trias politica,* such as China and Vietnam where the judiciary is constitutionally subject to the control of the communist party.[25] The same goes for an illiberal democracy such as Singapore, where the rule of law has been emptied of all substantive content, with 'the executive appropriating judicial functions and preventing the courts from conducting judicial review'.[26] On the other hand, the judiciaries in these countries in practice often act independently to a certain level, while in other countries that do provide the formal guarantees for an independent judiciary practical problems may inhibit the judiciary's ability to administer justice in an independent manner.[27]

The second element of special institutions is relatively new and a consequence of the increasing complexity of governance. In today's world citizens confront all kinds of authorities of a sometimes highly specialised nature and a generalist judiciary may not be able to provide the degree of protection they need against such agencies. Specialisation within the judiciary may help, but the formalised proceedings of a court are not always the most adequate answer. The result has been a rapid proliferation of tribunals, ombudsmen, human rights commissions, etc. which add to the function of an independent judiciary. Some of these institutions may also specifically address relations between citizens, such as anti-discrimination tribunals. Many of them, for example national human rights institutions, have been actively promoted by the UN in the framework of 'rule of law development' and can therefore now be found all over the world.[28]

While an independent judiciary is often mentioned explicitly in rule of law definitions, these other 'guardian institutions' can be read into the broad definitions as the UN-one reproduced above. This definition speaks of 'independent adjudication', but it does not say whether it is the judiciary that should be charged with this task.

An independent judiciary finds itself on a par with the three procedural elements found in most thin definitions. Other 'guardian institutions' are characteristic for those thick definitions which do not mention explicitly which institution should ensure 'independent adjudication'. They are typically included in the development-oriented definitions guiding international legal co-operation programmes. Before I proceed with discussing the purpose of thick versions of the rule of law I will first graphically represent the model discussed so far:

Let us now return to our initial question: how can we explain the continuous debate about 'thick' and 'thin' definitions of the rule of law? An obvious reason for some states to support a thin version is that the rule of law is generally considered as something

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[25] Li, L. (2016) 'The Chinese Communist Party and People's Courts: judicial dependence in China', *The American Journal of Comparative Law,* (64)1; Nguyen, H. T. (2016) 'Contesting constitutionalism in Vietnam: The justifications and proposed models of judicial review in the 2013 constitutional amendment process'. In: Bünte, M. and B. Dressel (eds) *Politics and constitutions in Southeast Asia*, Routledge, 271–90.

[26] Rajah, 2012, 281.

[27] See for instance Gloppen, S. (2003) 'The accountability function of the courts in Tanzania and Zambia', *Democratization* 10.4, 112–36.

[28] Cardenas, S. (2003). Emerging global actors: The United Nations and national human rights institutions. *Global Governance*, *9*(1), 23–42.

Table 2.1 Elements of the thin and thick norms of the rule of law

	Procedural	*Substantive*	*Enforcement mechanisms*
Thin ↓ **Thick**	rule by law	fundamental principles of justice	independent judiciary
	rule of law	individual rights and liberties	specialised institutions
	formal legality	social and economic rights	
	democracy	group rights	

The purpose of thick definitions

Source: Author's table.

positive and that it is easier to qualify as a state under the rule of law if this rule of law is less demanding – I have already mentioned the examples of communist states and illiberal democracies. Conversely, social activists and critics of authoritarian states usually prefer a thick definition of the rule of law because this supports their critique on anti-human rights policies.[29] The answer thus lies in the different ideals implied in a thin and a thick version. Yet, this does not explain why scholars are also divided on the topic. One explanation is that to scholars the rule of law is not only an ideal, but also an analytical concept. The preference for a thin or a thick definition can be partly reduced to the choice scholars make between discussing the rule of law in terms of an ideal or using the rule of law as an analytical concept.[30] For analytical purposes the rule of law concept needs to be sufficiently circumscribed to denote a phenomenon that can be distinguished from other phenomena, even if the latter bear a close relation to it. This makes a thin version of the rule of law appealing to scholars who emphasise its analytical use.

Looking at the debates, we may distinguish three approaches which result in a preference for a 'thin' rule of law: one legal-historical, one legal-philosophical, and one pragmatic. To start with the first, the rule of law has traditionally been a concept of legal scholars, many of whom are concerned in the first place with the quality of the legal system. This explains why thin definitions focus on procedural elements, but why most legal scholars do not consider democracy as a part of the rule of law. Democracy does not primarily belong to the domain of legal scholarship, but to political science. It concerns the political processes producing legal rules, not the quality of these rules as a system. The requirement that all government action is subject to law is key to political philosophers, but the demand of legal formality – that law must be clear and certain in its content, accessible and predictable for the subject, and general in its application – is typically a jurists' concern.

