Strasbourg, 29 May 2009 **CDL-DEM(2009)006***

Study 512/2009 Eng.Only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

THE RULE OF LAW IN EUROPEAN JURISPRUDENCE

by

Mr Martin LOUGHLIN (Expert, United Kingdom)

**This document has been classified restricted on the date of issue. Unless the Venice Commission decides otherwise, it will be declassified a year after its issue according to the rules set up in Resolution CM/Res(2001)6 on access to Council of Europe documents.*

Modern constitutional development is driven by a dynamic between power and liberty: since the powers of government in the modern era are invariably extensive, it is accepted that, if the key political value of liberty is to be maintained, these powers must be confined, channelled and checked. This is the basic purpose underpinning modern written constitutions. Written constitutions exist to maintain a balance between the grant and institutionalization of governmental power and the preservation of the liberties of the individual.

For this critical function of modern constitutions to be realized, three basic principles must be accepted. The first is that the constitution must be recognized to be the medium through which all governmental power is to be exercised; this is the principle of constitutional supremacy. The second principle is that the law of the constitution must be acknowledged as the fundamental law of the land. And the third is that, with the acceptance of constitutional law as fundamental law, the judiciary – as interpreters of constitutional law – must be accepted as being the institution that acts as the ultimate guardian of the constitution. Although each of these principles may remain contentious in practice, they have become broadly accepted as being central principles of modern constitutionalism. Once these principles of constitutional supremacy, fundamental law and judicial review have been accepted, however, a critical question presents itself: can law now be said not only to guide and constrain but also to rule? This is the animating idea behind the English expression, 'the rule of law'. Is the rule of law an essential fourth principle – or even the overarching meta-principle – of modern constitutionalism? Or is this phrase nothing more than a rhetorical formulation that has no specific practical consequences?

There is every reason to accept that the rule of law must be a mere slogan and that, however laudable its underlying intentions, the goal of achieving a 'government of laws and not of men' is one that is incapable of realization. One reason is that since in the modern era law is universally acknowledged to be a human creation, it cannot be placed above human will: law cannot therefore be placed above a 'government of men'. A second is that laws cannot be said to rule, for the obvious reason that ruling involves action and, in themselves, laws do not act. The rule of law, it would appear, is merely a rhetorical expression, and this conviction is reinforced by virtue of its intrinsic ambiguity: the ubiquity of usage of the expression, 'the rule of law', is matched only by the multiplicity of its meanings.

This intrinsic ambiguity is compounded when one looks at the influence of the expression across a range of legal traditions. The English idea of 'the rule of law' finds its correlative formulations in continental European concepts of *Rechtsstaat*, *l'Etat de droit*, *Stato di diritto*, *Estado de derecho*, and so on. But it is immediately evident that the latter group of concepts has a different orientation to that of the English expression, for the basic reason that the concept of the state has been placed at its core. The continental European formulations thus throw up an additional layer of controversy over the meaning of such phrases. These formulations highlight a specific conundrum: *viz*, although the state, as the source of law, is competent to define its own competences, the concept of 'the state of law' carries with it the meaning that the state acts only by means of law, and should therefore also be conceived as being subject to law. That is, the state that is presumed to be the source of law is also the subject of law.

This general conceptual puzzle is not the only difficulty presented by continental European formulations. Although these formulations raise a common conceptual paradox, expressions such as *Rechtsstaat* and *État de droit* have emerged from different constitutional traditions and they possess different political histories. Consequently, notwithstanding the similarity of the continental European formulations, such expressions cannot be assumed to be direct equivalents.

Even if one sticks with the original German notion, it would appear that the *Rechtsstaat* presents itself as no less an ambiguous expression than that of the rule of law. The doctrine

has been used to justify a wide variety of governing regimes,[1] and it has been estimated that over 140 legal concepts operating in the German legal system have been claimed to form aspects of the *Rechtsstaatprinzip*.[2] Schmitt noted that the term *Rechtsstaat* 'can mean as many different things as the word "law" [*Recht*] itself and, moreover, just as many different things as the organizations connoted by the term "state" [*Staat*]'. There is 'a feudal, an estate-based, a bourgeois, a national, a social, and further a natural-law, a rational-law, and a historical-legal form of *Rechtsstaat*'. Advocates thus 'claim the word for their own purposes, in order to denounce the opponent as the enemy of the *Rechtsstaat*'. As used in constitutional theory, Schmitt argued that the concept of the *Rechtsstaat* boils down to the mere claim that: 'Law should above all be what I and my friends value'.[3]

In such circumstances, precision in public law might demand abandonment of these concepts altogether in favour of a less charged investigation into the nature of the relationship between state, constitution, governing and law. The difficulty is that the very ubiquity of the expression demands that it be examined, especially for the purposes of revealing its underlying values, determining whether any coherent account of the general concept can be assembled, and assessing the force of the claim that it is a foundational element of the discipline. In this paper, the origins of these expressions in English, German and French thought will be examined, and an argument made about the coherence of the directing idea. My argument will be that although a coherent formulation of the general concept can be devised, that this formulation is entirely unworkable in practice. Consequently, the rule of law cannot be conceived as amounting to a foundational concept in public law. So far as it has utility, it must be deployed with precision, especially because, precisely because it is unrealizable, it is susceptible to being used for ideological purposes. The main value of the concept, it would appear, concerns its aspirational quality. But acceptance of this quality must be tempered by recognition that the extent to which the directing idea can - and should - be realized remains an essentially political task.

I. ORIGINS

Our starting assumption will be that, notwithstanding the different governing practices and constitutional traditions, the concept of the 'rule of law' refers to some general common phenomenon or aspiration. And whatever its precise meaning, it should at least be recognized that the concept we are seeking to fix on is a modern phenomenon. That is, the concept presents itself for consideration only with the birth of sovereignty, i.e. with the formation of a sovereign power that is an institutionalized power, and therefore a power that is established and conditioned by law. The concept of the rule of law emerges as a product of the formation of the modern state.

As has already been indicated, however, despite this common source, the way the 'rule of law' presents itself as meta-legal principle various according to the different histories, cultures and practices of European governing regimes. The first task in seeking to understand the concept must therefore be to examine some of these histories. I will do so by focusing on the English, German, and French cases.

---

[1] This even includes the legal ordering of the Third Reich: see, e.g., Ulrich Schellenberg, ‚Die Rechtsstaatskritik: Vom liberalen zum nationalen und nationalsozialistchen Rechtsstaat' in Ernst-Wolfgang Böckenförde (ed.), *Staatsrecht und Staatsrechtslehre im Dritten Reich* (Heidelberg: C.F. Müller, 1985), 71-88; Carl Schmitt, ‚Der Rechtsstaat' [1935] in his *Staat, Großraum, Nomos: Arbeiten aus den Jahren 1916-1969* (Berlin: Duncker & Humblot, 1995), 108-120.

[2] Katharina Sobota, *Das Prinzip Rechtsstaat* (Tübingen: Mohr Siebeck, 1997), 471-526.

[3] Carl Schmitt, *Legality and Legitimacy* [1932] Jeffrey Seitzer trans. (Durham NC: Duke University Press, 2004), 14.

The English concept of the Rule of Law

The concept of the rule of law was introduced into English constitutional discourse only in the latter half of the nineteenth century. First formulated by Hearn,[4] it achieved its classic (though rather imprecise) formulation by Dicey. In his *Law of the Constitution* of 1885, Dicey identified three guiding principles which underpinned the British constitution: the legislative sovereignty of Parliament, the universal rule throughout the constitution of ordinary law, and the role which conventions play in the ordering of the constitution.[5] Liberty, he argued, is preserved by maintaining the balance that is already implicit in these guiding principles.

