



Concepts of human rights, democracy, and the rule of law: a literature review

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28 November 2013

Large-Scale FP7 Collaborative Project

GA No. 320000

1 May 2013-30 April 2017

Concepts of human rights, democracy, and the rule of law: a literature review

Work Package No. 3 – Deliverable No. 1

| | |
|----------------------------|--|
| Due date | 30 November 2013 |
| Submission date | 28 November 2013 |
| Dissemination level | PU |
| Lead Beneficiary | Utrecht University |
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<http://www.fp7-frame.eu>

Executive Summary

This literature review is the first deliverable in Work Package 3 (“WP3”) of the FRAME project. Its topic is the conceptualization of the notions of human rights, democracy and rule of law in the recent academic literature. The purpose of this review is to lay a broad foundation for the rest of the research in WP 3.

This review emphasizes that human rights, democracy and rule of law are all contested concepts, meaning that they are continually subject to questioning and revision. The review first outlines the major debates regarding the conceptualization of these ideals one by one. Thus, in regard to human rights the tension between the universalist credo and particularist approaches is discussed, as are problems in relation to the conceptualization of the rights-holder, and debates concerning the content of rights and obligations. In regard to the concept of democracy various models of democracy are examined. Concerning the rule of law the debate between proponents of thin and thick definitions of the rule of law is investigated.

Though the chief focus of this literature review is on conceptual questions, it is recognized that questions regarding the implementation and promotion of human rights, democracy and rule of law are closely related. Therefore this review identifies some of the key current challenges that make the realization of the ideals of human rights, democracy and rule of law so complex.

At the end of the review the relationship between these three ideals is discussed. One of the findings is that these ideals are contested in similar ways, meaning that there are cross-cutting themes in the ways these concepts are challenged in the literature. These cross-cutting challenges relate to (i) the position of vulnerable groups; (ii) concerns about national sovereignty; (iii) the role of legal pluralism and informal institutions; and (iv) perceived neo-imperialism and hypocrisy. The tension between universalism and particularism can be perceived as the overarching theme of these four challenges.

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I. Introduction: aim and scope of this study*

Human rights, democracy and the rule of law are ideals. In that sense they are not possessions, something people “have”, but aspirations: something people strive for. They are also something people “do”, something they put into practice. None of these three ideals can be easily captured under one definition. On a conceptual level – as well as on the level of practice – human rights, democracy and the rule of law are inherently dynamic and contested. Yet, at the same time, it is important to gain an understanding of these concepts and strive towards some form of definition. Many governments – including repressive regimes – have united under the banners of human rights, democracy and the rule of law for different purposes. If no definition of these ideals is attempted, all varieties of government can fall under them. Thus, “despite the surrounding uncertainty, it is not the case that any proposed meaning is as good as another.”¹

This literature review summarizes the state-of-the-art as regards the conceptualization of human rights, democracy, and the rule of law in the academic literature. It also outlines key challenges in regard to the implementation of these ideals. As this involves canvassing an incredibly broad field of scholarship, several caveats apply. First, this review mainly discusses the most recent contributions to the long-lasting debates about those notions. Second, the emphasis is on academic literature. The parts on human rights and the rule of law (Parts II and IV) are primarily based on legal literature, because these concepts are particularly richly theorized in legal scholarship. Analogously, the discussion about democracy (Part III) is largely based on the work of political scientists.

This review is part of the FRAME project. FRAME is an ambitious, wide-ranging, and interdisciplinary research project on human rights in the EU’s internal and external policies. Within the FRAME project, Work Package 3 focuses on “underlying conceptions of human rights, democracy and rule of law”. These concepts are examined together because they are the founding values of the EU, as well as the guiding principles of the Union’s external action (Article 2 and 21 TEU).

WP 3 is the chief FRAME WP to focus on conceptual questions. Thus the primary aim of this literature review is to gain a deeper understanding of conceptual issues relating to human rights, democracy and rule of law. The different ways in which these concepts can be applied and promoted in practice are just discussed briefly here, since these will be studied more in-depth in other FRAME Work Packages. Also, the present review does not closely examine the EU’s conceptualization of human rights, democracy and rule of law, as this task is taken up in FRAME Deliverable 3.2. Instead, this review – being the first deliverable in this WP – seeks to lay a broad foundation for the rest of the research in WP 3. The aim is to indicate key debates in the current academic literature. The linkages between the general (academic) discussions about these three notions and the EU’s conceptualization will be explored when the research in the FRAME project is further advanced, notably when Deliverable 3.2 about the EU’s conceptualization of these three notions is finished. That is when the full range of implications for the EU’s agenda of human rights, democracy and rule of law promotion can be assessed.

In what follows, Part II discusses human rights; Part III democracy; Part IV the rule of law; and Part V the connections between these concepts. Part VI provides a conclusion.

* Alexandra Timmer wishes to thank Simona Florescu, Nicolas Hachez, Magnus Killander, and Filipa Raimundo for generously sharing their ideas, as well as the FRAME reviewers from AMU, BIM and Leuven.

¹ Tamanaha (2004), at 4.

II. Human Rights

A. Brief note on the evolution of the concept

Human rights are commonly understood as the inalienable rights to which each person is entitled by virtue of being human. In other words, these rights are inherent in human beings (i.e. they do not have to be earned or granted); they are inalienable (i.e. they cannot be forfeited); and they are equally applicable to all. At this very abstract level, there is nearly universal recognition of the human rights concept. Beyond this, however, the concept is deeply contested, as is its history.² Although ideas about justice and humanity have been around for a long time, the concept of “human rights developed rather late in human history”,³ It is said that: “No society, civilization, or culture prior to the seventeenth century . . . had a widely endorsed practice, or even vision, of equal and inalienable individual human rights.”⁴ The birth of the international human rights movement as such is usually dated at the adoption of the United Nations Charter (1945) and then the adoption of the Universal Declaration of Human Rights (UDHR; 1948).

Since the adoption of the UDHR, human rights have been incrementally codified in legal documents. On the basis of the Universal Declaration, the United Nations adopted two separate Covenants, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Additionally, the UN also adopted specific treaties. In chronological order, the main ones are: International Convention on the Elimination of Racial Discrimination (ICERD); the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Convention on the Rights of the Child (CRC); International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ICRMW); International Convention for the Protection of All Persons from Enforced Disappearance (CED); and the Convention on the Rights of Persons with Disabilities (CPRD). In parallel to the work of the UN, human rights treaties have been adopted at the regional level, including – again in chronological order – the European Convention of Human Rights, the European Social Charter, the American Convention on Human Rights and the African Charter on Human and Peoples’ Rights.

