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## INTRODUCTION

# The Rule of Law from Below – A Concept Under Development

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The rule of law is a central notion in legal thought and in the practice of democratic states. While a contested term, scholars have articulated its contours – both formal and substantive. This includes ideas such as legal certainty, prospectivity, access to justice, and the fact that everyone should be accountable under the law. Much of the scholarship has centred on states and international organisations as the primary entities responsible for protecting the rule of law. By contrast, the relationship between individuals and groups of people in civil society *vis-à-vis* the rule of law is under-explored in (international) law. This special issue is therefore dedicated to elaborating upon this relationship – the 'rule of law from below.' This Introduction sets out the concept and illustrates it with examples of the innovative ways that people are using in practice to support the rule of law from below. While noting that the concept of 'rule of law from below' is one under development, we argue that there is much value in investigating instances where actors beyond formal state institutions, who have no constitutional or other formal legal role, take it upon themselves to uphold and defend the rule of law. This is especially important in today's global context of shifts in power between state and non-state actors, as well as pervasive democratic and rule-of-law backsliding.

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*Every time you want to hurt someone's feelings, you put 'the rule of law'[on the table].*

Boyko Borisov<sup>1</sup>

That the rule of law could affect emotions is not something most legal scholars would think of. As such, what did Bulgarian Prime Minister Borisov mean in his 2018 quote above? It seems that he wanted to avoid debating the backsliding of the rule of law in fellow European Union (EU) member state Poland, as he was concerned it would become a bone of contention within the European Council. He added that violations of the rule of law were 'so vague' and difficult to measure.<sup>2</sup> In spite of his admonition, the rule of law has become a central item on the EU's agenda in recent years – with emotions indeed flaring up behind closed doors between heads of state and government. Formal steps have been taken by the European Parliament and the European Commission to chastise both Poland and Hungary for their deliberate erosion of the rule of law, one of the central values upon which the Union is founded. But what is even more remarkable than the cumbersome and often slow procedures in Brussels, is that the rule of law has also become a central issue in contemporary protests on the streets of Warsaw and many other Polish cities. The usually obscure notion of the rule of law in the constitution has been embraced by the population as evidenced by the high emotions and protest chants in Polish squares, where thousands demanded that the government restore the rule of law and stop its attacks on the independence of the judiciary. The rule of law has descended from its

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<sup>1</sup> Bulgarian Prime Minister Boyko Borisov in 2018, cited in: 'Borisov: Poland vote would give EU 'sleepless nights' (11 January 2018) EU Observer <<https://euobserver.com/institutional/140515>>.

<sup>2</sup> *ibid.*

ivory tower and is now being defended from below – and not just in Poland. Indeed, it has begun to hurt feelings ...

As a central notion in legal thought and the practice of democratic states, the rule of law has a long history. Awareness of its meaning and importance among individual citizens has varied over time, with the last few years seeing an increase in such awareness across a large number of states. Two developments seem to have been instrumental in this respect. The first includes the much-reported pressures on the rule of law stemming from increased restrictions on the judiciary's independence to the flouting of basic constitutional rules and standards as well as, in a broader sense, a shrinking of civic space with fewer and fewer available remedies.<sup>3</sup> This has been coined 'rule of law backsliding.'<sup>4</sup> The second element originated out of restrictions introduced during the pandemic, where citizens in many countries came to appreciate the rule of law, which protected public recourse to independent courts to determine whether restrictive governmental measures were (dis)proportionate. Perhaps never before has the importance of the protection of human rights under the rule of law been driven home for so many people globally, whether in places where rights are typically protected or places where the rule of law is gravely lacking. Indeed, it seems that when it comes to the rule of law, 'we recognize breakdowns more easily than the positive ideal.'<sup>5</sup>

The positive ideal of the rule of law is so obscure that Jeremy Waldron famously called it an 'essentially contested concept,' the origins, content, and application of which have always been controversial.<sup>6</sup> It is in fact often claimed that the term has lost its meaning, with Judith Shklar, the late Harvard political theorist, going so far as to comment that the term 'has become meaningless thanks to ideological abuse and general overuse [...].'<sup>7</sup> Although many academics would dispute this last point, it does seem clear that understandings of the rule of law remain under development, in flux, contested, and are constantly challenged by changing times. However, it is still possible to sketch out two main theoretical starting points for conceptualising the rule of law: formal and substantive.