Although the doctrine of Parliamentary sovereignty seems to be 'an instrument well adapted for the establishment of democratic despotism',[6] Dicey argued that once the way that sovereignty interlocks with the principle of the rule of law is understood, the doctrine can be seen to be conducive to the promotion of liberty. This can be illustrated from the perspective of each concept. Thus, he claimed that 'the sovereignty of Parliament, as contrasted with other forms of sovereign power, favours the supremacy of law', and the reason for this is that 'the commands of Parliament ... can be uttered only through the combined actions of its three constituent parts'.[7] Here, he was indicating that the necessity of achieving an accommodation between monarch, lords and commons establishes a series of internal balances and restraints. Similarly, Dicey contended that the rule of law upholds the principle of Parliamentary sovereignty precisely because the 'rigidity of the law constantly hampers ... the action of the executive, and ... the government can escape only by obtaining from Parliament the discretionary authority which is denied to the Crown by the law of the land'.[8]

Dicey's concept of the rule of law is thus closely tied to the idea that, acting in partnership, Parliament and the courts are the true sources of law within the British constitution. In this interpretation, the rule of law presents itself as an adjunct to the principle of parliamentary sovereignty, and the rule of law thus becomes an expression of the idea of 'the legislative state'.[9]

But Dicey's formulation of the concept is not without its ambiguities. He suggested that the rule of law had three main meanings. First, it meant the 'absolute supremacy ... of regular law as opposed to the influence of arbitrary power'. Secondly, it meant equality before the law, or 'the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts'. Finally, the concept was a formula for expressing the fact that in the English system 'the principles of private law have ... been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants'. That is, 'the constitution

---

[4] W.E. Hearn, *The Government of England: Its Structure and Development* (London: Longmans, 1867), 89-91.

[5] A.V. Dicey, *Introduction to the Study of the Law of the Constitution* (1885) (London: Macmillan, 8th edn., 1915), 34.

[6] A.V. Dicey, *Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century* (London: Macmillan, 1905), 305.

[7] Dicey, above n. 5, 402.

[8] Ibid, 406.

[9] Thus, Dicey's concept of the rule of law can be understood to be very close to Schmitt's concept of 'a parliamentary legislative state' (*ein parlamentarischer Gesetzgebungsstaat*) in which 'the lawmaker, and the legislative process under its guidance, is the final guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality, and the last security and protection against injustice': Schmitt, above n.3, 19. Schmitt argues, however, that although the 'legislative state' could present itself as a *Rechtsstaat*, 'the word *Rechtsstaat* should not be used here': ibid. 14. Schmitt's argument is given added force by Dicey's lament in the last edition of *Law of the Constitution* in 1915 that 'faith in parliamentary government has suffered an extraordinary decline' and that the 'ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline': Dicey, above n.5, xcii, xxxviii. Cf. Schmitt, ibid., 23-24 who argued that when the domestic situation is normal and confidence in the legislative organ remains unshaken then faith in legality is not placed in issue, but that in a democracy the concept of law must, on this understanding, become 'the will of a transient majority of the voting citizenry'. Dicey himself expressed a concern about majoritarianism (what he called 'class legislation') and believed that the balance in the British constitution could be maintained by the British practice of 'democracy tempered by snobbishness': Dicey, above n.6, 57.

is the result of the ordinary law of the land' and that 'the law of the constitution ... [is] not the source but the consequence of the rights of individuals'.[10] The first meaning appeals to the idea of law as a set of general rules of conduct and the second invokes the principle of universality; these can thus be understood as expressions of a general liberal orientation. But the third meaning is culturally specific. Linking the concept to the particularities of English constitutional history, it suggests that the rule of law is best understood to be an expression of the common law tradition.

Dicey thus explicated the rule of law not as a universal aspiration so much as the distinctive achievement of a particular – perhaps unique – constitutional tradition. It was for this reason that, although regarding Dicey's work as the most influential restatement of the rule of law since the eighteenth century, Shklar argued that in Dicey's work the concept was 'both trivialized as the peculiar patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it'.[11] Dicey's formulation of the concept of the rule of law amounted to an 'outburst of Anglo-Saxon parochialism', which tied the concept directly to the achievement of the common law to create an undivided system of law that rejected the distinction between public law and private law.[12]

Dicey's concept was not only tied directly to the particularities of English constitutional history. By claiming that the English constitution is, in effect, a judge-made constitution,[13] he also promoted a highly conservative interpretation of that constitutional history. Dicey's specific argument was that true rights are not to be found in paper constitutions. Rights contained in written constitutions, he argued, are 'something extraneous to and independent of the ordinary course of the law' and, since they owe their status to that constitution, they are capable of being suspended.[14] In the English tradition, by contrast, rights are drawn from the generalization of precedents expressed in the ordinary law of the land. And the great value of such rights is that they 'can hardly be destroyed without a thorough revolution in the institutions and manners of the nation'.[15] In this understanding, the rule of law in the English tradition came for Dicey to represent not so much the rule of the legislative state but the rule of judicature.

Dicey's concept of the rule of law is rich, intricate, and highly ambiguous. One aspect bolsters the doctrine of parliamentary sovereignty and – but for the internal balances in the parliamentary system – would appear to be authoritarian. Although the rigidity of the law acts as a restraint on the exercise of governmental power, this aspect expresses the principle of rule *by* law. A second aspect of Dicey's concept, that which extols the principle of equality before the law, is an expression of classical liberalism, and one which – of itself – does not take us beyond the principle of rule by law. Yet a third aspect draws on the peculiarities of the common law tradition operating within the frame of an ancient rather than modern idea of a constitution; if this be an expression of the rule of law then it expresses the idea of the 'rule of reason'[16] and

---

[10] Dicey, above n.5, 198-99.

[11] J.N. Shklar, 'Political Theory and the Rule of Law' in Allan C. Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology?* (Toronto: Carswell, 1987), 1-16 at 6.

[12] Ibid. 5.

[13] Dicey, above n.5, 192-3: 'There is in the English constitution an absence of those declarations of rights so dear to foreign constitutionalists. Such principles, moreover, as you can discover in the English constitution are, like all maxims established by judicial legislation, mere generalisations drawn either from the decisions or dicta of judges, or from statutes which, being passed to meet specific grievances, bear a close resemblance to judicial decisions, and are in effect judgments pronounced by the High Court of Parliament. …in England, … the constitution itself is based on legal decisions'.

[14] Ibid. 196.

[15] Ibid. 197.

[16] See Aristotle, *The Nicomachean Ethics* [c.334-323 BC] J.A.K. Thomson trans. (Harmondsworth: Penguin, rev.edn. 1976), Bk V.

draws on an ancient belief founded on the necessity of placing trust in the judiciary to act as guardians of the often implicit values of a distinctive constitutional tradition.[17]

The German concept of Rechtsstaat

The analogous German concept of the *Rechtsstaat* had actually emerged earlier than the English expression, and in relation to rather different governmental circumstances. The term came into use during the first half of the nineteenth century. Just as Dicey's elaboration of the rule of law had revealed tensions between liberalism and conservatism in the arrangements of the British constitution, so the *Rechtsstaat* concept appeared in the writing of German jurists as an attempt to reconcile modern claims of liberty with traditional authoritarian governing arrangements.