The main areas where the human rights concept is contested will be discussed in the next parts of this review. These are human rights’ claim to universalism and the tensions this has evoked with particularist approaches (Part B); challenges regarding the conceptual subject of human rights (Part C); and the content of human rights norms and obligations (Part D). These conceptual difficulties are related to numerous practical difficulties with the implementation of human rights. In these sections we will discuss the conceptual and the practical challenges together, as they frequently overlap. Part E discusses the practical implementation of human rights on the national, regional and international levels.

² See, e.g., Ishay (2004).

³ Bielefeldt (2009), at 14.

⁴ Donnelly (2007), at 284-285.

B. Tensions between universality and particularism

1. Universalist claims

The standard mantra, articulated in the Vienna Declaration of 1993 and building on the Universal Declaration, is that human rights are “universal, indivisible and interrelated”.⁵ In what senses are human rights universal?

Jack Donnelly has identified several ways in which human rights might be held to be universal.⁶ In the first place there is the conceptual universality that was already mentioned: human rights are universally possessed by all humans, simply by virtue of being human. That is not to say that human rights are universally enforced, for they are (evidently) not.⁷ Then there is what Donnelly terms “international legal universality”, meaning that at state level, there is near universal endorsement of the Universal Declaration and the two Covenants.⁸ At the same time there is “overlapping consensus universality”, meaning that the leading doctrines of the world (be they religious, philosophical or moral) to some extent replicate the consensus on the legal level: “Over the past few decades more and more adherents of a growing range of comprehensive doctrines in all regions of the world have come to endorse human rights—(but only) as a political conception of justice.”⁹ Finally there is what Donnelly terms “ontological universality”; the idea that human rights have a single trans-historical foundation.¹⁰ This is a notion he rejects. Other authors, notably Brian S. Turner, who theorizes human vulnerability as the (universal) foundation of human rights, would disagree.¹¹

2. Particularist and other critiques of universalism

Many challenges to the universalist claim have been formulated. Just as there are several different ways in which human rights can be said to be universal, there are also different ways in which they can be said to be particular. The classic cultural relativist claim is that the “principles used for judging behavior are valid only with a particular culture”.¹² This was the position famously taken by the American Anthropological Association in 1947.¹³ Their rejection of universal human rights was “based on the absence of empirical evidence which might confirm the existence of universal values.”¹⁴ This old version of cultural relativism is nowadays by and large rejected, inter alia because it confuses “is” and “ought”; it draws the wrong conclusions from its empirical analysis.¹⁵ Eva Brems points out that the universality of human rights does not have to rest on an empirical basis; cultures are dynamic and therefore a justice idea (such as the human rights concept) can spread beyond the society from which it originated.¹⁶

⁵ Vienna Declaration and Programme of Action, A/CONF.157/23 (12 July 1993), para. 5.

⁶ Donnelly (2007).

⁷ *Id.* at 283.

⁸ *Id.* at 288-289.

⁹ *Id.* at 290.

¹⁰ *Id.* at 292-293.

¹¹ Turner (2006).

¹² Brems (2004), at 214.

¹³ American Anthropological Association (1947).

¹⁴ Brems (2004), at 214.

¹⁵ *Id.* at 216.

¹⁶ *Id.*

More nuanced particularist critiques, however, warrant serious study. In the first place, human rights have repeatedly been castigated as tools of Western imperialism and criticized for leaving no room for cultural diversity.¹⁷ The history of human rights is a story of great inequality, “shadowed by the colonialist mission of civilizing ‘benighted’ peoples.”¹⁸ Human rights suffer from this civilizing mission to the present day, scholars on the relativist end of the spectrum often argue.¹⁹ Relatedly, scholars from non-Western countries, as well as many critical scholars within the West, have shown that human rights – in their present operation – favor Western ideology and/or interest.²⁰ For example, feminist scholars have shown that the human rights universal is gendered; it favors the male experience.²¹ One target of the feminist critique has been the Western/liberal assumption, underpinning human rights law, that the public and the private sphere can/should be divided. A consequence of this public/private split is that human rights law has developed along gendered lines; the deference shown to the private sphere has been a barrier to the development of human rights for women.

A further topic that has been much debated during the past decades is the tension between universalism and particular cultural/moral/religious values. This tension is probably apparent in all areas of human rights law; for example in the areas of women’s rights,²² and religious freedom.²³ Many scholars now emphasize that human rights are always universal *and* particular; human rights require both an appreciation of universality and an appreciation of particular identity.²⁴

Arguably, human rights mean different things to different people: the answer to the question “what are human rights” depends on who you ask. Marie-Bénédicte Dembour has recently mapped the field of human rights scholarship in four schools of thought: “‘natural scholars’ conceive of human rights as *given*; ‘deliberative scholars’ as *agreed upon*; ‘protest scholars’ as *fought for*; and ‘discourse scholars’ as *talked about*.”²⁵ Scholars in these different schools conceive of human rights in very different ways, and this is useful to be able to recognize when reading any kind of human rights literature.

3. Legal pluralism

The universalism-particularism tension is also manifest in discussions about the relationship between human rights and legal pluralism. Legal pluralism refers to the existence of several sources of law (both state and non-state) within a given geographical area. The recognition of the existence of legal pluralism provides nuance to the claim of human rights universality. Local justice institutions can advance human rights protection, but they can also operate on terms that are in tension with international human rights treaty norms (for example by discriminating on the basis of gender).²⁶

¹⁷ See, e.g., Brems (2001); Donnelly (2013); Sajó (2004).

¹⁸ Stacy (2009), at 11.

¹⁹ See, e.g., Kapur (2006); Mutua (2001).

²⁰ See, e.g., Douzinas (2000); Kapur (2006); and Mutua (2001).

²¹ Feminists critiques include, e.g., Banda (2005); Cook (1994); Knop (2004); and Otto (2006).

²² See, e.g., Holtmaat & Naber (2011).

²³ See, e.g., Zucca & Ungureanu (2012).

²⁴ See, e.g., Brems (2001) (coining the term “inclusive universality”).

²⁵ Dembour (2010), at 2.

²⁶ See, e.g., Sieder & McNeish (2013).