Formal conceptions of the rule of law involve a qualitative appraisal of the law. Key requirements relate to the manner in which the law was passed and promulgated, its clarity and temporal application.<sup>8</sup> The law should be prospective, not retrospective; it should be relatively stable; particular laws should be guided by open, general, and clear rules; there should be an independent judiciary and access to the courts; and the discretion of law enforcement entities should not be allowed to pervert the law.<sup>9</sup> Under this formal conceptualisation of the rule of law, a framework of law can pass a 'rule of law' test without attention being given to its specific content.<sup>10</sup> It is on account of the mono-dimensional textural lens employed by the formal view of the rule of law that it is sometimes called a 'thin' rule of law.

In addition to these formal elements, substantive conceptions of the rule of law include the content of the law. According to theorists of this approach, it is not enough for a law to be constituted properly, its content must also be 'good.'<sup>11</sup> Dworkin is one of the most well-known proponents of a rule of law that pays attention not only to its form, but also to its substantive provisions. According to his 'rights conception,' one of the key purposes of the rule of law is to 'capture and enforce moral rights.'<sup>12</sup> For example, everyone should be accountable under the law and fundamental rights should be protected. In contrast to formal approaches to the rule of law, theories addressing the law's content and its formal external features have been described as a 'thick' version of the rule of law.

The past two or three decades have been marked by attempts to go beyond these theoretical and philosophical debates relating to what the rule of law is or is not. These attempts have partly been fueled

<sup>3</sup> Antoine Buyse, 'Squeezing civic space: restrictions on civil society organizations and the linkages with human rights' (2018) 22(8) *International Journal of Human Rights*.

<sup>4</sup> See e.g. Laurent Pech and Kim Lane Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU' (2017) 19 *Cambridge Yearbook of European Legal Studies* 3–47.

<sup>5</sup> George P. Fletcher, *Basic Concepts of Legal Thought* (Oxford University Press 1996) 13.

<sup>6</sup> Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (In Florida)?' (2002) 21(2) *Law and Philosophy*, 137–164.

<sup>7</sup> Robert Stein, 'Rule of Law: What Does it Mean' (2009) 18 *Minnesota Journal of International Law* 296, citing Judith N. Shklar, 'Political Theory and The Rule of Law' in C. Hutchinson and Patrick Monahan (eds.), *The Rule of Law: Ideal or Ideology* (Carswell 1987).

<sup>8</sup> Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework* (1997) *Public Law*, 467–87, 467.

<sup>9</sup> Joseph Raz, 'The Rule of Law and Its Virtues' as re-printed in *The Authority of Law: Essays on Law and Morality* (Oxford University Press 1979) 218.

<sup>10</sup> *ibid*, 214.

<sup>11</sup> *ibid*, 211 and 227. See also Craig (n 9) 468.

<sup>12</sup> Ronald Dworkin, *A Matter of Principle* (Clarendon Press 1985) 11, 12.

by the above-mentioned rule of law backsliding in an increasing number of states, but also by the wave of indicator-driven assessments that have become popular in both the business and public sectors. On a global scale, the most famous initiative is arguably the Rule of Law Index by the World Justice Project. It defines the rule of law as 'a durable system of laws, institutions, norms, and community commitment that delivers accountability, just law, open government and accessible and impartial justice.'<sup>13</sup> It operationalises this very broad definition by scoring states on eight factors and no less than 44 sub-factors. The UN set up a small Rule of Law unit a few years ago to support, amongst others, the work of its peacekeeping operations. It defines 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 and independently adjudicated, and which are consistent with international human rights norms and standards.'<sup>14</sup> Rule of law assessments are also undertaken by the European Commission and, from a more purely legal and constitutional perspective, the Venice Commission of the Council of Europe. The Venice Commission developed a Rule of Law checklist that uses a number of overall benchmarks (legality, legal certainty, preventions of abuse of powers, equality before the law and non-discrimination, and access to justice), further subdivided into more substantive elements such as *nullum crimen sine lege* and the presumption of innocence.<sup>15</sup>