Nonetheless, the most powerful argument that formal legality is at the heart of the rule of law concept has been made by the historian E. P. Thompson. According to Thompson, formal legality is something inherently positive. This conclusion comes as something of a

[29] Peerenboom 2004, 1.
[30] Ibid.

surprise after 257 pages in the Marxist tradition of exposing law as an instrument of class exploitation. Thompson's *Whigs and Hunters* relates the story of the enclosure of the commons in the forests of Windsor and Hampshire in the eighteenth century, when England's oligarchic elite deployed the law as a tool for dispossessing the local population of land and forest products. The Black Act of 1723 threatened with the death penalty almost all acts of resistance against this dispossession. Those who had to obey the new rules had had no say in their making, nor could they exert any influence on how they were applied.

The book is thus certainly not about rights and liberties, but focuses almost entirely on the dark side of law. Yet, in the end Thompson introduces the notion of rule of law as an 'unqualified human good' – not in terms of rights, but in terms of a certain quality of the legal system. His use of the term rule of law is analytical, and concerns the constraints inherent in the use of law as a tool of oppression. In his own words: 'On the one hand, it is true that the law did mediate existent class relations to the advantage of the rulers [. . .] On the other hand, the law mediated these class relations through legal forms, which imposed, repeatedly, inhibitions upon the actions of the rulers.'[31] This, to Thompson, is the core of the rule of law.

Thompson added that the jurists who make up a legal system *must* take the law seriously. Law and legal studies are imbued with ideas about legal certainty and 'fairness', or formal justice. Paraphrasing Thompson, studying law for many years makes no sense if this knowledge is a mere 'masquerade' of power. To give effect to these qualities of the law also requires an independent judiciary. Consequently, even if the law is tilted against the lower classes, women, ethnic minorities, etc., jurists within the limitations of the system and their own knowledge will try to further formal legality. If they do not, this will have two consequences. First, it will undermine the power of law to legitimise state action. According to Thompson, law is in the first place an efficient way of exercising power, but no longer so if the public perceives its administration as 'unfair'. Second, the absence of this very thin version of the rule of law will eliminate the legitimacy of the legal profession. Why would you bother to study law for many years if it is nothing but a sham that can be bent at will by those in power? Taking law seriously in this manner inevitably leads to some protection of citizens against the state, or more precisely, against the executive. From the perspective of citizens, therefore, in their encounters with the law at least they are not treated arbitrarily.[32]

The second route to a thin version comes from analytical legal philosophy. Probably the most prominent contemporary protagonist of a thin version on an analytical philosophical basis is Joseph Raz. In his essay 'The Rule of Law and Its Virtue' he argues that the rule of law it 'is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man'. According to Raz:

> The rule of law means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it. But in political and legal theory it has come to be read in a narrower sense, that the government shall be ruled by the law and subject to it.[33]

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[31] Thompson, 1976, 264.

[32] Cf. Krygier, 2012, 239–40.

[33] Raz, J. (2009/1979) 'The rule of law and its virtue'. In: Raz, J. *The Authority of Law: Essays on Law and Morality*, Oxford: Oxford University Press, 211.

Raz elaborates this concept in the form of a number of principles which include all the procedural elements minus democracy but plus the independence of the judiciary.[34] He defends this interpretation as that 'it presents a coherent view of one important virtue which legal systems should possess.' Although Raz refers to the rule of law as an ideal, it is an *analytical* ideal: it indicates a specific quality of the legal system that can be described independently. This also shows in Raz's main objection against including substantive elements: 'if the rule of law is the rule of the good law, then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function'.[35]

The third, 'pragmatic' approach is defended by Brian Tamanaha. Tamanaha not only argues in favour of a thin rule of law conception for reasons of analytical rigour but also because there is no consensus in modern societies about a shared morality – including human rights – and, finally, because for practical reasons he thinks that a thin version of the rule of law has advantages when it is used in development co-operation. On the first point Tamanaha is in agreement with Thompson and Raz, and on the second with Raz, but he makes this point more elaborately: morality and human rights are contested; natural law has fallen from its pedestal, so there is no basis for a shared morality or a shared conception of human rights. Worse, giving human rights such a prominent place goes against democracy and leads to the judicialisation of what should be a political debate.[36]

Tamanaha has elaborated his third reason for using a thin conception in the context of legal development co-operation. The more encompassing the rule of law, he argues, the larger the chance that its promotion will stimulate legal pluralism and create a mismatch between expectations of what the state can achieve and the actual power it wields.[37] One might add that a thin definition helps to provide guidance to rule of law programmes, which have to compete with development programmes pursuing other goals. The broader the rule of law is defined, the less clear it becomes where the focus for intervention should lie. Another consequence of promoting a thicker version of the rule of law is that it influences the way in which we look at countries that may not subscribe to a liberal worldview, but that do pay attention to procedural rule of law elements.[38] The danger is that one loses sight of their achievements in this realm.