Initially, the term *Rechtsstaat* was used as 'a descriptive category applicable to all modern states which used general laws to harmonize the sovereign concentration of political power with liberal policy'.[18] This suggests that the term meant nothing more than rule by law. But ambiguities in the usage of the term were evident from the outset, with the reactionary Adam Müller and the liberal Carl Theodor Welcker each using the expression (in 1808 and 1813 respectively) for the purpose of justifying a reconstruction of governmental ordering in the light of modernizing pressures. While diverging in their political objectives, each shared in common the idea that the *Rechtsstaat* was the 'state of reason'.[19] But this general expression only became elevated to the status of a doctrine through the more systematic work undertaken by Robert von Mohl.[20]

Mohl's account of the *Rechtsstaat* contained three main elements. The first involved a rejection of the idea that political order is divinely-ordained; rather, argued Mohl, the foundation of governmental order must be conceived to be the product of the earthly aims of free, equal and rational individuals. Secondly, the aim of a governing order must be directed towards the promotion of the liberty, security and property of the person, though this general aim also encompassed the policing functions that provided a platform of regulation and protection. Thirdly, that the state should be rationally organized, a general principle which incorporated acceptance of the principles of responsible government, judicial independence, parliamentary representation, rule by means of law, and recognition of basic civil liberties.[21] Mohl's account seemed to trace its lineage back to Kant's attempt to reconcile the establishment of order with the maintenance of freedom; this is especially evident given the fact that in Kant's theory law became the medium through which that reconciliation was to be achieved.[22] Within this general frame, the *Rechtsstaat* stood in direct contrast to both the absolutist state and the police state (*Polizeistaat*).

---

[17] See Martin Loughlin, *Sword and Scales: An Examination of the Relationship between Law and Politics* (Oxford: Hart, 2000), ch.5.

[18] Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Chicago: University of Chicago Press, 1957), 253.

[19] Adam Heinrich Müller, *Elemente der Staatskunst* (Berlin: J.D. Sander, 1809), vol.1, 1-35; Carl Theodor Welcker, *Die letzte Gründe von Recht, Staat, und Strafe* (Gießen: Heyer, 1813), 25: discussed in Krieger, ibid. 253-6; Michael Stolleis, *Public Law in Germany, 1800-1914* New York: Berghahn, 2001), 103-6, 131-2.

[20] Robert von Mohl, *Das Staatsrecht des Königsreichs Württemberg* (Tübingen: Laupp, 1829); id., *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* [1832] (Tübingen: Laupp, 3rd edn. 1866): discussed in Sobota, above n.2, 306-319.

[21] See the synthesis of Ernst-Wolfgang Böckenförde, 'The Origin and Development of the Concept of the *Rechtsstaat*' in his *State, Society and Liberty: Studies in Political Theory and Constitutional Law* J.A. Underwood trans (New York: Berg, 1991),at 49-50.

[22] Kant, Metaphysic of Morals, where Kant defines the state as an association of a number of people under law- I Maus, 15]. Stolleis has noted that already in the 1790s Kant and his followers had been designated as 'die Schule der Rechts-Staats-Lehre': Michael Stolleis, 'Rechtsstaat' in Adalbert Erler and Ekkehard Kaufmann (eds), *Handwörterbuch zur deutschen Rechtsgeschichte* (Berlin: Schmidt, 1990), vol.4, 367-375, at 375.

This Kantian explanation of both Mohl's particular argument and the general approach to the concept of the *Rechtstaat* in the early- nineteenth century is, however, neither straightforward nor uncontroversial. One difficulty with it is that, notwithstanding his liberal orientation, Mohl cannot himself be held up to be a diligent disciple of Kant. In place of Kantian 'negative freedom', Mohl promoted the idea of freedom through the state: the law-bound state was not designed to specify precise limits to governmental action but rather to measure such action against the general objective of promoting an individual's complete development.[23] A second complicating factor is that given Kant's rejection of the right of resistance, German state practice was such that adherence to the principle of legality came to be treated by many simply as the price rulers had to pay for the maintenance of authoritarian systems of government.[24] That is, Kantian formulations themselves incorporated significant conservative aspects. But it is also the case that in its early formulations the concept could not be assumed to a liberal formulation; even prior to 1848, there existed other, more conservative expressions of the *Rechtsstaat* concept.[25]

These tensions between authoritarianism and liberalism within early formulations of the concept came to a head in the 1848 revolution. Such tensions became explicit when the *Paulskirche* national assembly sought to establish the protection of basic rights as the foundational constitutional principle.[26] In this construction, the concept of the *Rechtsstaat* was treated as a fundamental principle of liberal constitutionalism. Nevertheless, with the failure of that revolutionary movement, the liberal version was defeated. The concept of the *Rechtsstaat* thus emerged in the post-1848 period as a thoroughly ambiguous compromise between the principle of liberalism and monarchical authoritarianism in German governing regimes. And since it was only during the latter-half of the nineteenth century that the doctrine became thoroughly formalized, these methodological ambiguities remained submerged within the concept itself.

The ambiguities implicitly contained within the concept expressed themselves mainly in the way in which the concept of the state itself was understood. In Bähr's influential exposition, for example, the state was conceived to be an organic association, and its law-bounded character was asserted through the formulation of its evolving functional differentiation into legislative, judicial and administrative activities.[27] With respect to these functions – and especially with

---

[23] In *Polizeiwissenschaft*, above n.20, Mohl defines the goal of the *Rechtsstaat* as 'the arrangement of the common life of a population such that each member is supported and encouraged in the most free and general exercise and use of his complete powers'. Cited in Stolleis, above n.19, 246 (n.194).

[24] Stolleis, ibid. Referring to the rule of law (*die Herrschaft des Gesetzes*) as a legislative state (*Gesetzgebungstaat*), Schmitt, above n.3. at 14, states that the lawmaker 'is the final guardian of all law, ultimate guarantor of the existing order, conclusive source of all legality, and the last security and protection against injustice. Misuse of the legislative power and of the lawmaking process must remain out of consideration in practical terms, because otherwise a differently constituted state form … would become immediately necessary. The pre-existing and presumed congruence and harmony of law and statute, justice and legality, substance and process dominated every detail of the legal thinking of the legislative state. Only through the acceptance of these pairings was it possible to subordinate oneself to the rule of law precisely in the name of freedom, remove the right of resistance from the catalogue of liberty rights, and grant to the state the previously noted unconditional priority.'

[25] See, e.g., the work of Friedrich Julius Stahl, who understood the *Rechtsstaat* as the product of a state comprising the union of a people under a sovereign authority and as an objective expression of that national unity. In Stahl's work the term *Rechtsstaat* defined only the formal means by which the political ends of the state were realized: Friedrich Julius Stahl, *Die Philosophie des Rechts nach geschichtlicher Ansicht* [1833-37] (Tübingen: Mohr, 1878), vol.2, 137. Stahl also maintained that that expression of national unity is best expressed through the monarchy: see Stahl, *Das monarchische Prinzip* (Heidelberg: Mohr, 1845), 34: 'the monarchical principle is the foundation of German public law and of the German science of the state' (‚Das monarchische Prinzip … is das Fundament deutschen Staatsrechts und deutscher Staatsweisheit'.). See further, Sobota, above n.2, 319-337; Christoph Schönberger, 'État de droit et État conservateur : Friedrich Julius Stahl' in Olivier Jouanjan (ed.), *Figures de l'État de droit* (Strasbourg : Presses Universitaires de Strasbourg, 2001), 177-192.