We set out on this exploration of the rule of law 'from below' because we observed that these theories and indicator assessments approach the rule of law 'from above.' While they do include some elements that could be considered bottom-up notions, such as access to justice, they typically comprise top-down elements that are functions of the state. This includes various requirements for the practice of legislative bodies, judicial systems, and law enforcement. From both positivist and realist perspectives, attention has tended to centre on states and international organisations as the primary entities responsible for protecting the rule of law. However, the relationship between individuals and groups of people *vis-à-vis* the rule of law, as it exists at the local, national, and international level, is under-explored in (international) law. We aim to elaborate further upon this relationship – the rule of law from below – with this special issue.

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The concept we propose here attempts to shift the perspective, looking at how and what the rule of law means, both as a concept and tool, when taken up by the individuals it is supposed to protect. We see value in investigating instances where actors beyond formal state institutions, who do not have constitutional or other formal legal roles, take it upon themselves to uphold and defend (elements of) the rule of law. To try and protect the institutions that safeguard the rule of law, such as the judiciary, and principles like the separation of powers. Media can lay bare arbitrary use or even abuse of state power. Civil society organisations and social movements can mobilise, protest, and raise concerns, traditionally in the streets but now also online. There are, of course, long-existing approaches of looking at law in action, including the fields of anthropology and sociology of law and the translation of higher, formal legal norms into the practice of everyday struggles for justice. We assert that there is potential for more linkages between these bodies of literature and scholarship on the rule of law.<sup>16</sup>

Our examination goes beyond the 'thin' conception of the rule of law, as what captures the imagination more easily are threats to substantive norms, to constitutional or human rights, representing the 'thick' conception. The 'rule of law from below' also takes shape through a wide range of actions, from the small to the very large, informal to the formal. For example, informal actions might include situations in every-day life in territories held by armed groups or by international peacekeepers where people endeavour to negotiate with the relevant powers for some sense of normalcy and predictability of rule application. In doing so, they attempt to achieve, maintain, contribute to, restore or navigate a (multi-dimensional and sometimes contradictory) rule-based order (formal or informal) that provides some structure to the interactions between the governing and the governed. Formal actions might include individuals using institutions that were set up to protect human rights, whether it be local courts or international judiciaries or monitoring bodies. By

<sup>13</sup> See World Justice Project <[www.worldjusticeproject.org](http://www.worldjusticeproject.org)> accessed 20 September 2021.

<sup>14</sup> See United Nations, 'What is the Rule of Law' <<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>> accessed 20 September 2021.

<sup>15</sup> European Commission for Democracy through Law (Venice Commission), *Rule of Law Checklist*, adopted on 11-12 March 2016, Council of Europe.

<sup>16</sup> See e.g. 'the work on the vernacularisation of human rights of Sally Engle Merry and other similar approaches' in Mark Goodale and Sally Engle Merry (eds), *The Practice of Human Rights. Tracking Law Between the Global and the Local* (Cambridge University Press 2007).

putting forward complaints and submitting proof of violations, they provide the very input that is the fuel of rule of law institutions, feeding them, as it were, from below.

Employing the lens of ‘from below’ to examine and explore an area of scholarship is not new.<sup>17</sup> It has been used by historians and others precisely because it allows for a focus on the views and actions of individuals who may be more marginalised in society and have little direct power or influence over law and governance. It is associated with democratising the sources and materials studied and the adoption of more inclusive ways of looking at specific fields of study.<sup>18</sup> By exploring the rule of law ‘from below,’ we seek to contribute to broader understandings of the rule of law by bringing in the perspectives of different actors with new ways of looking at traditional legal infrastructures. In this way, the special issue can be seen as part of the shift in international law that de-centres the state and examines the under-studied but prolific (and increasingly powerful) role of non-state actors.<sup>19</sup> It turns from formal and public state institutions and actors to those that are often informal, private or social institutions.