There is no denying that a thin rule of law concept has analytical advantages. Nonetheless, most scholars writing on the rule of law do *not* promote a thin version. Raz seems aware that in the end the meaning of a concept depends on how it is used in practice. He claims that it is not only 'good reasons' causing this preference, but also that 'it is not original, that I am following in the footsteps of Hayek and of many others who

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[34] Note that Raz does refer the 'principles of natural justice', which seems to indicate the recognition of a substantive element, however, Raz interprets these merely in a procedural manner (e.g., the requirement of an open and fair hearing and the absence of bias in applying the rule). See Raz, 2009/1979, 217.

[35] Ibid. 211. For a critique on this point see e.g., Krygier, 2012, 237–8.

[36] Tamanaha, 2004, 80-81, 103–4. Similarly, Peerenboom, 2004, 9.

[37] Tamanaha, B. Z. (2011) 'The rule of law and legal pluralism in development', *Hague Journal on the Rule of Law*, *3*(1), 1–17.

[38] Cf. Peerenboom, 2004, 5–6.

understood "the rule of law" in similar ways'.[39] Raz unfortunately does not provide a reference to 'the many others' – and for truly good reasons this time, for it seems to me that there are not that many. Worse is that he misreads Hayek, who did include individual rights and liberties in his rule of law concept.[40] Tamanaha makes an equally unsubstantiated claim, when he says that 'formal legality is the dominant understanding of the rule of law among legal theorists'. Historically speaking, as from the late eighteenth century thick rule of law conceptions have been dominant in legal theory, in the sense that they incorporate individual rights and liberties. So, what then were the reasons for these legal theorists to prefer a thick version over a thin one?

Upon a superficial reading, Dicey, the first British author to use the term 'rule of law' in modern times and hugely influential indeed, seems *not* to include individual rights and liberties in his definition of the rule of law in his *Introduction to the Study of the Law of the Constitution* of 1885. Nonetheless, after Part I ('The Sovereignty of Parliament'), Dicey moves to Part II ('The Rule of Law') which is little more than an elaborate discussion of rights and liberties. In Dicey's own words: 'This supremacy of the law, or the security given under the English constitution to the rights of individuals looked at from various points of view, forms the subject of this part of this treatise'.[41] To Dicey, the rule of law is *all* about individual rights. His discussion simply presupposes that they are there. In the German tradition a formal conception of the rule of law may have been dominant during the second half of the nineteenth century, but it certainly was not during that century's first half or during any period in the twentieth century. All major authors writing on the *Rechtsstaat* during these two periods agreed that individual rights and liberties were central to it, in addition to the procedural thin rule of law elements and the independence of the judiciary.[42] In France the concept of '*état de droit*' never played such a prominent role in legal and political debates as it did in Germany, but Duguit, Hauriou and Carré de Malberg who championed the notion during the early twentieth century, all supported a substantive version.[43] These scholars, and most scholars after them, have promoted a rule of law concept that offers complete protection against tyranny – whether the tyranny of a dictator or of a democrati-

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[39] Raz, 2009, 211.

[40] As Hayek wrote:

> Whether, as in some countries, the main application of the Rule of Law is laid down in a Bill of Rights or a Constitutional Code, or whether the principle is merely a firmly established tradition, matters comparatively little. But it will readily be seen that whatever form it takes, any such recognised limitations of the powers of legislation imply the inalienable right of the individual, inviolable rights of man

Hayek, F. A. (1976/1944) *The Road to Serfdom*, London, and Henley: Routledge & Kegan Paul, 63.

[41] Dicey, A. V. (1889) *Introduction to the Study of the Law of the Constitution*, London and New York: MacMillan and Co, 172.