[26] See Krieger, above n.18, 329-340.

[27] Otto Bähr, *Der Rechtsstaat* [1864] (Aalen: Scientia Verlag, 1961): see discussion in Pietro Costa, 'The Rule of Law: A Historical Introduction' in Pietro Costa and Danilo Zolo (eds) *The Rule of Law: History, Theory and Criticism* (Dordrecht: Springer, 2007), 73-149, at 93-95. Bähr's organic argument was founded on the idea of

respect to the extending administrative responsibilities of government[28] – spheres of governmental action could be identified as being constituted by rules and subject to legal controls.

During the latter-half of the nineteenth century, however, this organicist approach, along with more political conceptions of the concept, came to be superseded by the emerging legal positivism expressed in the work of Gerber and Laband.[29] Within the influential jurisprudence of Gerber and Laband, the state was conceived to be a juristic person which embodied sovereignty. Their arguments had radical implications: once accepted, the (Kantian) liberal approach that treated individuals as bearers of rights by virtue of their humanity – and which therefore were able to impose limitations on the authority of the state – had, as a logical necessity, to be rejected. Being created through objective law, rights within the frame of this positivist jurisprudence came to be understood as being entirely conventional concepts. And once this manoeuvre was accepted, the concept of the *Rechtsstaat* itself came to be subsumed under the concept of *Staatsrecht*.

In one sense, this development led to the formulation of the first purely juridical concept of the *Rechtsstaat*. In this juridical understanding, however, law (in the form of rights) cannot be foundational. That is, rights cannot be treated as having any natural or pre-state existence, and nor do they have constitutive status; rights are created purely as a product of legislative action. The concept of the *Rechtsstaat* thus could be conceived solely in aspirational terms. Jhering was one of the first to clearly identify the consequential difficulties concerning the relationship between state and law. How, he asked, 'can the state's power be subordinated to a given entity since there is no power above it?'[30] Jhering's own answer to that question was supplied by the concept of self-limitation (*Selbstbeschränkung*): it was in the state's interest, he argued, to promote its self-limitation through self-binding to legal norms. And it was this self-limitation that Jellinek later sought to resolve in his two-sided theory of the state, in which a formally sovereign entity was obliged, for the purpose of maintaining its authority, to rely on precepts that emerged from a historical tradition and which thus could only be gradually modified.[31]

Owing to the predominance of legal positivism in late-nineteenth century public law thought, the concept of the *Rechtsstaat* emerged in twentieth century German jurisprudence as a purely formal principle. Since there could be no legal limitation on the legislative power, the concept denoted only the formalities of the relations between law, government and individual in which it is claimed that 'the administration may not interfere in the realm of individual liberty either against a law (*contra legem*) or without a legal foundation (*praetor, ultra legem*)'.[32] In the frame of this formal principle, the concept ceased any longer to present itself as a constitutional principle in a strict sense; that is, it loses its connection with foundational aspects of state-building. The idea of 'the rule of law' which is implicit in the concept of the *Rechtsstaat* thus becomes limited to that of 'rule by law'.

Genossenschaft pioneered by Gierke: see, e.g., Otto Gierke, *Political Theories of the Middle Age* F.W. Maitland trans. (Cambridge: Cambridge University Press, 1988) [a section of Gierke's *Das Deutsche Genossenschaftsrecht*]

[28] See, esp., Otto Mayer, *Deutsches Verwaltungsrecht* (Leipzig: Dunker & Humblot, 1895): 'Der Rechtsstaat ist der Staat des wohlgeordneten Verwaltungsrecht' (The Rechtsstaat is the state with well-ordered administrative law), cited in Stolleis, above n.22, 372.

[29] See C.F. von Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig: Tauchnitz,1865); Paul Laband, *Das Staatsrecht des deutschen Reiches* (3 vols. 1876-82; 5th edn. 4 vols. 1911-14); see Olivier Jouanjan, *Une Histoire de la Pensée Juridique en Allemagne (1800-1918)* (Paris: Presses Universitaires de France, 2005), Pt. II, chs 1-2.

[30] Rudolf von Jhering, *The Struggle for Law* [1872] John J. Lalor trans. (Chicago: Callaghan & Co., 1915)

[31] Georg Jellinek, *Allgemeine Staatslehre* (Berlin: Springer, 3rd edn. 1922), 476-484.

[32] Gerhard Anschütz, 'Deutsches Staatsrecht' in Franz von Holtzendorff and Josef Kohler (eds), *Enzyklopädie der Rechtswissenschaft* (Munich: Duncker & Humblot, 1904) vol.2, 593: cited in Böckenförde, above n.21, 58.

After the debasement of the concept in the National Socialist regime,[33] the positivist conception of the *Rechtsstaat* became, after 1945, the subject of renewed and often contentious discussion. The context was the framing of a new constitution for the Federal Republic of Germany and the establishment of a Federal Constitutional Court (*Bundesverfassungsgericht*) as the guardian of that constitution. Since the court maintained that the constitution embodied a regime of basic values (*Wertgrundlage*) of social life,[34] a tension was established between formal legal liberal protections (epitomized by the positivist *Rechtsstaat*) and the social values implicit in the system of constitutional democracy (epitomized by the post-war concept of the *Sozialstaat*).[35] This tension manifested itself juristically between laws and measures; that is, between the concept of law as a set of general rules and law as a series of measures (*Maßnahmegesetze*) that regulate social and economic life.[36] And this tension replicates itself more generally at the level of constitutional discourse in the distinction between the formal and material concepts of the *Rechtsstaat*.[37] In such circumstances – in which the concept is given various (often highly politicized) interpretations by certain jurists and altogether jettisoned by others - the concept itself is unable to carry much authority.

The French concept of l'Etat de droit

The French concept of *l'Etat de droit* has an altogether different history. Whereas the English 'rule of law' idea was the consequence of an attempt to give a particular and highly formalized interpretation of the history of the common law engagement with modern ideas of constitutionalism, and the German concept of *Rechtsstaat* evolved from the tensions between authoritarianism and liberalism in governmental practice, the French concept was explicitly introduced by French jurists as a normative principle designed to highlight certain perceived deficiencies in post-revolutionary governing arrangements.

By the late-nineteenth century, French public law had come to revolve around the concept of national sovereignty, with the legislative power, being conceived as an exercise of the general will, assuming a status of pre-eminence.[38] Only with the acceptance of this key principle did French jurists then begin to ask whether – and, if so, how - the exercise of all powers of the state, including the legislative power, could be made subject to law.

The jurist who did most to promote the case was Carré de Malberg. Influenced by the work of the German jurists, Gerber and Laband, Carré de Malberg established as a general principle that the state was an entity that could act only through law. And, influenced in particular by Jellinek, he argued further that, as a legal entity, the state could, through the concept of self-limitation, bind itself to its own norms.[39]

For the purpose of developing this thesis, Carré de Malberg drew a distinction between the concepts of *l'Etat légal* and *l'Etat de droit*. The former concept was directed primarily to the

---

[33] See Böckenförde (ed.), above n.1; Michael Stolleis, ‚Que signifiait la querelle autour de l'État de droit sous le Troisième Reich?' in Jouanjan (ed.), above n.25, 373-383.

