

THE RULE OF LAW PRINCIPLE AND THE EFFECTIVE FUNCTIONING OF DEMOCRATIC INSTITUTIONS

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ABSTRACT

The rule of law is one of the most debated topics in the legal science currently. This concept is dynamic, multidimensional and ever-changing as it varies depending on the political, cultural and historical traditions of each country. Today, the rule of law is a basic principle upon which modern democratic states and international (universal and regional) organizations (institutions) are based worldwide. This paper first analyzes the rule of law concept from a theoretical aspect in terms of effective functioning of democratic institutions by broadening its concept by including the concept of good governance. Then, the quantitative form of the rule of law measured through the rule of law index is presented. This index leads to the conclusion that in different countries the rule of law is implemented in different ways. At the same time the index serves as a sufficient reliable indicator for the democratic capacities of modern states. The aim of this paper is to present the rule of law concept in the contemporary political and legal theory, to determine the elements of the concept in theoretical and practical terms as well as to show the quantitative forms of this concept for the Republic of Macedonia. These indicators are of great importance for the improvement of the rule of law concept in the Republic of Macedonia whose strategic priority is the Euro-Atlantic integration.

KEYWORDS: democracy, good governance, rule of law, rule of law index.

INTRODUCTION

The idea of the rule of law traces its origins to the time of ancient philosophers. The archbishop Solon was the first person to establish the equality of citizens before the law (isonomia), whereas Plato and Aristotle introduced the authority restriction principle by means of laws. This idea was very prominent in the Middle Ages among the philosophers, who believed that the authority of the state should be based on law and that its activities should be restricted by law. The idea of the rule of law obtained its definite shape as late as the 17th century, when Edward Coke and James

Harington introduced equality of laws to all manner of persons in England.¹ Nowadays, the rule of law is the basic principle within national and international framework.

DETERMINING THE RULE OF LAW

Although, today, almost all national and international legal and political documents contain the rule of law principle as a hallmark of the functioning and arrangement of states and international organizations, what seems to be especially significant is the fact that none of those documents contains a precise and clear definition of this term. Scholars try to define this principle by means of descriptive definitions or by means of elements which are part of the rule of law principle. Shkaric (2006) states that the rule of law is based on the following postulates: the primary significance of human freedoms and rights; the existence of a limited state power; the division of the power into legislative, executive and judicial; the existence of an independent judiciary and legal safety of people and citizens. Maxeiner (2010) follows the same line of thinking as Shkaric, claiming that a general definition of the rule of law principle should determine the form of governing which would coerce good and equal laws as well as impartial enforcement and objective interpretation of laws so that all citizens could enjoy their benefits and be positive about their consistency. Sachiko & Durwoo (2007) determine an autonomous definition of the rule of law principle, stating that the rule of law implies independent, efficient and accessible legal system in which the government applies fair and just laws equally, constantly, purposefully as well as perspective to all its citizens. According to Čavoški (1994), the rule of law is a meta-legal idea for a legitimate legal order which constantly and legally limits the power of the state and creates adequate laws and efficient institutional warranties for adequately ensuring human safety and freedom.

OECD (2005) underlines the following cumulatively set elements of the rule of law principle: constitutionalism, limited power, independent judiciary, prohibition of discrimination, transparency, human rights protection. The European Commission for Democracy through law (Venice Commission) (2011) has identified six elements which are part of the rule of law principle: legality, including a transparent, accountable and democratic process of enacting laws, legal certainty, prohibition of arbitrariness, access to justice before independent and impartial courts, including judicial review of administrative acts, respect for human rights, non-discrimination and equality before the law (p.10). Stephenson (2005) purports that the rule of law principle belongs to the category of “open concepts” which is a subject of a constant debate. He attempts to classify all these interpretations into three categories of definitions: formal², material³ and functional⁴.

¹ The rule of law concept, on the European continent, was particularly developed in the context of the civic revolutions in the 17th and 18th century.

² Formal definitions include: formal, independent and impartial judiciary, public laws; prohibition of discrimination; prohibition of retroactive effects of laws, judicial control of administrative operations.

³ Material definitions provide a moral vision of the legal system.