Out of the complexity described here, people acting individually or in groups as part of civil society are increasingly finding innovative ways to support the rule of law. They are standing up to authoritarian regimes, using technology to document violations of fundamental norms and holding those in power to account, taking on leadership roles within their communities in armed conflict, and asserting their power to enforce international obligations or the values underlying the rule of law, by means of collective action, litigation, or advocacy. These types of action taken together, as we have argued here, are reflections of both a phenomenon and a concept under development: *the rule of law from below*.

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The above introduction, and its initial conceptualisation of the ‘rule of law from below’ is the result of a research collaboration culminating in this special issue of the Utrecht Law Review. It originated in an international online conference organised by Utrecht University’s Montaigne Centre for the Rule of Law and Administration of Justice and the Netherlands Institute of Human Rights (SIM) in October 2020. The conference explored the role of individuals and civil society as protectors of the rule of law in troubled times. The purpose of the conference was to investigate the different ways in which individuals can be protectors and defenders of the rule of law, and also to assess whether attention to this perspective may influence how the rule of law is defined and understood by individuals, civil society organisations, states, and other international actors. A selection of the papers is presented in this special issue, each illustrating and deepening the overall conference theme.

The various contributions all firstly reflect the *agency* of individuals and groups, of human rights defenders, civil society organisations, the media, and even universities to contribute to the rule of law. They show how a wide range of actors, without a formal or constitutional role, can bolster and help constitute the rule of law from below. Secondly, they also all point to the importance of *interactions* between these players and entities wielding power – from the state itself, to international organisations as well as de facto rulers such as armed groups. The rule of law, its principles, procedures, and practices are shaped by these very interactions. The articles in this special issue can broadly be divided into three strands.

Two contributions in the first strand delve into possible meanings of what rule of law from below entails in specific instances in which the rule of law is most severely under pressure: firstly, in times of armed conflict and secondly in situations of rule of law backsliding. In her contribution, ‘Of interactionality and legal universes: a bottom-up approach to the rule of law in armed group territory’, Fortin delves into the predicament of people living in territories under the control of non-state armed groups. It is here that some of the rule of law’s key features – stability, predictability, consistency – materialise in completely non-traditional ways. Fortin argues that it is key to pay attention to the point of view or perspective of the individuals in the legal framework who act as conduits or recipients of rules. She argues that it is only when the real-life ‘lived legal universe’ of people is addressed, that the full complexity of these legal spaces can be understood. Drawing on writings by *inter alia* Fuller, Waldron, Brunnée and Toope, Ewick and Silbey, Sarat

<sup>17</sup> See E.P. Thompson, ‘History from Below’, *Times Literary Supplement*, 7 April 1966, 279–80; Howard Zinn, *A People’s History of the United States* (Longman 1980); Kieran McEvoy and Lorna McGregor (eds), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change* (Hart Publishing 2008).

<sup>18</sup> Kevin Myers and Ian Grosvenor, ‘Collaborative Research: History from Below’ University of Bristol and the AHRC Connected Communities Program, September 2018, 12 <[https://connected-communities.org/wp-content/uploads/2018/07/History\\_From\\_Below\\_SP-1.pdf](https://connected-communities.org/wp-content/uploads/2018/07/History_From_Below_SP-1.pdf)> accessed 10 June 2021.

<sup>19</sup> See Julie Fraser, *Social Institutions and International Human Rights Law Implementation: ‘Every Organ of Society’* (Cambridge University Press 2020).

and Kearns and Hertogh, she proposes a framework for assessing a rule of law from below.<sup>20</sup> She highlights three particular aspects that reflect different interactions between the governing and the governed, between the law and its users: (1) the ability of the legal framework to confer the capacity of self-determination upon individuals; (2) the extent to which the legal framework is reciprocal/ interactional, in that it creates expectations between governing and governed; and (3) the contribution made by ordinary individuals in the form of participation with or contribution to communities of practice and law in everyday life.