4. **International human rights law and national sovereignty**

The strained relationship between the universal and the particular in legal human rights discourse is partly a result of the inescapable tension between adhering to international human rights norms on the one hand and national sovereignty on the other. This tension surfaces in many debates – for example the one about U.S. exceptionalism when it comes to ratifying human rights treaties. From a European perspective, an important discussion at the moment is about the proper role of the ECtHR.²⁷ According to some, the Strasbourg Court increasingly widens its own competences, especially in the area of asylum law.²⁸

The Court has, *inter alia*, developed the doctrine of the margin of appreciation to cope with the tension between international human rights supervision and national sovereignty.²⁹ At the heart of this doctrine is the idea of deference: the Court should maintain a certain deference toward the judgment of the domestic authorities when it comes to applying the norms of the Convention to a certain set of facts.³⁰ Thus the margin of appreciation is a tool that allows for some national variation and diversity in the ways in which the European Convention can be implemented. There is a lot of debate about this doctrine: scholars often maintain that the Court is not consistent in applying the doctrine,³¹ and at the same time there is also a political discussion which has led to the creation of Protocol 15 to the ECHR, which – when it is ratified by all Council of Europe Member States – will add a reference to subsidiarity and the margin of the appreciation to the preamble of the Convention.³²

C. **Challenges regarding the subjects of human rights**

This part will take a closer look at the rights-holder of human rights. The credo is that everyone has human rights, but it turns out that the conceptualization of the “human” in human rights is not so easy.

1. **Human rights for vulnerable groups?**

Who is the rights-holder in human rights law? Are human rights for those who suffer? This is both a conceptual question and a matter of implementation. To start with the latter: in the abstract human rights are universal, but in many cases members of vulnerable groups have more difficulties obtaining recognition and protection of their human rights than members of dominant groups.³³ This is in part why specific treaties such as the CERD, the CEDAW, the CRC and the CRPD have proliferated: to offer frameworks of protection for those whose rights are most systematically violated. In these frameworks attention is paid to the participation of the persons concerned, not only by explicit provisions to guarantee their participation in public and private institutions (see e.g. art. 29 and 30 CRPD), but also by giving them a role in the monitoring process (see art 33 (3) CRPD). Participation is seen as a necessary condition for effective implementation.³⁴

²⁷ See, e.g., Christoffersen & Madsen (2011); Flogaitis, Zwart & Fraser (2013).

²⁸ See, e.g., Bossuyt (2010).

²⁹ See, e.g., Kratochvil (2011); Legg (2012).

³⁰ Kratochvil (2011), at 330.

³¹ See, e.g., Kratochvil (2011); Legg (2012).

³² The text of Protocol 15 ECHR is available here: <http://conventions.coe.int/Treaty/en/Treaties/Html/213.htm>.

³³ Recent works making this point include: Brems (2013); Hammarberg (2011); and Otto (2006).

³⁴ See also Fredman (2008), at 200 et seq.

But the question of vulnerable groups is also a fundamental/conceptual one. The human of human rights law, meaning the conceptual subject of human rights, is not really universal, critical authors contend.³⁵ The subject of human rights law is really a liberal subject, who is conceived of as autonomous, rational and independent.³⁶ Everybody who does not fit this picture – liberalisms’ “Others”³⁷ – falls outside the remit of human rights. The archetype liberal subject is a white Christian male propertied citizen (and, one could add, able-bodied and heterosexual).³⁸ Put differently, the human rights universal is arguably premised on the liberal subject, but not necessarily on vulnerable subjects (such as, notably, refugees³⁹).

In this context an interesting development within human rights law and scholarship is that the dominant norm is increasingly being questioned.⁴⁰ Since the CERD, the perspective of protection of specific vulnerable groups has evolved considerably. The CEDAW was innovative by including the obligation to combat not only discriminatory acts, but also to reconsider social and cultural patterns of conduct and eliminate practices reflecting inferiority or superiority of either sex (Art. 5 (a)). The Disability Convention marks an important stage in the development from “protection” and prohibition of discrimination, to a full recognition of difference as a two-sided phenomenon, defined by both the impairment of a person and the barriers in society (those being social and environmental). The CRPD sees empowerment and inclusion as important goals. This reflects a more inclusive human rights approach.⁴¹ The CRPD also recognises more explicitly the duty to take differences into account by providing reasonable accommodation, and finally the CRPD emphasizes the impact of intersectional discrimination, by paying attention to women and children with disabilities.

2. The role of human dignity

The conceptual basis for human rights is often sought in human dignity, as is evidenced inter alia by the preambles of the Universal Declaration and the two International Covenants.⁴² But human dignity is obviously an open concept, which raises philosophical questions⁴³ as well as more practical questions. One practical question is what guiding value such an open concept has for judges who have to rule on individual cases.⁴⁴

Mary Neal has recently offered an original approach towards the subject: she argues that dignity should be understood in light of human vulnerability.⁴⁵ In classic readings, based on Kant, dignity is often associated with *invulnerability*:⁴⁶ on this account dignity is about overcoming vulnerability through the use of reason.⁴⁷ In contrast, Neal argues that “[d]ignity ... treats vulnerability as a *source* of value. ... all

³⁵ See, e.g., Douzinas (2000); Gear (2010); and Kapur (2006).

³⁶ *Id.*

³⁷ Kapur (2006), at 675.

³⁸ Kapur (2006), at 673.

³⁹ Douzinas (2000); Gear (2010).

⁴⁰ See, e.g., Cook & Cusack (2010).

⁴¹ Bielefeldt (2009).

⁴² In the preambles of both the Covenants it says: “Recognizing that these rights derive from the inherent dignity of the human person [...]”.

⁴³ See, e.g., Habermas (2010); Waldron (2009).

⁴⁴ See, e.g., Khaitan (2012); McCrudden (2008).

⁴⁵ Neal (2012).

⁴⁶ See e.g., Neal (2012), at 190; Waldron (2009), at 11.

⁴⁷ Neal (2012), at 197; and Waldron (2009) at 15-16.

valid uses of “dignity” reflect a valuing of the sense in which human existence (perhaps uniquely) embodies a union between the fragile/material/finite and the transcendent/sublime/immortal”.⁴⁸ Reconceptualising dignity in this manner might be one step towards a more truly inclusive human rights law, meaning human rights law that is responsive to the positions of “vulnerable” or non-dominant groups.

3. **The human rights of future generations**

The question of how to conceptualize the subject of human rights law also raises concerns about intergenerational justice. To what extent do we in the present have to take account of the human rights of future generations? This is a topic that is particularly salient in relation to questions of environmental protection and climate change.⁴⁹ The choices that we make in the present regarding the environment have a profound impact on the ways in which future generations can enjoy their human rights. In 2012, the UN Human Rights Council has appointed an Independent Expert on human rights and the environment, whose task is to examine the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment.⁵⁰

D. Rights and obligations

Having looked at the rights-holders of human rights, it is now time to turn to the scope of rights and obligations.