On the other hand, Belton (2005) mentions an institutional approach, i.e. aspect of the rule of law principle.

Despite the distinct interpretations of the term ‘the rule of law principle’, our position is that there are certain basic postulates, namely “minimal limits” which should be accepted and respected in every state, irrespective of its political, legal and cultural tradition and values. In that vein, we have accepted Stephenson’s standpoint that the rule of law is an “open” principle, which is permanently evolving. We also believe that the fundamental basic postulates of the rule of law have been set by the Venice Commission, which defines this principle comprehensively from a formal, material, functional and institutional aspect. The term ‘rule of law’ is determined in a similar manner by the International Justice Project (which will be further elaborated in this study).

EXTENSION OF THE CONTENT OF THE RULE OF LAW PRINCIPLE

Precisely the abovementioned institutional aspect of the rule of law imposes the concept of good management/governance as a new and crucial element of the rule of law principle. Practically, with the advent of this element, the institutions have been transformed from means of exercising the rule of law to targets of the rule of law (Belton, 2005). In other words, the democratic capacities of institutions (in the national and international framework) are the best possible indicator for the respect of the rule of law principle. The functioning of the institutions in one state is utilized to conduct and measure the rule of law. Provided these institutions undergo reforms, the rule of law could be significantly improved.

The extension of the capacity of the rule of law with the capacity of good governance puts additional pressure on the political elites. Namely, they are no longer required only to govern honestly and in a balanced way, but they are also required to respect the principles of accountability, transparency, efficiency, effectiveness and inclusiveness. This put the rule of law concept into a completely different perspective which necessitates a far more intricate systems and networks of governance within the framework of the state, in order to meet the contemporary challenges of the rule of law without jeopardizing the democratic character of the political system.

On the other hand, the rule of law and the democratic institutions which work efficiently are basic prerequisites for citizen’s safety as well. They contribute to people’s safety and guarantee that no one will be, on an arbitrary basis, prosecuted and arrested and that everyone is guaranteed a just judicial process which is led by an independent and unbiased judge. The justness of the legal proceedings is a constituent part of justice and it ensures citizens’ confidence in judiciary which is based on law and is impartial.

QUANTITATIVE DETERMINATION OF THE RULE OF LAW

It is undeniable that the rule of law principle has evolved in the course of time, assuming different shapes. At the beginning the rule of law was an abstract principle, however, today it has a quantitative form as well, which is obtained by measuring the functioning of the institutions in one state. In that vein, the index of the rule of law which is measured annually for separate states

⁴ Functional definitions focus on the efficiency with which the law and the legal system perform certain functions.

by the World Justice Project is of a paramount importance.⁵ According to the World Justice Project, the rule of law concept is based on four basic principles: the government and its officials and agents are accountable under the law (accountable government), the laws are clear, publicized, stable and fair, and protect fundamental rights, including the security of persons and property (good laws), the process by which the laws are enacted, administered and enforced is accessible, fair and efficient (good process) and justice is delivered by competent, ethical, and independent representatives and neutrals who are of sufficient number, have adequate resources, and reflect the makeup of the communities they serve (access to justice).

Practically, this index ranks states according to eight indicators which influence the rule of law: limited government powers, absence of corruption, order and security, fundamental rights, open government, regulatory enforcement, civil justice and criminal justice.

THE RULE OF LAW IN THE REPUBLIC OF MACEDONIA: ARE THE INSTITUTIONS DEMOCRATIC AND EFFICIENT?

The Constitution of the Republic of Macedonia determines the rule of law principle as a fundamental value of the constitutional order. The role of this principle along with the total respect of its elements in building liberal democracy in our country, are under a constant monitoring by numerous relevant international organizations. For the purposes of this study, we would present and analyze the conclusions of both the European Commission in the Report on the Progress of the Republic of Macedonia and the World Justice Project via the index of the rule of law.

According to the World Justice Project, the index of rule of law for the year 2012 in the Republic of Macedonia was descriptively determined as upper middle income. The table below presents the quantitative sums of the separate parameters.

