

MAKALAH



The Rule of Law

Negara Hukum / Reshtsstaat / Ètat de droit / Rettsstat

Oleh:

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Universal Declaration of Human Rights

- Preamble:

*“Whereas it is essential , if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that **human rights should be protected by the rule of law**”.*

What is Rule of Law?

- Many different definitions
 - Thin / thick
 - Formal / Substantial
- Core content
 - Concerned with the control of public power through law; and
 - Is aimed at the protection of the individual
 - From what?
 - Arbitrary applied legislation
 - Misuse of power
- Rule of law in domestic jurisdictions
- Rule of law on the International level

Rule of Law at the National level

Rule of law and democracy

- Democracy
 - Majority rule or participatory democracy
- Procedural Concept – procedures and representation
- Formal (procedural) Concept
 - Focus on the method of decision making
- Substantive (inclusive) Concept
 - Includes values such as autonomy and equal value of individuals
- European Court of Human Rights
 - Pluralist society (= genuine recognition of, and respect for Diversity)
 - Diversity = cultural traditions, ethnic and cultural identities, Religious belief, artistic- literary and socio-economic ideas and concepts
 - Protected by: Freedom of expression, assembly and voting rights
 - Protection of the other convention rights
 - Fair trial & Liberty and security
 - Prohibition of slavery & forced labour
 - Right to life
 - Prohibition of torture or degrading/inhumane treatment/punishment

Democracy and the European Court

- Democracy in the context of the Convention:
 - Concerned with the balance between the rights of the individual and the democratic pursuit of the public interest
- Klaes and others vs. Germany (1978)
 - “some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention... Fundamental freedoms... are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human rights upon which (the Contracting States) depend”.
- Proportionality principle in ECHR – Limitation (law, aim & prop.)

Dissecting the Rule of Law

- Which elements does ROL consist of?
 - Formal definition
 - “Rule by law”
 - Strict adherence to law does not guarantee against arbitrary use of power.
 - In most legal systems, principles of law that can be understood as quality requirements set to law, can be found.
 - Usually these includes the minimum of:
 - Generality, certainty and none-retroactivity
 - Foreseeability, intelligible and clear

The Legality Principle

- What does **legality** mean?
- What law is differs considerably from jurisdiction to jurisdiction.
 - Democratic laws
 - Precedent
 - Hierarchy of legal sources
- The diversity is a result of the different balance that is struck in different countries between the different powers of government and between the different requirements for democratic laws and constitutional review.
- But of course, also the observance of and respect for the principles of RoL

The Legality Principle

- Starting point
 - Legality in the formal sense
 - A demand that the government only operates through law and remains within the boundaries of competence described by the law
- Quality requirements with which law must comply:
 - Generality
 - Promulgation
 - None retroactivity
 - Clarity of the law
 - No conflicting laws
 - Laws requiring the impossible – “impossibilium nulla obligatio est”
 - Stability of the law
 - Congruence between official acts and declared rules
 - Equality of law

Separation of powers

- Separation of powers vs. division of powers (the Indonesian model?)
- Historically: related to class difference, limitation of power
 - No social group shall dominate the rest – balance powers
- Today: mostly concerned with functional separation between the different powers of government
 - Three different legal tasks was identified and distinguished - and assigned to three different powers
 - Legislative
 - Executive
 - Adjudicative
- Constitutionalism – State powers set up by law