1. **Dichotomy between civil-political and socio-economic rights is outdated**

Human rights are various in nature. There are physical integrity rights (e.g. the right to life; and the prohibition of torture and inhuman and degrading treatment); other civil rights (e.g., the right to a fair trial; the right to equality of treatment; and the freedom of thought, conscience and religion); political rights (e.g., freedom of expression; right to vote; freedom of assembly); economic rights (e.g., the right to property; the right to work); social rights (e.g., the right to food; and the right to education); and cultural rights (e.g. the right to participate freely in the cultural life of the community).

Formerly human rights have often been split in civil and political rights on the one hand and social and economic rights on the other hand. The idea was that civil and political rights could be implemented immediately because they are precise and only impose negative obligations on states, whereas social and economic rights were thought to be vague and involving a progressive realization, because these rights require some kind of positive action on the part of the state, which depends on the amount of available resources. In the traditional version of this dichotomous thinking, civil and political rights are justiciable and social and economic rights are not.⁵¹

⁴⁸ Neal (2012), at 198.

⁴⁹ See, e.g., Hiskes (2009).

⁵⁰ More information about the Independent Expert is available at: <http://www.ohchr.org/EN/Issues/Environment/IEEnvironment/Pages/IEenvironmentIndex.aspx>.

⁵¹ For discussion of this dichotomous thinking, see, e.g., Koch (2005).

Scholars now broadly agree that this dichotomy oversimplifies the matter and, moreover, hinders the full implementation of human rights.⁵² It weakens the core idea of the indivisibility of human rights. Both the UN and the EU consider that human rights are indivisible.⁵³

2. **Tripartite framework: respect, protect, fulfill**

During the late 1980's, the still current tripartite typology of States' obligations "to respect, to protect and to fulfill" human rights was introduced to replace the controversial dichotomy between civil-political and socio-economic rights.⁵⁴ The obligation to respect requires states to refrain from interfering with the enjoyment of human rights (e.g. state police must refrain from torturing people). The obligation to protect means that states must take measures to prevent violations of human rights by state authorities and third parties (e.g. the state must protect people from domestic violence). The obligation to fulfill means that states must take active steps to put in place institutions and procedures, including the allocation of resources, to enable people to enjoy their rights (e.g. the State must facilitate the use of sign languages, Braille, and alternative communication in official interactions to fulfill the right to freedom of expression of people with a disability).

States are under an obligation to respect, protect and fulfill *all* human rights. This framework has, however, been especially invoked in relation to socio-economic rights. Olivier de Schutter (UN Special Rapporteur on the right to food) writes: "The tripartite typology of States' obligations has been widely seen as allowing a concretization of economic, social and cultural rights, and therefore as encouraging their justiciability."⁵⁵

3. **Positive obligations and negative obligations**

Due to the case law of the ECtHR (which does not really use the tripartite framework), nowadays human rights debates are increasingly framed in terms of negative and positive obligations. Negative obligations refer to the duty to refrain from interfering in the enjoyment of people's human rights. Alastair Mowbray has characterized positive obligations as: "the duty upon states to undertake specific affirmative tasks".⁵⁶

All types of rights can entail both negative (non-interference) and positive state obligations, depending on the situation. Positive obligations are gaining ground in the case law of the ECtHR, both when it comes to civil-political rights and when it comes to socio-economic rights.⁵⁷ The terminology of positive and negative obligations might be thought to raise another dichotomy, but the Court's case law makes clear that there is no clear line between positive and negative obligations, and that they sometimes overlap.⁵⁸ There is a continuum rather than a divide between positive and negative obligations.

⁵² See, e.g., Koch (2005).

⁵³ For discussion of the notion of indivisibility see, e.g., Nickel (2008).

⁵⁴ Koch (2005), at 84-85. See generally De Schutter (2010), at 241-512.

⁵⁵ *Id.* at 248.

⁵⁶ Mowbray (2004), at 2. See also about positive obligations, e.g., Fredman (2008).

⁵⁷ See, e.g., Mowbray (2004); and Koch (2009).

⁵⁸ Koch (2005), at 97.

4. **Obligations of non-state actors**

Thus far we have discussed the human rights obligations of states. States are still the prime bearers of human rights obligations, even though they are not the sole human rights violators. In the past years, therefore, there has been increasing debate about the obligations of non-state actors such as international organizations;⁵⁹ and transnational corporations.⁶⁰ UN Special Representative John Ruggie has developed a framework of Guiding Principles on Business and Human Rights.⁶¹

5. **Conflicts between human rights**

Eva Brems has observed: “When a legally protected interest takes the shape of a fundamental right, a society expresses a desire to grant this interest priority over other interests as a matter of principle. Human rights are as a rule included in constitutions and international treaties and as a result stand on the top of the hierarchy of legal sources. This does not mean that human rights are absolute. Their exercise can be subjected to restrictions that are imposed for the protection of other general or individual interests. The priority of human rights that holds in principle does not hold in every concrete case. A special situation occurs when the right or interest colliding with a certain human right is itself a human right. Such situations are not exceptional.”⁶²

The question is what states (and international judges) should do when human rights obligations (apparently) collide with each other.⁶³ How, if at all, can these conflicts be solved? One of the conflicts that is prominent in the literature is the perceived conflict between women’s rights v. religious freedom.⁶⁴ And what if human rights considerations are perceived to conflict with other important considerations (which in themselves can also be related to human rights) such as considerations pertaining to environmental protection or collective security?⁶⁵ When engaging in human rights work – be that practical, scholarly or policy-oriented work – it needs to be kept in mind that human rights obligations can conflict with each other.

⁵⁹ Wouters, Brems, Smis and Schmitt (eds.), 2012.

⁶⁰ The UN Human Rights Council has established a “Working Group on the issue of human rights and transnational corporations and other business enterprises”. See: <http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx>

⁶¹ Human Rights Council, *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie*, 21 March 2011, A/HRC/17/31.

⁶² Brems (2005), at 299.

⁶³ See, e.g., Baer (2010); and Brems ed. (2008).

⁶⁴ See, e.g., Baer (2010).

⁶⁵ See, e.g., Shelton (2012); and Tzanakopoulos (2012).

E. Implementation: national, regional and global

This section briefly discusses the implementation of human rights law at three levels. First comes the *national* level and the role of national human rights institutions; the next part outlines the *regional* systems of human rights protection; and then the idea of setting up a *World Court* of Human Rights will be discussed. The section closes by discussing the idea of a “human rights based approach to development”, as developed by the UN.

1. National human rights institutions

The responsibility for protecting human rights primarily lies with the national authorities. National Human Rights Institutions (NHRI's) are bodies that monitor and ensure that human rights are effectively protected in a given country. The UN has adopted the Paris Principles as a set of standards which guide the work of the NHRI's. NHRIs must comply with the Principles which identify their human rights objectives and provide for their independence, broad human rights mandate, adequate funding, and an inclusive and transparent selection and appointment process.⁶⁶ The Principles are broadly accepted as the test of an institution's legitimacy and credibility.