[34] Luth

[35] On the concept of the *Sozialstaat* and its tensions with the *Rechtsstaat* see, e.g., Mehdi Tohidipur (ed.), *Der bürgerliche Rechtsstaat* (Frankfurt am Main: Suhrkamp, 1978); Ernst Forsthoff, 'Begriff und Wesen des sozialen Rechtsstaat' in Forsthoff, *Rechtstaat im Wandel: Verfassungsrechtliche Abhandlungen 1950-1964* (Stuttgart: Kohlhammer, 1964), 27-56.

[36] Ernst Forsthoff, 'Über Maßnahme-Gesetze' in Forsthoff, ibid. 78-98; Konrad Huber, *Rechtsgesetz und Maßnahmegesetz: Eine Studie zum rechtsstaatlichen Gesetzesbegriff* (Berlin: Duncker & Humblot, 1964).

[37] Konrad Hesse, 'Der Rechtsstaat im Verfassungssystem des Grundgesetzes' in Tohidipur (ed.), above n.35, 290-314.

[38] See Marie-Joëlle Redor, *De l'Etat légal á Etat de droit. L'évolution des conceptions de la doctrine publiciste française 1879-1914* (Paris: Economica, 1992), 52-59; Guillaume Bacot, *Carré de Malberg et L'Origine de la Distinction entre Souveraineté du Peuple et Souveraineté Nationale* (Paris: CNRS Éditions, 1985)

[39] Raymond Carré de Malberg, *Contribution à la Théorie générale de l'Etat* [1920] (Paris: Dalloz, 2004), vol.1, 228-243.

administration and served the object of ensuring that the administration acted according to law. That is, the administration ought to remain subordinate to the legislative authority, and must locate the source and limitations of its jurisdictional authority in statutory authorization. But *l'Etat légal*, the equivalent of Schmitt's concept of the legislative state or of what has been called 'rule by law', was a concept fully compatible with the doctrine of national sovereignty as it had been formulated in the Third Republic. And it was this rather thin account of the law-state relationship that the concept of *l'Etat de droit* sought to supplant. The latter concept grew from the conviction that law exists to protect individual rights and that such rights were only partially protected by the idea of 'rule by law'. The concept of *l'Etat de droit* sought to supply authoritative norms that not only determined the relationship between administration and the individual, but which also conditioned the exercise of the legislative power.[40]

Within the discussion of the concept of *l'Etat de droit* amongst French jurists, it is possible to discern a tension similar to that which evolved in the German discourse between positivist and anti-positivist conceptions. The French debate came to focus in particular on the status of the 1789 Declaration of the Rights of Man and the Citizen within the constitutional framework of the Third Republic. Since the 1875 constitution had not referred to the 1789 Declaration, questions were raised about its legal status. Positivists such as Esmein and Carré de Malberg maintained that, without specific appendage to the constitution, the Declaration (being a statement of general principles only) could have no legal effect.

But the positivists were opposed by more sociologically orientated jurists, such as Duguit and Hauriou, who claimed that the principles of the Declaration, being the foundation on which the republic was established, have 'supra-constitutional' status. The Declaration, claimed Hauriou, has not only a legal but also a special constitutional status. Although the claims of the Declaration, being only in the preamble, are not incorporated in the text of the constitution, he contended that 'this means that they contain constitutional principles that rank higher in order than the written constitution'.[41]

As a matter of jurisprudence, this debate would appear to raise questions of primary importance: is law to be understood only as a set of formally promulgated rules, or does it embrace the immanent values of a living constitutional tradition? In the French context, however, this debate had an air of unreality about it: lacking an institutional frame through which these juristic questions could be addressed (there was, for example, no constitutional court established in the French system with authority to address these matters), it was difficult to see what impact this dispute might have in practice. As a consequence, it might be said that the concept of *l'Etat de droit* has, in the French system, been addressed primarily in the realm of legal thought rather than in legal practice.

Common origins

One common element in the analysis of origins of the concept in the regimes of Britain, Germany and France is that debates over the idea of 'the rule of law' all tend to reach their highpoint in the period of the late-nineteenth/early twentieth centuries. And although both the constitutional context and the particular formulation of the concept varies, these debates over the 'rule of law' during this period were fuelled almost entirely by liberal jurists. These jurists, it would appear, were expressing particular concerns about the impact for the idea of law of the emergence of an extensive governmental system, charged with the tasks of regulating social life and promoting the welfare of the citizen through administrative measures.

Although the rhetoric of the rule of law lived on into the twentieth century beyond that critical period, its message has become more disparate. For some jurists, its claims are entirely

---

[40] Carré de Malberg, ibid. vol.1, 488-494; Redor, above n.38, esp. 294-316.

[41] Maurice Hauriou, *Précis de Droit Constitutionnel* (Paris: Sirey, 1923), 245 : cited in Alain Laquièze, '*État de droit* and National Sovereignty in France' in Costa and Zolo (eds), above n.27, 261-291, at 268.

illusory, and serve only as a justification for asserting the supremacy of the judge over governmental affairs.[42] Others continue to promote the claims of the rule of law, though largely as a term that expresses the most basic legal values that modern government must respect.[43] These claims should now be assessed.

Before considering the contemporary significance of the concept of the rule of law, it should first be asked whether – regardless of the particular political circumstances in which it comes to be invoked - the rule of law can be conceived as forming a coherent and foundational concept.

II. THE RULE OF LAW AS LIBERAL ASPIRATION

In a profound essay, Michael Oakeshott explains how the rule of law might be understood as a coherent and foundational concept.[44] For this to be realized, however, he notes that two basic conditions must be accepted. The first is that collective human association (the state) is to be conceived to be purely as a type of moral association, rather than as a collective association seeking to achieve some set of purposes (the realization of some desired goal). The second is that the nature of this type of association can be understood only if one conceives this association as being analogous to a game, in which we embrace an internal point of view: ie, just as games are activities constituted by a set of rules, so too must the state be grasped as an entirely rule-based association. In outlining the pre-conditions, Oakeshott in effect presents an account of the state as a nomocracy. And once specified as such, it seems evident that these rigorous conditions of nomocratic order are incapable of realization in practice. After all, even Oakeshott himself recognizes that the modern European state is itself built on 'an unresolved tension between … two irreconcilable dispositions', one of which is a type of moral association but the other is what in his rule of law essay he calls transactional association.[45] The practical question, then, is whether Oakeshott's ideal concept of the rule of law can serve as some sort of a measure against which the laws and practices of modern states may be evaluated.

In order to address this question, it is necessary to differentiate more precisely between two aspects of the concept which to this point have been mentioned only in passing. This is the distinction between 'rule by *law*' and '*rule* of law'. Although each aspect is implicit in the concept of the rule of law, they are not often clearly distinguished. My argument will be that, especially in the classical liberal treatment of the concept, these two aspects deal with different questions and they pull in different directions. The former focuses on the qualities inherent in the concept of law, while the latter focuses on a more explicitly political issue: *viz*, the desirability of establishing a fully institutionalized governing order in which everyone has an incentive to act in accordance with the rules.

The differences between these two aspects of the concept are particularly marked in classical liberal approaches to the rule of law. If the practical relevance of the concept of the rule of law is to be fully grasped, each of these aspects should be considered separately, and then the underlying liberal assumptions reassessed.

---

[42] Ernst Forsthoff, 'Rechtsstaat oder Richterstaat?' in Forsthoff, *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen 1954-1973* (Munich: Beck 1976), 243-256; J.A.G. Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1-19; Michel Troper, 'Le concept d'État de droit' (1992) 15 *Droits* 51-63.