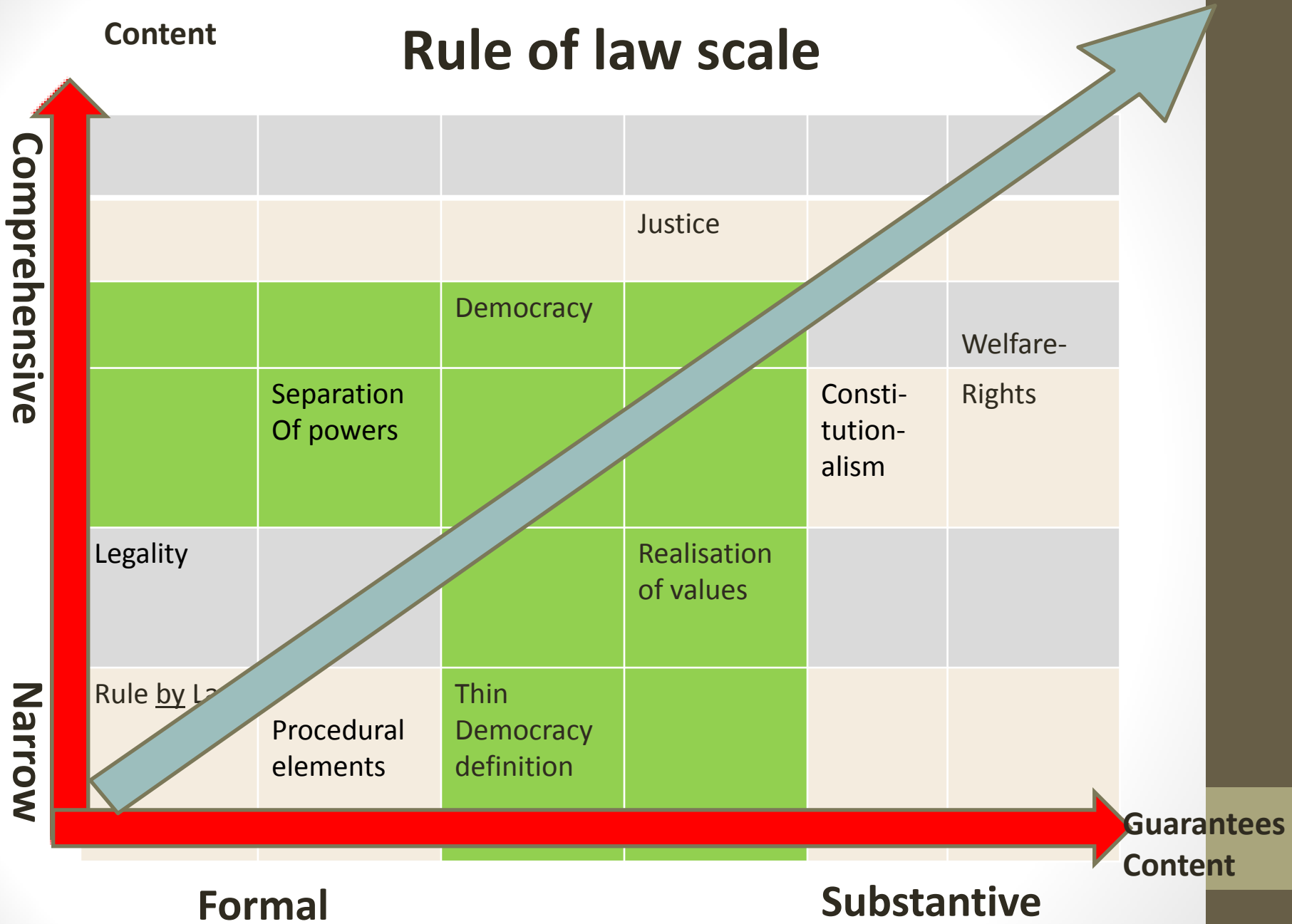
Judicial Safeguards

- The judiciary is entrusted with the task of preventing discrepancy between the law and acts of government
 - Judicial review
- «Where there is no remedy there is no right»
 - Access to court
 - Solve disputes
 - Secure that law does not remain in the books
 - Fair hearing
- Minimum procedural principles
 - Equal application of law
 - Independent Judiciary
 - Impartial Judiciary
- Procedural Safeguards

Functional separation of power elements that is part of the rule of law

- The requirements of legality presupposes the existence of different powers of government that each fulfil a different function
- The functional separation ensures and upholds the authority and integrity of the law
 - Mutually controlling powers – secures that power is not exercised arbitrarily
 - Accountability and transparency
- Secures that rules are not made with particular cases in mind; and that particular cases are decided only in the light of general rules
 - Prerequisite for generality of the law;
 - and equality before the law

Rule of law scale



Bingham's 8 principles

- "the law must be accessible and so far as possible intelligible, clear and predictable"
- "questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion"
- "the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation"
- "ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably"
- "the law must afford adequate protection of fundamental human rights"
- "resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve"
- "adjudicative procedures provided by the state should be fair"
- "the rule of law requires compliance by the state with its obligations in international law as in national law"

The Parliament (Legislative)

- The quality of laws
- The process of making laws
 - Hearings
 - Public representation – elections through secret ballots
 - Accountability to the electors/the constituents
 - The competence of the drafters/writers

The Government (Executive)

- Executing the will of the state
- The Government must abide by the law
- Delegation of law making power
 - Limited in scope
 - Clear delegation
 - To wide authority goes against the idea of balancing powers – misuse
- Positive and negative obligations

The Judiciary (Adjudicative)

- Access to a dispute settling body
- Fair resolution of legal disputes between individuals
- Independence
- Methodology:
 - Consistent
 - Hierarchy of legal sources
 - Interpretation

Judicial review

- Control of laws
- Ensures that government acts only on the basis of law, and
- ...that laws respects the constitutional boundaries set

Rule of law and human rights

- Both RoL and HR aims to protect individuals against arbitrary governmental power
 - RoL protects against arbitrary use of state power
 - HR protects against oppression
- Procedural requirements
 - Fair trial ++
- Securing the integrity of individuals
 - Anti torture, prohibition of slavery
- Liberty and security of persons
- Democratic rights
 - ICCPR art 25
 - Those designed to assure the public debate
 - Freedom of expression, assembly

Rule of Law at the International level

- Laws shall be upheld
 - Pacta sunt servanda
- What is special for Int. Law?
 - There is no central legislator who is or can be held responsible for the accessibility, clarity and certainty of international law
 - Instead, the responsibility for the certainty of international law lies in the hands of the many states which conclude treaties and form customary law
 - Customary law is generally clear, but notoriously imprecise at the level of detail
 - A concern is the proliferation of rules and institutions of international law.
 - The 1969 Vienna Convention on the Law of Treaties provides an impressive body of rules regarding such issues as the conclusion, interpretation, and termination of treaties

Challenges

- A more formidable challenge to the realization of the rule of law at the international level regards dispute resolution by peaceful means
 - Diplomacy and adjudication
 - The most prominent challenge for the courts at the international level is the nature of their jurisdiction
- There is no central law enforcement agency with a monopoly of force in the international society

Why is RoL important on the Int. arena?

- International law is traditionally a set of norms and institutions which is aimed at creating and maintaining peace and security in the society of states
- International law has increasingly been aimed at attempting to solve global or regional problems
- International crime, international terrorism, dysfunctional financial markets and threats to the environment (atmospheric and marine pollution, global warming, threatened wildlife species, the dangers of nuclear and other hazardous substances)
- national human rights law is affirmed and stabilized by international human rights law