2. Regional human rights protection

The table below gives an overview of the main human rights regional organisations.

⁶⁶ See generally about NHRI's, e.g.: Carver (2010); and Wouters & Meuwissen (2013).

| REGION | EUROPE | AMERICA | AFRICA | MIDDLE EAST | SOUTH EAST ASIA |
|----------------------------|---|--|---|---|--|
| ORGANISATION | COUNCIL OF EUROPE | ORGANISATION OF AMERICAN STATES | AFRICAN UNION | LEAGUE OF ARAB STATES | ASSOCIATION OF SOUTHEAST ASIAN NATIONS |
| Date established | 1949 | 1948 | 2001 (successor of Organisation of African Unity set up in 1963) | 1945 | 1967 |
| State Parties | 47 states | 35 states | 53 states | 22 states | 10 states |
| Objectives | human rights, democracy and rule of law | achievement of peace and justice, solidarity, collaboration, territorial integrity, and independence | unity and solidarity; sovereignty; integration; peace and security; democracy; human rights; development | supervise affairs and interests of the Arab countries | regional stability and economic cooperation |
| Main HR Instrument | European Convention on Human Rights | American Convention on Human Rights | African Charter on Human and Peoples' Rights | Arab Charter on Human Rights | ASEAN Charter |
| Into force | 3 September 1953 | 18 July 1978 | 21 October 1986 | 15 March 2008 | 15 Dec. 2008 |
| Contracting States | All members of CoE | 24 states | All members of AU except South Sudan | 10 states | 10 states |
| Contents | Focus on civil and political rights | Similar to ECHR and ICCPR | Includes civil, political, economic, social, cultural and peoples' rights as well as duties | Attempt to reconcile Islamic principles with universal human rights | Scarce human rights provisions; human rights are rather set as a goal of ASEAN |
| Supranational Court | European Court of Human Rights | Inter-American Court of Human Rights | African Court on Human and Peoples' Rights | N/A | N/A |
| Established | 21 January 1959 | 22 May 1979 | 25 January 2004 | | |
| State parties | all members of CoE | 21 states | 26 states | | |
| Jurisdiction | advisory and contentious; everyone has the right to submit complaints directly to the Court | advisory and contentious; no right to individual petition; only via the Inter-American Commission of Human Rights. | advisory and contentious; access to the Court via the African Commission on Human and Peoples' Rights except for complaints submitted against the 7 states allowing direct access of individuals & NGOs | | |

Manfred Nowak has described the backgrounds of the regional human rights systems.⁶⁷ Their different origins play a role in the development of these systems, even when they are now much more inclined to harmonisation.

During the Cold War, the CoE aimed to distinguish the values of the Western European States (being human rights, the rule of law and pluralistic democracy) from the communist states in Eastern and Western Europe.⁶⁸ With the end of the Cold War, the CoE became less strict in its membership requirements, which had serious consequences for the effectiveness of the ECtHR's monitoring power.⁶⁹ The European Union developed its own human rights system in parallel.

The system of the Organisation of American States is far more complex than the European system, by reason of the enormous differences that exist between the Member States in almost all possible aspects (such as the amount of poverty, or the existence of military rule).⁷⁰ The context of poverty and military dictatorships shaped the development of this system. The fact that the U.S. and Canada and other countries have not ratified the Convention hampers its effectiveness.

The African System, today embodied in the African Union, was originally set up as a post-colonial organisation. The Organisation of African Unity was based on the principle of sovereignty, which then had to be harmonised with human rights, including the collective rights of the peoples.⁷¹

These different backgrounds can to some extent explain the differing emphases the individual systems have put on particular developments: e.g. on enforced disappearances (Americas), or neo-colonialist forms of exploitation by international corporations (Africa).

3. **A world court of human rights?**

At the global level human rights implementation is monitored by the UN, specifically the Human Rights Council ("UNHCR"), and the treaty bodies which monitor the implementation of the core international human rights treaties.⁷² To date there is no worldwide judicial body with compulsory jurisdiction over alleged human rights violations. Nevertheless, discussions over the creation of such a body have existed as early as 1940.⁷³ After a long time of relative silence on the matter, a 2008 Swiss initiative identified the creation of a World Court of Human Rights (WCHR) as a theme meriting further research.⁷⁴ One novelty of the proposed WCHR is to include non-state actors as entities against whom complaints may be brought, under the condition that they accepted the jurisdiction of this court. Even if the nature of such entities is not clearly delineated in the proposed statute, its authors have suggested that the provision primarily aims at transnational corporations, international non-profit organizations, organized opposition movements and autonomous communities.⁷⁵

⁶⁷ Nowak (2003), at 158-159, 189-191 and 203-205.

⁶⁸ *Id.* at 158.

⁶⁹ *Id.* at 159.

⁷⁰ *Id.* at 190.

⁷¹ Kumando (2008).

⁷² See for an overview: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>.

⁷³ Kozma, Nowak & Scheinin (2010), at 3.

⁷⁴ *Id.* at 35.

⁷⁵ *Id.* at 33-34.

4. **Human rights-based approaches**

To ensure that UN agencies at all levels (global regional and country level) mainstream human rights in their activities and do this consistently, the concept of Human Rights-Based Approaches (HRBA) has been developed.⁷⁶ HRBA emphasizes the complementarity of top down approaches (i.e. standard-setting and monitoring at the national and international level) and bottom up strategies (empowerment of vulnerable groups and developing strategies to use human rights effectively). This implies more emphasis not only on participation but also human rights education and strengthening of civil society.

To conclude the human rights part of this literature review: the main challenge regarding human rights is how to make the human rights idea a reality for *everybody*. It is a sad fact that despite all the promise and rhetoric, despite the universal recognition of the idea of human rights, many people face daily human rights violations. From a policy perspective, the ways in which the gap between rhetoric and reality is tackled depend on the choices that are made regarding the conceptual challenges that have just been outlined. From a bottom up perspective, closing the gap depends on the daily struggle of individual rights-holders, as well as the pressure exerted by social movements.⁷⁷

⁷⁶ See: <http://hrbaportal.org/the-human-rights-based-approach-to-development-cooperation-towards-a-common-understanding-among-un-agencies> .

⁷⁷ See, e.g., Stammers (2009).