⁵ The World Justice Project is a multinational and multidisciplinary organization which aims at strengthening the rule of law in order to ensure development of communities according to the equal opportunities principle. It was established in 2006, and its headquarters is in Washington, the USA.

Table 1: Scores for the Rule of Law Factors

WJR Rule of Law Index Factors		Score	Global Rank.	Regional Rank.	Income Grope Rank.
Factor 1	Limited Government Power	0.52	59/97	9/21	18/30
Factor 2	Absence of Corruption	0.55	36/97	8/21	7/30
Factor 3	Order and Security	0.75	41/97	14/21	9/30
Factor 4	Fundamental Rights	0.64	41/97	10/21	12/30
Factor 5	Open Government	0.62	23/97	3/21	3/30
Factor 6	Regulatory Enforcement	0.56	34/97	7/21	5/30
Factor 7	Civil Justice	0.53	52/97	11/21	16/30
Factor 8	Criminal Justice	0.53	41/97	10/21	9/30

Source: *The WJP Rule of Law Index, 2012/2013*

Considering the values presented in the Table 1 above it can be concluded that the Republic of Macedonia has received high scores for the openness of the government. The Republic of Macedonia has also been ranked on the third position in the Eastern Europe and Central Asia, namely on the twenty-third position globally. Moreover, the Republic of Macedonia has received high scores for the execution of the regulations (it is on the thirty-fourth position on the global level and fifth position in the group of states with high middle income). In that direction, the Report of the European Commission for the year 2012 states that: "... *Citizens' services have been improved and e-government is being gradually introduced, but additional efforts are needed in order to guarantee transparency, professionalism and independence of the public administration.*" (p.12).

The corruption in the Republic of Macedonia, according to the World Justice Project is on a law level, in comparison with the states from the same group (seventh position according to the income level and the eighth position on the regional level.) On the other hand, in the Report of the European Commission (2012) it has been noted that: "*Corruption remains prevalent in many areas and is a serious problem.*" (p.13).

Shortcomings, according to the index of the rule of law, can be spotted in the principle of power division among separate state organs and in the establishment of the Harrington's system of checks and balances among them. In this sector, the Republic of Macedonia has been assessed with a relatively low score and it is placed on the fifty-ninth position globally, namely on the eighteenth position in the group of states with a high middle income. The report of the World

Justice Project highlights the fact that neither courts, nor the legislator restrict the authority of the executive power (Botero, Martinez, Ponce & Prat, 2012-2013). The conclusions of the European Commission (2012) are following the same line: *“Continued efforts to develop the capacity of the Assembly as well as to enhance the political dialogue are needed... Overall, as far as the judiciary is concerned there are legal and institutional measures, but, yet, additional efforts are needed to guarantee independence and impartiality in practice.”* (p.13).

According to the index of the rule of law, the citizens in the Republic of Macedonia have an access to the civil and criminal justice, but the level is not very satisfactory. Shortcomings have been detected in the investigative and criminal procedures before the authorities in particular. Also, the assessment of the respect of human rights and freedoms is not favorable, as certain restrictions on the freedom of opinion and speech, as well as the discrimination of the marginalized groups have been noted. The European Commission (2012) in the Report states that: *“A limited progress has been made in the area of basic rights; a limited progress has been made in the treatment of socially vulnerable people and/or people with special needs; as well as in the antidiscrimination politics.”* *“... Certain progress has been made in the area of freedom of expression and media.”* *“... In practice there are still gaps as to the execution of the formal protective measures against degrading behavior; efforts have been made to improve the procedures and treatment of imprisoned people, nevertheless, the conditions in numerous detention centers remain under the needed standards.”* *“... The prison system seriously remains without sufficient financial means and without sufficient number of employees.”* (p.16).

Generally speaking, the Republic of Macedonia has received an average descriptive score as to the implementation of the rule of law principle by its institutions, which implies that the institutions should undergo reforms in the context of their democratic capacity. Accordingly, it is undisputable that in the future, the principle of checks and balances should be established among the legislative, executive and judiciary power, namely efficient power should be established limited by law and under a constant judicial monitoring, as a primary expression of the term ‘the rule of law’. In the future, special efforts should be made to improve the respect of human rights and freedoms, because they are of a primary importance and have. Human rights and freedoms, as pre-existence values in comparison to the government are an indivisible segment of the rule of law. Legal safety, expressed by means of civil and criminal justice of citizens, should be on the agenda of the political elites, especially as far as the processing warranties are concerned, which undoubtedly are a significant indicator for the rule of law, similarly to the maxim: the law exists only where legal remedies exist (*ubi jus ubi remidium*).