Grabowska-Moroz and Śniadach, by contrast, focus on situations in which the state is still functioning but has been captured by one faction or party to the detriment of democracy and the rule of law. In their article 'The role of civil society in protecting judicial independence in times of the rule of law backsliding in Poland,' they trace how civil society organisations have stood up to counter the crumbling of the rule of law, when formal checks and balances within the state ceased to function properly. They specifically look at how the orchestrated threats to the independence of the judiciary in Poland led to a reaction from below, from civil society. This was not only caused by indignation about the deliberate erosion of judicial independence but also about the collateral damage this was starting to cause: the shrinking of civic space, in which civil society was losing previously existing effective remedies, in the form of independent courts, to turn to. Through a series of detailed case studies, the authors show how this mobilisation against rule of law backsliding has been shaped by a varied set of groups, reaching beyond traditional divisions and definitions.

A second strand of contributions to this special issue traces the ways in which abuses of the rule of law, whether it relates to the perpetration of grave crimes or violations of human rights, are being documented by civil society. Rather than state institutions being the only players to implement the rule of law, these are instances in which states are either perpetrators themselves or are too weak to prevent or remedy transgressions of the rule of law – or have competing political interests. That is when civil society actors attempt to buttress the rule of law from below, by bringing forward evidence and calling out abuses.

In her article 'The role of universities and law schools in documenting serious international crimes and advancing the rule of law,' McGonigle Leyh highlights the role of a very specific type of civil society actor that is not often identified as playing a role in the rule of law framework: the university. She argues that universities through their legal clinical work and their documentation projects more broadly protect and bolster the rule of law from below. Their role in documenting and investigating serious international crimes, often in cooperation with other civil society organisations, continues to make considerable contributions to accountability for the gravest violations of the rule of law. As such a role has not traditionally been seen to be a core feature of universities, McGonigle Leyh explores what taking up the role of independent fact-finder or investigator means for universities, their staff, and students. While clearly carrying risks, it is nevertheless also part of academia's increasing drive for societal engagement.

Equally emphasising how documenting human rights violations and aiming to increase accountability can go hand in hand, Burbano Herrera and Haeck, address the role of non-governmental organisations (NGOs) in the Americas specifically. In their contribution, 'The historical and present-day role of non-governmental organisations before the inter-American human rights system in documenting serious human rights violations and protecting human rights and the rule of law through ensuring accountability', they trace the work of civil society over more than half a century. In a context in which the rule of law has been weak or has faced sustained attacks for years, they highlight the different ways in which NGOs have stepped in to uphold human rights standards. By bringing situations to the attention of the Inter-American human rights institutions, by supporting human rights victims, and bringing in evidence, they show how the work of NGOs has been crucial input for the functioning of both the Inter-American Commission and the Inter-American Court. In turn, the Inter-American human rights system, through its procedural possibilities for NGO input and through its substantive case-law on the importance of civil society, helped to maintain crucial spaces for local actors defending the rule of law from below.

This closely connects to a third strand of articles in this special issue that focus on a different aspect of the rule of law from below: those instances in which people and groups below the state level – organised civil society but also individual victims of abuses – interact with international institutions (and vice versa) in order to improve the rule of law performance of the state or to remedy abuses or backsliding more broadly.

<sup>20</sup> Lon Fuller, *The Morality of Law* (Yale University Press 1964); Jeremy Waldron, 'The Rule of Law and the Importance of Procedure' in James E. Fleming (ed) *Getting to the Rule of Law* (Nomos 2011) 3; Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2012); Patricia Ewick and Susan S. Silbey, *The common place of law – stories from everyday life* (University of Chicago Press 1998); Austin Sarat and Thomas R. Kearns (eds) *Law in Everyday Life* (University of Michigan Press 1995); Marc Hertogh, 'Your rule of law is not mine: rethinking empirical approaches to EU rule of law promotion', 14(43) (2016) *Asia Europe Journal* 48.