III. Democracy

A. Brief note on the evolution of the concept

The origins of the term ‘democracy’ are Greek, coming from *demos* (people) and *kratos* (rule).⁷⁸ Democracy is “rule by the people” and – Abraham Lincoln added, foreshadowing debates about the “responsiveness” of democratic institutions – “for the people”.⁷⁹ Some scholars add that democracy also presumes a political community that has some autonomy; “[a] polity, however large or small, must enjoy some degree of self-government in order for democracy to be realized.”⁸⁰

Democracy is fraught with difficulties. Since Plato and the earliest days of democracy in ancient Greece, commentators have simultaneously celebrated democracy as the end of arbitrary rule and worried that democracy could mean “rule by the rabble”.⁸¹ Moreover, democracy is both difficult to create and difficult to sustain,⁸² as the twentieth century has shown notably during the Weimar Republic.

Following the work of Samuel Huntington, democracy researchers often speak of three historical “waves of democratization”, with in between periods of regression.⁸³ The First Wave started in the early nineteenth century (in the wake of the American and French revolutions) and ended after World War I. The Second Wave started after World War II and ended around 1962. The Third Wave started around the mid 1970’s (in Southern Europe, and later spreading all across the globe) and crested around the late 1990’s.⁸⁴ Jan Theorell warns, however, that “[b]eneath the general trend of democratization . . . the third wave has also been marred by serious undercurrents pulling in the opposite direction.”⁸⁵

In what follows the basic tenets and conceptual challenges of the democracy debate will first be set out (Part B); then several practical challenges will be considered (Part C); and finally the empirical measurement and evaluation of democracy will be briefly discussed (Part D).

B. Conceptual challenges

1. Instrumental and non-instrumental conceptions

There are several demarcation lines within debates about democracy. A first demarcation is between instrumental and non-instrumental conceptions of democracy.⁸⁶ Is democracy a means or an end? David Held writes: “a clear divide exists between those who value political participation for its own sake, and those who take a more instrumental view and understand democratic politics as a means of protecting citizens from arbitrary rule and expressing (via mechanisms of aggregation) their preferences.”⁸⁷ Held mentions that the majority of (at least the American) democratic thinkers take an instrumental view.⁸⁸

⁷⁸ See, e.g., Held (2006), at 1.

⁷⁹ Abraham Lincoln, *Gettysburg Address* (19 November 1863).

⁸⁰ Coppedge & Gerring (2011), at 248.

⁸¹ Held (2006), at 231.

⁸² *Id.* at 1.

⁸³ Huntington (1991). See also, e.g., Theorell (2010), at 1-8.

⁸⁴ APSA (2012), at 33.

⁸⁵ Theorell (2010), at 2.

⁸⁶ Anderson (2009); Held (2006), at 231.

⁸⁷ Held (2006), at 231.

⁸⁸ *Id.*

2. Procedural and substantive definitions

In democratic theory another important demarcation line “runs between procedural definitions, construing democracy as a political method defined by certain procedures, and substantive definitions, construing democracy in terms of its substance”.⁸⁹ We will see below, in Part IV, that similar distinctions exist in rule of law theory.

The procedural – or minimal or electoral – definition was pioneered by Schumpeter, who defined democracy as “institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”⁹⁰ Nowadays, defining democracy solely by the electoral criterion is outdated.

3. Models of democracy

In fact, there are many different models of democracy. From the perspective of the FRAME project it is interesting to reflect in terms of these different models, first of all because this is how democracy debates are often being framed. But thinking in terms of models is also worthwhile because it encourages researchers to resist the temptation of uncritically adopting the dominant liberal conception of democracy. John Gaventa warns: “in much of the literature and policies, certain models of democracy – usually those based on neoliberal or liberal representative understandings – often remain hegemonic. An important part of democracy work is thus to democratise the debate itself, to move beyond one-size-fits-all approaches.”⁹¹ In other words, thinking in terms of different models reminds us that democracy is “constantly contested and under construction.”⁹² Moreover, what is also interesting from the perspective of FRAME is that the place accorded to human rights is different in the various models.

In his book *Models of Democracy*, David Held distinguishes nine models (those being: classical democracy; republicanism; liberal democracy; direct democracy; competitive elitist democracy; pluralism; legal democracy; participatory democracy; and deliberative democracy).⁹³ An alternative summary of the different models was recently developed by a group of scholars led by Michael Coppedge and John Gerring.⁹⁴ This summary by Coppedge and Gerring differs somewhat from Held’s,⁹⁵ in that it distinguishes six models/conceptions of democracy.⁹⁶ “Each represents a different way of understanding what “rule by the people” means.”⁹⁷

⁸⁹ Møller & Skaaning (2012), at 138.

⁹⁰ Quoted in Møller & Skaaning (2013), at 144-145.

⁹¹ Gaventa (2006), at 21.

⁹² *Id.*

⁹³ Held (2006).

⁹⁴ Coppedge & Gerring (2011).

⁹⁵ Examples of other typologies are Møller & Skaaning (2013), at 144.

⁹⁶ Coppedge & Gerring (2011), at 254.

⁹⁷ Coppedge & Gerring (2011), at 254.

| <i>Model of democracy</i> | Principles | Question | Institutions |
|---|---|--|--|
| I. Electoral (aka elite, minimal, realist, Schumpeterian) | Contestation, competition | Are government offices filled by free and fair multiparty elections? | Elections, political parties, competition and turnover |
| II. Liberal (aka consensus, pluralist) | Limited government, multiple veto points, horizontal accountability, individual rights, civil liberties, transparency | Is political power decentralized & constrained? | Multiple, independent, and decentralized, with special focus on the role of the media, interest groups, the judiciary, and a written constitution with explicit guarantees |
| III. Majoritarian (aka responsible party government) | Majority rule, centralization, vertical accountability | Does the majority (or plurality) rule? | Consolidated and centralized, with special focus on the role of political parties |
| IV. Participatory | Government by the people | Do ordinary citizens participate in politics? | Election law, civil society, local government, direct democracy |
| V. Deliberative | Government by reason | Are political decisions the product of public deliberation? | Media, hearings, panels, other deliberative bodies |
| VI. Egalitarian | Political equality | Are all citizens equally empowered? | Designed to ensure equal participation, representation, protection, and politically relevant resources |

In the sections that follow some of the most salient distinctions between these models will be discussed, as well as the ways in which these models perceive of the relationship between human rights and democracy.

4. **Majority rule vs. deliberative democracy**

Majoritarian democracy (model 3) “reflects the principle that the will of the majority should be sovereign. The many should prevail over the few.”⁹⁸ Deliberative democracy (model 5) is as a body of thought only about 25 years old. “The deliberative conception of democracy focuses on the process by which decisions are reached in a polity.”⁹⁹ Held describes its “key objective” as “the transformation of private preferences via a process of deliberation into positions that can withstand public scrutiny and test.”¹⁰⁰ The basic idea is that political decisions should reflect and promote the common good, which is defined through a process of public reasoning.