According to the noted state in the Republic of Macedonia, and in order to achieve Euro-Atlantic values, concrete measures should be taken in the direction of: the improvement of the law enforcement performance via efficient execution of the legal and bylaws acts in this area; the consolidation of the independence and the entire capacity of the judiciary system (establishment of a comprehensive functionality of the judiciary, continued trainings, functional IT centre for the judiciary) and continued and sustained obstruction of the emergence of corruption via coherent cooperation of the authorities.

CONCLUSION

As a summary of what has been presented in this paper, it can be concluded that, on the one hand, the rule of law principle is based on respecting the laws, above which no single individual in the society can be, on the other hand, this principle is based on the justness of the adopted

laws from the material aspect, as well as respecting the procedure with which they are being adopted. The ultimate purpose of this principle is always and everywhere the same: equality and justice for all citizens. The fact that there is no precise definition of the term ‘the rule of law’ is in fact due to the dynamic, universal and political matrix of this principle. However, as it was previously stated, there is one “minimal threshold” for the implementation of this principle and its putting into practice on the part of the institutions. Exactly the democratic capacities of the institutions of the states and the international organizations are a reflection of the law and creators of its concrete shape.

Principally, not a single political system can address completely all challenges set by the rule of law which imply fair principles, on the one hand, and efficient governance of the state mechanism, on the other hand. The comprehension and insistence on changes in the rule of law principle are fundamental in each and every modern democratic regime, but also, following the tenet of OSCE, democracy is also an inherent element of the rule of law.

The partial realization of the rule of law principle in the Republic of Macedonia has certain specificities, typical of a state which has undergone a process of transition from mono-party system to political pluralism, without a sufficient time span for creating a tradition of the rule of law and for upgrading it to date. Nevertheless, the mentioned characteristics should not be taken as an excuse for the current implementation of the rule of law principle on the part of the institutions, presented in the assessment of the European Commission and the World Justice Project. The consolidation of the democratic character of the institutions in the Republic of Macedonia could be achieved merely via real endeavours for efficient application and respect of the rule of law, as a fundamental value of the constitutional order. In that direction, the positive experiences of states with matching political and legal tradition, values and culture will make a significant contribution.

To that aim, it is necessary to:

- re-establish the principle of the division of power and the system of checks and balances among the legislative, executive and judiciary power in the Republic of Macedonia. In this vein, it is an imperative to consolidate the role of the Assembly, as a legislative power, which creates the normative order, namely the rules referring to the functioning of the state power. On the other hand, the executive power should objectively and non-selectively apply the laws on the entire territory of the Republic of Macedonia, according to the principle of good governance, as a new qualitative element of the rule of law. In this context, the functioning of the administration should be improved, as a part of the executive power (along with the functioning of the Government). What is needed is a creation of an independent, professional, expert and service-oriented public and state administration and objective and uncorrupted law enforcement. The judiciary power, as a power which maintains the legal order should be professional, impartial and completely independent of the executive power;
- redefine the institutions which are responsible for the protection of human rights and freedoms and for the improvement of legal mechanisms for their promotion and advancement. The institutional reforms in this segment should be directed towards greater financial independence, intensification of the mutual cooperation and efficient and timely intervention in the concrete cases;
- effectively restrict the government power with the law, but also with constant judicial control. In this part, the role of the Constitutional Court is of a primary importance, as the Constitutional

Court is a “guardian” of the constitutional order and it should promote the rule of law principle as the highest fundamental value and basic presupposition for the development of democracy. Tit Livij stated that the rule of laws is more powerful than the rule of people (*imperia legume potentora quam hominum*). Consequently, the rule of law should be a framework which comprises justness, equal importance and application of laws, as well as exemption from whatever privileged position of whomever member of the state community.

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