[43] Jeffrey Jowell, 'The Rule of Law Today' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford: Oxford University Press, 6th edn 2007), 3-22; David Dyzenhaus (ed.), *Recrafting the Rule of Law* (Oxford: Hart, 1999).

[44] Michael Oakeshott, "The Rule of Law" in his *On History and Other Essays* (Oxford: Blackwell, 1983), 119-64.

[45] Michael Oakeshott, 'On the Character of a Modern European State' in his *On Human Conduct* (Oxford: Clarendon Press, 1975), 185-326, at 201.

Rule by law

At its most basic, the rule of law may be taken to mean the rule of *the* law. In this understanding, law is recognized to be the essential means through which the business of governing is conducted. This is the core meaning of the expression, 'government according to law': government must be able to specify a law that authorizes each and every one of its actions.[46] This formulation states an important principle, *viz*, that government is a creature of the constitution and possesses only those powers recognized in that constitution. But this is a principle of limited significance. It suggests that the *Rechtsstaat* is merely a legislative state. As Schmitt explains, if everything that the legislative authority dictates is law, then, by this logic, 'every absolute monarchy is also a *Rechtsstaat*, for in it the "law" rules, specifically the will of the king'.[47]

Schmitt here recognizes that 'if the "rule of law" should retain its connection with the concept of the *Rechtsstaat*, it is necessary to incorporate certain *qualities* into the concept of law, through which it is possible to distinguish a *legal norm* from a *command* based on mere will or a *measure*.'[48] The rule of law, he is arguing, must be distinguishable from the rule of persons, 'whether it is an individual person, an assembly, or body whose *will* takes the place of a general norm that is equal for all and determined in advance'.[49] The rule of law implies, in short, that law takes the form of a norm of general character, that law is not essentially *voluntas* but *ratio*.

Only when these intrinsic qualities of law are recognized might it be said that government should not only rule by means of law (i.e. the edicts of the legislative authority) but that government must also be subject to law (i.e. the general norms of conduct implicit in the idea of law). The question then arises: what are these intrinsic qualities that meet the standards implied by this principle of the rule of law?

The answers jurists have offered to this question exhibit a considerable degree of consensus. The classic formulation has been provided by Fuller, who specifies eight formal qualities that are intrinsic to the idea of law. These are that laws should (1) take the form of general rules, which should (2) be publicly promulgated and (3) be of prospective effect. The rules should also (4) be clear and understandable, (5) exhibit a degree of consistency or freedom from contradiction, (6) maintain a degree of constancy over time and (7) should not demand action which it is impossible to perform. Fuller argues finally that (8) there should be a significant degree of congruence between the rules as promulgated and their enforcement by officials.[50]

With minor variation, these qualities are also highlighted by other jurists.[51] Although Fuller claims that these are 'moral' qualities, this claim should be understood in Oakeshott's terms as association understood in the light of its rule structure. Treated as moral qualities, they must be conceived in the way we understand games as being constituted by their rules. It might be noted, however, that since Fuller regards law as 'the enterprise of subjecting human conduct to

---

[46] See, e.g., the classic English case of *Entick* v. *Carrington* (1765) 19 St.Tr. 1030 in which the King's messengers, having relied on a warrant issued by the Secretary of State, were successfully sued in trespass for search of plaintiff's house and seizure of property. Rejecting the argument of 'State necessity', the court held that if the government possessed lawful authority 'it will be found in our [law] books. If it is not found there, it is not law'.

[47] Carl Schmitt, *Verfassungslehre*, §. 13 (p.138)

[48] Ibid.

[49] Ibid. 139.

[50] Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 2nd edn. 1969), ch.2.

[51] See, eg, F.A. Hayek, *The Constitution of Liberty* (London: Routledge, 1960), ch.10; Joseph Raz, 'The Rule of Law and its Virtue' in his *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), ch.11; Lawrence Solum, 'Equity and the Rule of Law' in Ian Shapiro (ed.), *The Rule of Law: Nomos XXXVI* (New York: New York University Press, 1994), ch.?

the governance of rules',[52] these qualities can just as readily be understood as functional or prudential criteria. That is, serious failure to comply with these criteria would make it impossible to subject human conduct to rules, and thereby would render the rule system ineffective. Just as a knife is not a knife unless it has the ability to cut, so too must law be capable of guiding behaviour. For this reason, Raz has argued that although adherence to these standards is a virtue, it is a virtue of an instrumental nature and is 'not a moral virtue as such'.[53]

Raz has elaborated this point by also claiming that although 'the rule of law is an inherent virtue of the law', it is merely one virtue – one aspiration among several.[54] Adherence to the rule of law in this sense stands in opposition to 'arbitrary power',[55] and it can thus be identified as promoting a (particular conception of) individual liberty.[56] But Raz claims that this virtue of a legal system is 'not itself an ultimate goal'.[57] Conformity to these qualities, and hence conformity to the rule of law, may make the law 'a good instrument for achieving certain goals' but 'sacrificing too many social goals on the altar of the rule of law may make the law barren and empty'.[58] Raz here accepts implicitly the point about the modern state being more than rule-based association; he recognizes that it also exists to meet certain social purposes. Consequently, legal systems will, of their nature, exhibit conflict between the rule of law and other values and goals. Conformity to the rule of law – or, more precisely, rule by law - can therefore only be 'a matter of degree, and though, other things being equal, the greater the conformity the better – other things are rarely equal'.[59]

By treating Fuller's qualities as prudential criteria (as Raz does) the idea of 'the rule of law' is drawn into a closer alignment with that of 'rule by law'. But is this justified? Fuller's criteria need to be carefully examined. On closer analysis, it becomes evident that some uncertainty exists concerning the nature of the qualities that Fuller identifies as constituent elements of 'rule of law' ordering. The first six qualities are purely formal characteristics of rules: rule-based order, Fuller claims, should consist of general, public, prospective, clear, consistent and stable rules. These are the conditions of authenticity of rule order; they are, in Oakeshott's terminology, conditions of *lex*. But the last two qualities – that rules should not require the impossible and that there should be a degree of congruence between rules and their enforcement – do not refer to qualities of rules *stricto sensu*. These latter criteria seek to align rules to conditions of compliance. They therefore are not so much attributes of *lex* as social conditions of efficacy, in that, rather than being inherent qualities of rules, they are qualities that a rule-order can be seen to achieve only when set to work in a particular social context.

If general conditions of efficacy are to be included in these rule of law qualities, then it would appear that Fuller's are too limited. Raz notes, for example, that the conditions of impartial and effective enforcement of the rule-order are essential criteria of the rule of law. These include: respect for the principle of judicial independence, which is the pre-condition of impartial administration of the rules; adherence to the principles of adjudicative fairness, which ensures the integrity of rule-based dispute resolution; establishment of judicial review of governmental action, which protects against the erosion by governments of the rule-based regime; and ease

---

[52] Fuller, above n.50, 106.

[53] Raz, ibid. at 226.

[54] Ibid.

[55] Dicey, above n.5, 198; Raz, ibid. at 219-220.

[56] Dicey, ibid. 202 ('freedom of person is not a special privilege [conferred by a constitution] but the outcome of the ordinary law of the land enforced by the Courts'); Kant (on which see Taylor, Philosophical Papers); Hayek, above n.51, 153 ('The conception of freedom under the law that is the chief concern of this book rests on the contention that when we obey laws, in the sense of general abstract rules laid down irrespective of their application to us, we are not subject to another man's will and are therefore free').