Elizabeth Anderson highlights why the distinction between majoritarian and deliberative democracy is important for human rights scholars: “within a conception of democracy as majority rule, individual rights tend to be construed as constraints on democracy rather than constitutive features of it.”¹⁰¹ Anderson explains that from the standpoint of deliberative democracy, this reading of rights is misconceived: numerous rights, such as the right to vote, freedom of speech as well as rights that secure the equality of citizens (such as the freedom of religion and the prohibition on discrimination) are constitutive of democracy.¹⁰² “A majority that silences or segregates minorities . . . is tyrannically undemocratic.”¹⁰³

5. **Consensual democracy and deliberative democracy**

Consensual democracy is in the schematic overview above a form of liberal democracy (model 2). Consensual democracy is the model used by many European countries (such as the Netherlands, Belgium and Germany), and has been discussed extensively by Lijphart and others.¹⁰⁴ Consensual democracies have a multi-party system, and leadership is based on discussion, accommodation and compromise.

How can consensual and deliberative democracy be distinguished? The differences between consensual democracy and deliberative democracy do not run so deep as the differences between both these models and majoritarian democracy. Indeed, both in the consensual and in the deliberative tradition decisions are eventually reached through consensus. The difference between these two models lies mainly in how they structure democratic institutions. Put simply, deliberative democracy is based on the notion of “may the best argument prevail”. Consensual democracy, on the other hand, puts more emphasis on checks on the democratic system in the form of specific protection for minorities (e.g. quota’s). Lijphart argues that consensual democracy is the model that is followed by the EU itself,¹⁰⁵ however, deliberative democracy is also a powerful notion in the EU context. The challenges relating to democracy in governance structures that extend beyond the state will be discussed in the next part.

⁹⁸ Coppedge & Gerring (2011), at 253.

⁹⁹ Coppedge & Gerring (2011), at 253.

¹⁰⁰ Held (2006), at 237.

¹⁰¹ Anderson (2009), at 215.

¹⁰² *Id.* at 215-216.

¹⁰³ *Id.* at 216.

¹⁰⁴ Lijphart (1999); Hendriks (2010), Ch. 4.

¹⁰⁵ Lijphart (1999), at 42 et seq.; Hendriks (2010) at 76.

6. **Egalitarian democracy**

Scholars in the egalitarian tradition theorize democracy from the viewpoint of power relations and emancipation.¹⁰⁶ Ian Shapiro, a representative of this tradition, thinks that both scholars in the aggregative (meaning simple majority rule) and in the deliberative tradition “overestimate the importance of the idea of the common good for democracy. Instead, democracy is better thought of as a means of managing power relations so as to minimize domination.”¹⁰⁷ Michael Goodhart, also a representative of this school of thought, writes: “Theorists in this tradition see emancipation as the aim of democratization and invoke human rights as the language of democratic empowerment.”¹⁰⁸ Goodhart calls this “democracy as human rights”,¹⁰⁹ thus suggesting that the object of democratization is the realization of human rights.

C. **Practical challenges**

1. **Informal institutions**

Informal institutions have been extensively studied in relation to developing countries,¹¹⁰ but some authors also plead for a more extensive study of the role of informal institutions in established democracies.¹¹¹ In a 2012 article, Julia R. Azari and Jennifer K. Smith “reject the widespread, if often implicit, assumption that informal institutions are politically significant mainly where formal institutions are new, underdeveloped, or dysfunctional.”¹¹² They understand informal institutions as “the unwritten rules of political life” and argue that, in established democracies, these “perform three functions: they complete or fill gaps in formal institutions, coordinate the operation of overlapping (and perhaps clashing) institutions, and operate parallel to formal institutions in regulating political behavior.”¹¹³ Earlier work of Hans-Joachim Lauth also focused on informal institutions, and more specifically on the role of clientelism.¹¹⁴

2. **Deepening democracy**

Next to the scholarship on the institutional design of democracy, there is a growing amount of work on the concept of deepening democracy. According to a 2012 report from the American Political Science Association (APSA), “[t]he key questions today concern democratic deepening: How can the political system work better — be made more responsive, more accountable, give people a greater voice, and promote social justice?”¹¹⁵ Put differently, the project of deepening democracy aims to redress *democratic deficits*. According to the deepening democracy approach, “democracy is not only a set of rules, procedures, and institutional design . . . Rather it is a process through which citizens exercise ever

¹⁰⁶ See, e.g., Goodhart (2012); Shapiro (2003).

¹⁰⁷ Shapiro (2003), at 3.

¹⁰⁸ Goodhart (2012), at 69.

¹⁰⁹ Goodhart (2012).

¹¹⁰ See, e.g., Bratton (2007); Helmke and Levitsky (2006).

¹¹¹ Azari and Smith (2012).

¹¹² *Id.* at 38.

¹¹³ *Id.* at 37.

¹¹⁴ Lauth (2000).

¹¹⁵ APSA (2012), at 36.

deepening control over decisions which affect their lives, and as such it is also constantly under construction.”¹¹⁶

The APSA report states: “Some of these deficits reflect gaps or flaws in existing democratic institutions, whereas others reflect distortions of the democratic process — its corruption by power or money, its capture by experts, bureaucrats, or special interests . . . Put differently, democratic deficits do not necessarily open up suddenly like sinkholes; some are dug intentionally to entrench powerful interests. In such cases, traditionally subordinate or marginalized groups — often marked by gender, class, ethnicity, religion — are systematically excluded from effective participation in political life.”¹¹⁷

This APSA report puts forward the idea of “participatory governance” as a way to close/counteract these democratic deficits; participatory governance is primarily about “institutionalizing opportunities for involvement” (rather than about social justice as such).¹¹⁸ But participatory governance is not the only approach to deepening democracy: other authors have devised other approaches, depending on what model of democracy they adhere to.¹¹⁹ Further strategies to deepen democracy have included, for example, strengthening civil society; empowered participatory governance; and deepening democracy through more deliberative democracy.¹²⁰ In accordance with others, Gaventa argues that the success of a strategy to deepen democracy depends to a large extent on local political settings.¹²¹ What strategy works in one setting might not work in another.

3. Democracy beyond the state

The deepening democracy debate is connected to debates about global governance. Gaventa writes: “Programmatically, the challenge for advocates of deepening democracy may be how to link together the historically important work on issues at local level with other currently important work on civil society engagement and democratic governance at the global level”.¹²²

To what extent can governance structures that extend beyond the state be democratic? Can democracy work on the transnational level? Opinions are divided. The underlying issue is, as Gráinne De Búrca observes, that “an increasing number of international and transnational bodies, organizations and networks are carrying out public governing functions that have normally or previously been carried out by states, and which raise questions of democratic legitimacy analogous to those which have classically been addressed in the state context.”¹²³

Scholars generally agree that national democratic models cannot straight away be transposed to the international/transnational level,¹²⁴ however several authors have taken the approach that

¹¹⁶ Gaventa (2006), at 11.