[42] See Pierot, 2011, 732–3. Some authors even deny that a formal conception has *ever* been dominant; for more information on this debate see the Wikipedia page about *Rechtsstaatbegriff* (https://de.wikipedia.org/wiki/Rechtsstaatsbegriff#Forschungskontroverse:_Gab_es_eine_Etappe_der_Formalisierung_des_Rechtsstaatskonzeptes.3F, accessed 27-9-2017). This goes against Brian Tamanaha's assertion that 'From the mid-nineteenth century, up through the mid-twentieth century, it [the *rechtsstaat*] came to be understood more in terms of rule *by* law.' (2004, 109).

[43] Heuschling, 2010, 544.

cally elected majority. For the latter reason, they do *not* include democracy as an element. This line of thinking has been further reinforced after the Second World War, when natural law made a comeback in the form of the Universal Declaration of Human Rights.

Next to this legal-historical pedigree of a thick rule of law concept, an original and more recent contribution to the support for a thick version of the rule of laws comes from legal sociologist Philip Selznick. According to Selznick, there is a 'larger promise of the rule of law' than just constraining the state. This promise consists of moral values implicit in the rule of law concept that are appealing to citizens, such as 'dignity, integrity, and moral equality'. They convey a positive sense on the concept, stimulating citizens to hold the state accountable and reinforcing the state's own willingness to obey such values.[44] Although these values are implicit in a rule of law that includes individual rights and liberties, they fit even better with socio-economic rights and provide a reason for including these as well. Selznick's approach is not merely normative, but also sociological; his focus is on the meaning of the rule of law for citizens, not for legal philosophers.

The issue of reducing the rule of law to a set of institutions instead of emphasising its inherent values has gained prominence with the rise of rule of law indexes.[45] In her study about rule of law in Singapore Jothie Rajah gives the telling example of Lee Kuan Yew, who rebuked the critique of the International Bar Association (IBA) on the condition of the rule of law in Singapore by pointing at Singapore's high rankings in several rule of law indexes.[46] Apparently the makers of these indexes are more concerned about legal certainty in commercial law than about the civil rights the IBA promotes.

A third, and very practical reason why even thicker conceptions of the rule of law that also include democracy and socio-economic rights have become more popular during the past decades is that from a socio-liberal perspective they offer a shorthand for an ideal state. The UN-definition cited above is a good example; but in 1959 the International Commission of Jurists went even further in its so-called Delhi Declaration:

> [. . .] the Rule of Law is a dynamic concept for the expansion and fulfilment of which jurists are primarily responsible and which should be employed not only to safeguard and advance the civil and political rights of the individual in a free society, but also to establish social, economic, educational and cultural conditions under which his legitimate aspirations and dignity may be realized.[47]

Following Raz and Tamanaha, one may wonder whether it is sensible to bring all forms of social development under the banner of the rule of law. The danger is obviously that the primary function of the rule of law – protection of citizens against the state – loses attention. A similar point has been made about economists who in the 1990s started to hijack

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[44] Selznick, P. (1999) 'Legal cultures and the rule of law', In Krygier, M., and Czarnota, A. W. (eds) *The Rule of Law after Communism: Problems and Prospects in East-Central Europe* (Vol. 5). Dartmouth Publishing Company. Cited and discussed in Krygier 2012, 244.

[45] See for a concise critique Ginsburg, T. (2011) 'Pitfalls of measuring the rule of law', *Hague Journal on the Rule of Law*, *3*(2), 269–80. More generally about the problems of measuring: Merry, S. E., Davis, K. E., and Kingsbury, B. (eds) (2015) *The Quiet Power of Indicators: Measuring Governance, Corruption, and Rule of Law*. Cambridge: Cambridge University Press.

[46] Rajah, 2012, 1–3.

[47] 'The Declaration of Delhi', *Journal of the International Commission of Jurists*, 2(1), 7.

the rule of law concept for promoting economic development, neglecting its primary legal-political function.[48] A cynical explanation for the popularity of such thick rule of law versions is similar to the one that explains the transition from using 'government' to 'governance': it is a way to hide the political action in which donor agencies are involved, as they try to impose their neo-liberal recipes for development on recipient countries.[49]

On the other hand, the same mechanism can be judged more positively. Thick versions may help change the political discourse in a particular country. Brought under the rule of law politically controversial issues may be discussed. Peerenboom provides the example of China, where the rule of law opened up new space for democracy, separation of powers and human rights issues.[50]

A final reason for promoting thick versions of the rule of law has to do with changes in the nature of the state in combination with its obligation to protect citizens against their fellow citizens (the second function of the rule of law). The rule of law originally emerged in response to the demands of the *bourgeoisie* in seeking protection against the monarch; Carl Schmitt even consistently speaks of the *bürgerliche Rechtsstaat* (*bourgeois* state under the rule of law). Its main objective was to protect the sphere of freedom of citizens, where they could lead their lives without interference from the monarch. With the rise of the welfare state the freedom of citizens became more limited, as the state increasingly interfered in the distribution of wealth and benefits in order to protect the working classes against exploitation by the owners of capital. The inclusion of socio-economic rights provides legitimacy for such interference, without completely rejecting the *bourgeois* version of the rule of law.