[57] Raz, above n.51, 229.

[58] Ibid.

[59] Ibid. 228.

of citizen access to the courts, which safeguards their rights.[60] These are basic institutional conditions that bolster the formal qualities of rule-based order, thus converting it into an operative regime animated by the ideal of the rule by law. If this is correct, then Fuller's eight qualities of the rule of law fall between two stools. If treated as being directed primarily to the conditions of *lex*, these qualities, by incorporating efficacy conditions, are over-inclusive. But if the qualities of the rule of law should include conditions of efficacy, then Fuller's – by ignoring the institutional arrangements that bolster formal rule-based action – are too limited.

In conclusion, it might be said that most jurists who seek to make sense of the principle of the rule of law start from the idea of rule *by* law. Viewing the threat of 'arbitrary' governmental action as the main threat to liberty (thereby revealing their classical liberal convictions), these jurists seek first to develop a concept of law as a system of rules and then to elaborate the institutional conditions that protect the integrity of that rule system. The concept of the rule of law thus promoted makes no reference to more general constitutional values, such as those that flow from democracy or broader ideas of social justice, and in this sense the formal rule of law qualities are not necessarily incompatible with dictatorship.[61] This concept serves mainly to identify the virtues of a rule-system, as differentiated from orders and commands, and to outline the conditions under which this system of legal rules can operate free from political manipulation.

Rule of law

The concept of the rule of law generated from the perspective of rule by law can be contrasted with a more explicitly political aspect of the concept that liberals often advocate. Rather than elaborating the conditions of *lex*, this political concept of the rule of law seeks to elaborate the conditions of legitimate political rule.

As with the rule by law aspect, this political concept is similarly underpinned by classical liberal convictions. It might be said, specifically, that just as the rule by law ideal is driven by the objective of curbing arbitrariness in the regime of positive law, the political aspect is driven by the objective of curbing arbitrariness in the entire governing regime. Consequently, although the particular form of rule is irrelevant to the rule by law aspect, it becomes the central issue for the political aspect. Although rule by law may be compatible with dictatorship, in the political aspect it is directly placed in question. In its political aspect, the rule of law maintains that dictatorship is fundamentally destructive of the values inherent in the concept.

The argument driving this liberal principle runs as follows. If governmental power comes to be monopolized, law will be used as an instrument of personal rule. And since this is corrosive of liberty, the political aspect of the rule of law must incorporate protections against the possibility of dictatorship. The political aspect thus asserts the necessity of power dispersal as a means of protecting rule of law values. The objective of the political aspect is to create a set of constitutional rules that will promote three key aims: first, ensure that governmental action is entirely institutionalized; secondly, ensure that governmental powers are differentiated and dispersed; and thirdly ensure that those exercising governmental authority possess incentives not to subvert this institutionalized order.

In this understanding, a properly designed constitutional regime is one in which the rules establishing and regulating governmental action disperse that power (especially through the separation of legislative, executive and judicial power), that official powers are enumerated in the constitution, and that sufficient checks are set in place to ensure that office-holders do not find it advantageous to act contrary to their institutional responsibilities. The political concept of

---

[60] Raz, above n.51, 216-7.

[61] See Robert Barros, 'Dictatorship and the Rule of Law: Rules and Military Power in Pinochet's Chile' in José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), 188-219.

the rule of law thus establishes a rule-based constitutional order that seeks to maintain its own status by incorporating within its own structure incentives that protect against its subversion. The basic liberal principle that drives this concept of the rule of law is that of the constitution in the image of 'a machine that would go of itself'.[62]

The political aspect of the rule of law thus presents itself as 'the rule of rules', that is, as the correlative principle of the political philosophy of modern constitutionalism based on the doctrine of the separation of powers. Its limitations are evident, not least because it is founded on eighteenth century political doctrines constructed on the basis of an idealized model of limited government which has little bearing on the ways of government in the contemporary world. Like the rule by law aspect, the political aspect of the rule of law presents itself as an impossible ideal.

III. *RECHTSSTAAT* OR *STAATSRECHT*?

The central problem with the concept of the rule of law as developed in liberal philosophy is that it sets up an ideal arrangement for rule systems, whether of positive law or public law, that are simply incapable of being realized. And the problem with establishing such unachievable ideals is that the concept then becomes susceptible to being transformed into an instrument of ideology. That is, in the practical world of contemporary government, the rule of law can readily be used as an anti-governmental ideology device which treats the state solely as a type of rule association and ignores its other social purposes; or which reduces government, contrary to experience, to the limited task of rule-execution; or which is invoked to bolsters the status of the judiciary as guardian of the rule order, without properly acknowledging that, in accordance with the concept, the judiciary is itself bound to a highly limited task of rule-interpretation.

The limitations of the liberal formulation are particularly evident with respect to the notion that the constitution can be a rule machine that runs itself. Just as some external action is needed to set machines in operation, so too must the institutional mechanisms of modern constitutions be driven by social and political action. But perhaps this is entirely the wrong metaphor to be applied to such arrangements. Constitutions may not be machines that are able to run themselves, but then neither are they merely the instruments of power-holders. Constitutional rules are neither self-generating nor simply the outputs of the dominant power groups. While evidently shaped by the dominant power interests in society, constitutional rules also have the capacity of guiding, shaping and indeed generating power. It is this power-generative aspect of constitutional rules that often is overlooked in classical liberal formulations of the rule of law.

Under the influence of classical liberal ideas, the exercise of power is commonly regarded as amounting to a potential restriction on some pre-existing liberty. Liberal formulations of the rule of law thus tend to treat power and liberty as antagonistic concepts: in the 'rule by law' aspect, rule order is designed as a counterpoise to 'arbitrary power' and in the political aspect of the rule of law the overall objective is to establish a rule framework that divides, limits and constrains the exercise of governmental power. But if a more practical and positive account of importance of the concept of the rule of law is to be developed, we might begin by reassessing the relationship between power and liberty. The most appropriate starting point is to consider the function of constitutional rules in the light of the distinction that philosophers have drawn between regulative and constitutive rules.[63]

Whereas regulative rules aim to influence behaviour that exists independently of the rule (e.g. 'do not run in the school corridors'), constitutive rules make possible action that cannot take

---

[62] See Michael Kammen, *A Machine that would go of itself: The Constitution in American Culture* (New York: Knopf, 1987), 16-19.

[63] See John Searle, *Speech Acts: An Essay in the Philosophy of Language* (Cambridge: Cambridge University Press, 1969); id. *Mind, Language and Society: Philosophy in the Real World* (New York: Basic Books, 1998), 131.

place without the existence of the rule. The clearest illustrations of constitutive rules are those that create games: the game of chess, for example, can be played only by observing the rules that define how the pieces move across the board. Constitutive rules can thus operate to create certain practices (such as the practice of playing chess) and institutions (the institution of chess). Viewed in this light, it might be said that while regulative rules can be treated as imposing restrictions on existing power relations, constitutive rules in themselves create a set of power relations. Further, while regulative rules might be restrictive of liberty, constitutive rules – by creating an ability to do certain things that could not be undertaken without them (e.g. play the game of chess) – are liberty-enhancing.