They concern the UN, the Council of Europe's platform for the protection of journalists, and the European Court of Human Rights respectively, as three examples of such interactions.

In his contribution 'UN peace operations and the role of the local in (re)building the rule of law,' Gilder zooms in on the rule of law activities of UN peace operations. By assessing a number of specific peacekeeping missions placing a, he identifies what he calls a 'maturing' of rule of law activities over the last two decades. Rather than more narrow focus on combating impunity, strengthening security for civilians, or putting in place temporary transitional justice mechanisms, they now can be seen as part of a broader effort: (re-) establishing the legitimate authority of the state in which they are active. He emphasises that such endeavours can only be successful if they also focus on providing local justice. Recognising that ending impunity and strengthening formal institutions is important to end human rights violations and identifying the dilemmas the UN faces in decisions regarding how and when to engage with customary methods of justice, he argues for an overarching, bottom-up strategy to engage and empower local communities and other civil society actors to be part of the rule of law process.

Another key element of a vibrant local civil society is a free and independent press. In her article 'The Platform for the protection of journalists: a mechanism for cooperation between non-governmental organisations and the Council of Europe,' Gascón Marcén goes into the direct vicious circle connecting rule of law backsliding and attacks on the media. The more restricted the work of journalists becomes, the less room they have to perform their crucial role as public watchdogs. This means that a deterioration of the rule of law will less easily be uncovered if and when journalists feel less safe to do so. To counter this problem, the Council of Europe has created a mechanism that gives direct access to civil society organisations such as groups of journalists to give early warnings of attacks and pressures on the media: the platform for the protection of journalism and the safety of journalists. In her contribution, Gascón Marcén assesses how this platform functions as a bridge between local media and an international organisation. She concludes, however, that the Platform could be improved by more effectively engaging with states.

The final contribution in this third strand that also focuses on 'from below' engagement of civil society with an international institution, is the article of Tsampi on 'The role of civil society in checking the executive in the case-law of the European Court of Human Rights: recasting the rule of law.' She explores how beyond the traditional balance of powers – with the legislative and judiciary acting as a check on the executive, the system of the European Convention of Human Rights (ECHR) offers a fourth player – civil society, the opportunity to act as a check on the executive powers of the state. This monitoring of the government, in her view, is an element of upholding the rule of law from below, and can be performed by civil society lodging complaints at the European level with the Court. She assesses the role of good and bad faith of both states and civil society actors through the lens of Article 18 ECHR. In doing so, her contribution argues that civil society's monitoring of a state's executive is generally important but comes even more to the fore when the rule of law faces systemic pressures. When the formally mandated branches of the state no longer function as checks, then civil society actors may be the last possible ones to perform this role. They need the support of the international level to perform this role, however.

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By delving into these matters, the articles in this special issue all strive to carry the debate beyond the more traditional philosophical or constitutional legal discussions on the rule of law. They point to the actual practices and thus to the local, bottom-up importance the rule of law may have. They show a user's perspective of the rule of law by analysing how international mechanisms can be seized to complain about abuses, violations, and other shortcomings of the rule of law. It may not be surprising that the rule of law becomes all the more salient for the public and civil society groups when it faces pressure, attacks, and structural deterioration. Thus, societies in transition, states in and after armed conflict, and countries facing democratic and rule-of-law backsliding may be the very places where popular awareness and defence of the rule of law comes to life. It is in these situations that it becomes clear that the individual is as much a part of the rule of law as the institutions that are traditionally thought to protect it. In a variation on the famous dictum 'I know it when I see it,' 'the rule of law from below' phenomena may be instances of 'I know it when I'm losing it.' And if a few people's feelings get hurt by more individuals around the world demanding more attention and support for the rule of law, then so be it.

## Competing Interests

The authors have no competing interests to declare.

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