In summary, the preference for a thick version can rely on five different grounds: (1) the wish to provide a shorthand for an ideal state, or a substantial part of it; (2) the view that the state's powers can be limited in a meaningful way only if at least individual rights and liberties are included; (3) the historical evolution of the concept; (4) the support for holding the state accountable that comes from conceiving of the rule of law in terms of moral values; and (5) on the ground that the nature of the state has changed from a *bourgeois* to an inclusive one.

CONCLUSION

This chapter is not a plea for a thick version of the rule of law, even if it has outlined strong arguments in favour of such a version. I have argued that the choice for a thick over a thin conception depends on two issues. The first is purpose:[51] one may use the concept rule of law as an analytical tool to assess the quality of a particular legal system; or one may use it for referring to a desirable state of the legal system. The latter is the preferred objective in the world of rule of law development. The second issue is the discourse one wishes to engage with. Misunderstandings about the meaning of the rule of law concept are around the corner and different discursive settings impose different limitations on its use.

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[48] J. Ohnesorge (2003) 'The rule of law, economic development and developmental states in Asia'. In: C. Antons, *Law and Development in East and Southeast Asia*, London: Routledge.

[49] Bedner, 2010, 53.

[50] Peerenboom, 2004, 10.

[51] As already argued by Peerenboom, 2004, 10.

Purpose is related to the functions ascribed to the rule of law, but not uniquely so. If one emphasises the protection of citizens against the state, it makes sense to include individual rights and liberties. If, by contrast, one considers that the rule of law mainly serves to guarantee the quality of the legal system, the focus will be on formal legality and an impartial judiciary. Purpose is also context-dependent: this is evidenced by the preference for thick definitions within the field of international rule of law promotion, where socio-economic disparities have huge implications for the ability of individuals to find protection against the state. Positing the rule of law as a broad, aspirational ideal in this situation may help to overcome resistance against discussing issues of distributive justice that are political in nature. At the same time, as I have argued above, the use of thick versions may obscure what is most important about the rule of law and serve as legitimation for international projects that are solely concerned with security and economic growth.[52]

Such variance and contestation need not be a problem; it actually makes sense to opt for different definitions of the rule of law. It *is* a convenient shorthand for addressing a number of features of a legal system. At the same time, when one gets to the level of formulating a critique on a legal system, or of promoting a specific intervention, one should explain which aspect or element of the rule of law is being addressed. The use of rule of law indexes, based on selected indicators for different aspects of the rule of law, seems to promote such specificity, but in practice this is seldom how they work. Many indexes have built-in biases and suggest a universal logic and importance of different elements in different contexts, often measured by problematic indicators. The problem is precisely that there is no universal logic; at best, there is a path-dependent logic that varies from one context to another.[53] The contexts in which the classical theories of the rule of law and its equivalents emerged were moreover completely different from the ones in countries where rule of law promotion is now being implemented, for instance when it comes to popular attitudes about law and legality.[54]

We have also seen that the distinction between a thick and a thin version of the rule of law may be located at the level of function. I do think that the suggestion by Cheesman, to found the rule of law solely on its function to protect citizens from the state, i.e., to leave out the protection of citizens from their fellow-citizens, has a considerable downside. With the rise of governance by institutions other than the state, this function seems to have gained rather than diminished in importance.

Finally, this chapter has demonstrated that among those who favour a thick version of the rule of law there is considerable consensus regarding what it should include. It consists of all procedural elements (rule by law, rule of law and formal legality), the institutional element of an independent judiciary, and the substantive elements of general principles of justice and individual rights and liberties. Democracy, socio-economic rights, group rights and other institutions charged with implementation are far less common. The conclusion therefore is that the most popular thick version is remarkably similar to what the classical liberal legal theorists presented in the nineteenth century. The promise of a thick version is therefore at least to continue a tradition of almost two centuries.

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[52] Humphreys, 2010, 7.

[53] Cf. Krygier, 2012, 236–7. This point is also emphasised by Tamanaha, 2004, 57–8 and Humphreys, 2012, 220–21.

[54] Krygier, 2012, 247–8. See also Tamanaha, 2004, 138.