It is in this distinction that we see the essence of Oakeshott's account of the rule of law as a mode of association: the rule of law, he argues, makes sense only when political association – the governing relationship – is treated as being constituted entirely by the rules that establish and regulate governmental power. But as Oakeshott himself recognizes, this argument about the nature of constitutive rules cannot be extended from the sphere of games to that of the governing relationship without significant difficulties.[64] It is relatively easy to see the way in which constitutive rules operate to establish activities that do not otherwise exist in the material world (e.g. playing chess); it is less obvious when we are dealing with a governing relationship of permanent duration, that involves the allocation of large scale material resources, and in which there is a multiplicity of rules of uncertain status and no obvious exit option.

The critical issue with respect to the rule of law, then, must be to consider the extent to which the governing relationship can sensibly be treated as being bounded by constitutive rules. It is clearly the case that within the political sphere certain types of behaviour can be treated as being constituted by the rules. Electoral rules, for example, can be assumed to be constitutive of the activity of winning office: voting is a meaningful action only within the context of these rules, and an individual is able legitimately to assume the office of the prime minister or president only by virtue of these rules. But even in this case, this activity is recognized to be authoritative only because of social acceptance of extensive background practices concerning constitutional government.[65]

If the constitutive status of electoral rules remains ambivalent, there are other more problematic aspects of governmental action. Consider, for example, the situation when one state deploys its military forces to invade the territory of another. Under the state's constitution, a formal declaration might be required before engaging in war with another country. But it is evident that this type of military action can – and does – take place without this declaration; the action therefore cannot easily be described as being constituted by the rule. As Sánchez-Cuenca notes, 'even if there is a constitutive rule that defines what counts as war, the occurrence of war is not very dependent on that rule'.[66] The general point to be highlighted is this: in the political sphere, we are dealing with a complex situation in which there are few truly constitutive rules, where adherence to the existing constitutional rules is often not straightforward, and where acceptance of the authority of those constitutional rules might remain highly contingent.

In this type of situation, rather than simply asserting the vital importance of the rule of law and its principles of rule-compliance and equality before the law, a more appropriate starting point

---

[64] See above p.17.

[65] See Ignacio Sánchez-Cuenca, 'Power, Rules, and Compliance' in Maravall and Przeworski (eds), above n.61, 62-93, at 75: 'It is easy to understand that although voting is completely dependent on electoral constitutive rules, acceptance of the results of the ballot has no obvious parallel in games. ... The losing candidate in a presidential contest may decide that the elections must be annulled. If he has the support of the army, he will break the constitutive rules. He will break the constitutive rules. He will become president despite having lost the elections. He becomes president by sheer force. Obviously, someone could refuse to call him president, because he has not been chosen according to the procedure established by the constitutive rule, but the new ruler, no matter what we call him, will do the kinds of things that the last authentic president did'.

[66] Sánchez-Cuenca, ibid. 77; cf. John Searle, *The Construction of Social Reality* (New York: Free Press, 1995), 89.

might be to acknowledge that certain intrinsic inequalities exist in the governing the relationship and then to ask the question: why do rulers (to the extent that they do) comply with the rules?' The answer – as has been supplied by Stephen Holmes – is that people restrain themselves 'either when they are in the grip of moral norms or when they anticipate the advantages of self-restraint'.[67] And rather than assuming the inherently binding power of norms, as most jurists who invoke the concept of the rule of law tend to do, Holmes suggests that it might be more constructive to consider the conditions under which office-holders might regard rule constraints as being power-enabling.

A key principle in this way of analysing the problem, argues Holmes, is that of deniability: 'Shedding responsibilities, downsizing goals to match capacities, is a prudent step for the most Herculean of bosses, commanders, rulers, panjandrums, chiefs'.[68] Control is enhanced, especially in the typical political situation in which problems appear intractable, where office-holders are able to deny responsibility. When viewed in this perspective many of the nostrums underpinning the principle of the rule of law are cast in a different light. The continuous differentiation of governmental tasks – such as the differentiation of executive and judicial tasks or within the judicial role between law-finding (for judges) and fact-finding (for juries) – can thus be understood as ways of maintaining authority. To defend against external threats, argues Holmes (following Machiavelli), 'prescient rulers will create, train, and finance a military establishment', while in order to defend against internal threats 'they will create, train, and finance a judicial establishment'.[69] The institutionalization of political power and the establishment of rule-based governmental procedures are, in short, methods of maintaining and enhancing governmental authority. Constraints on power serve the function of generating power.

This perspective on the rule of law (*Rechtsstaat*) brings us closer to the dynamic that drives the development of public law (*Staatsrecht/droit politique*). Governments rule by means of law because, by maintaining the expectations implicit in these general rules, they are more easily able to foster the allegiance of their citizens and this, in turn, is power-generating. Governments bind themselves to respect the constitutional rules largely from self-interest, and this situation arises when conditions are set in place to make constitutional rules self-enforcing.[70] That is, to the extent that rule of law values are maintained, this is because they are perceived to be prudential necessities rather than universal moral values. To the extent that the political aspect of the rule of law – the precepts of constitutionalism – is maintained, this is because a regime has been established in which obeys Madison's precept that 'ambition must be made to counteract ambition'.[71] In Madison's words, 'you must first enable the government to control the governed; and in the next place oblige it to control itself'. And although a dependence on the people is 'the primary control on the government', Madison recognizes that 'experience has taught mankind the necessity of auxiliary precautions'.[72]

The rule of law is one expression – and not the most helpful at that - of the objective of obliging government to control itself. It is – along with the three basic principles asserted at the beginning of this chapter - part of the 'auxiliary precautions' needed in government. In this sense, however, the rule of law is better understood as being an aspect of the political theory of constitutionalism. But when constitutionalism is treated as being a practical working principle of government rather than some universal moral ideal it is evident that the problem is not essentially that of achieving some value consensus amongst the citizenry; rather the issue must

---

[67] Stephen Holmes, 'Lineages of the Rule of Law' in Maravall and Przeworski (eds), above n.61, 19-61, at 24.

[68] Ibid. 26.

[69] Ibid. 36.

[70] For the political scientist's modelling of these conditions see: Barry Weingast, 'The Political Foundations of Democracy and the Rule of Law' (1997) 91 *American Political Science Review* 245-263.

[71] Federalist, 51.

[72] Ibid.

be treated as one that raises a major problem of social co-ordination. Constitutional rules not only establish a set of governing institutions; they also endow those institutions with particular interests. And by doing so, these constitutional rules have the capacity to establish a system of countervailing power which operates to reinforce mutual respect for the rules.[73]

These arrangements work not because these are to be seen as the realization of some universal moral consensus, the achievement of the 'rule of law' or fulfilment of the *Rechtsstaat*. To the extent that they do, they operate through an essentially political logic, the workings of political right (*droit politique*), or *Staatsrecht*. Rather than being seen as a manifestation of consensus, they are seen to operate precisely because the interests of citizens vary and there is no authoritative metric for resolving these differences. Such constitutional arrangements establish basic procedures – co-ordination mechanisms[74] - that might enable citizens, despite their differences, to work in concert and to mutual advantage. And these constitutional arrangements do their work most effectively when the co-ordination mechanisms have gained sufficient support that they work to prohibit any intended breach of the basic constitutional rules.

Martin Loughlin
Professor of Public Law
London School of Economics & Political Science

[73] This is similar to what Dahl called 'polyarchy': Robert Dahl, *Polyarchy* (New Haven: Yale University Press, 1971), ch.1.

[74] Russell Hardin, *Liberalism, Constitutionalism, and Democracy* (Oxford: Oxford University Press, 1999).