¹¹⁷ APSA (2012), at 37.

¹¹⁸ *Id.*

¹¹⁹ Gaventa (2006).

¹²⁰ *Id.* at 11-20.

¹²¹ *Id.* at 22.

¹²² Gaventa (2006), at 27.

¹²³ De Búrca (2008), at 116.

¹²⁴ See, e.g., Wouters et al. (2013), at 198.

democratic “building blocks”¹²⁵ (such as equality, inclusive participation and accountability¹²⁶) can be identified, which can help translate the concept of democracy to levels beyond the state.

Regarding the topic of democracy beyond the state there is an especially abundant literature on the democratic legitimacy of the EU.¹²⁷ The EU has a *sui generis* democratic character, which has proved fertile ground for debate. There is little consensus, not even on the fundamental question of whether the EU suffers from a democratic deficit.¹²⁸ The way scholars define the deficit often depends on what kind of model of democracy they support.¹²⁹ Often heard reasons why there would be a democratic deficit are that the EU has brought about an increase in the power of bureaucrats and a decrease in national parliamentary control; that the European Parliament does not have enough real power; that there are no genuine EU elections; and that the EU adopts policies that are not supported by a majority of citizens in Europe.¹³⁰ These kinds of criticisms obviously present a challenge to the EU. Many different proposals have been put forward to address the perceived democratic deficit and the EU’s related legitimacy troubles. Some have suggested, for example, that the EU should rely on ordinary democratic processes (notably elections) to ground its legitimacy, while others – such as De Búrca – have argued that the EU needs to articulate a more convincing mission statement to strengthen its legitimacy.¹³¹ The question of the EU’s perceived democratic deficit is likely to occupy scholars and policymakers for a long time.

D. Measurement

This section shifts the inquiry from the theoretical to the empirical study of democracy. To what extent is the ideal of democracy achieved in practice? *What* should empirical analyses of democracy measure and *how* is that being done? These are the two questions that this section briefly discusses.

1. Measuring the quality of democracy

Because of the remarkable spread of democracy – the majority of countries can today claim to be democratic¹³² – the need is felt to assess the democratic progress and the quality of all these different democracies. Thus, an important current academic debate concerns the *quality of democracy*. This is a debate about how to measure the performance of democratic *institutions*.

Leonardo Morlino has, together with Larry Diamond and other scholars who study this topic, identified eight “dimensions in which good democracies might vary and that should be at the core of empirical analysis.”¹³³ These dimensions are grouped into three aspects of democracy: the procedural, substantive and responsiveness aspects.

- Procedural:
 - o Rule of law;

¹²⁵ De Búrca (2008); and Wouters et al. (2013).

¹²⁶ See, e.g., Wouters et al. (2013), at 198.

¹²⁷ See, e.g., Follesdal and Hix (2006); Jensen (2009); and Kohler-Koch & Bittberger (2007).

¹²⁸ See, e.g., Follesdal and Hix (2006).

¹²⁹ Jensen (2009), at 1-2.

¹³⁰ Follesdal and Hix (2006), at 534-537.

¹³¹ De Búrca (2013).

¹³² International Institute for Democracy and Electoral Assistance (2008), at 7.

¹³³ Morlino (2010), at 213. See also, e.g., Diamond and Morlino (2004).

- Electoral accountability;
- Institutional accountability;
- Political competition
- Participation¹³⁴
- Substantive:
 - Equality;
 - Freedom
- Responsiveness: this means the “responsiveness or adherence of the system to the desires of the citizens and civil society in general”.¹³⁵ This is the element that links the procedural and the substantive qualities of democracy. Responsiveness is the *result*: it enquires into the degree to which people are satisfied with the system.

These dimensions are very general, so the idea is that they can be applied to all different models of democracy (discussed above).

2. Main indices

To make an empirical assessment of these democratic qualities is complicated. The question is how these eight dimensions can be operationalized. The table below gives an overview of the most well-established democracy indexes, their conceptions of democracy and the attributes/indicators that they use. These indices focus on different qualities of democracy (as identified by Morlino and others): they do not encompass all eight dimensions at the same time.

| Title of index (alphabetic) | Conception of democracy | Attributes/ indicators |
|---|---|--|
| Bertelsmann Stiftung Transformation Index ¹³⁶ | Democracy includes the rule of law and the separation of powers backed by a system of checks and balances | The indicators are divided into five groups with further subdivisions as follows: (i) stateness: monopoly on the use of force; state identity; no interference of religious dogmas; basic administration; (ii) political participation: free and fair elections; effective power to govern; association/ assembly rights; freedom of expression; (iii) rule of law: separation of powers; independent judiciary; prosecution of office abuse; civil rights; (iv) stability of democratic institutions: performance of democratic institutions; commitment to democratic institutions; (v) political and social integration: party system; interest groups; approval of democracy; social capital. |

¹³⁴ Note that only formal participation, as opposed to informal participation through informal networks, can be measured.

¹³⁵ Morlino (2010), at 213.

¹³⁶ See: <http://www.bti-project.org/>

| | | |
|---|---|--|
| Democracy Barometer ¹³⁷ | Includes liberal as well as participatory ideas of democracy. The starting point is the premise that a democratic system tries to establish a good balance between the normative, interdependent values of freedom and equality and that this requires control. | There are nine democratic functions to be fulfilled in order to guarantee the three fundamental principles of democracy, as follows: (i) freedom: individual liberties; rule of law; public sphere; (ii) control: competition; mutual constraints; governmental capability; (iii) equality: transparency; participation; representation. |
| Economist Intelligence Unit Democracy Index ¹³⁸ | Democracy as more than a sum of its institutions. For assessing the level of democracy it looks at the five categories mentioned in the column to the right. | 60 indicators grouped in five categories: (i) electoral process and pluralism; (ii) civil liberties; (iii) the functioning of government; (iv) political participation; (v) political culture. |
| Freedom House ¹³⁹ | Electoral democracy; and Freedom House measures the presence of political rights and civil liberties. | Political rights ratings are based on an evaluation of three subcategories: (i) electoral process (ii) political pluralism and participation (iii) functioning of government Civil liberties ratings are based on an evaluation of four subcategories: (i) freedom of expression and belief (ii) associational and organizational rights (iii) rule of law (iv) personal autonomy and individual |
| Polity ¹⁴⁰ | Measures concomitant qualities of democratic and autocratic authority in governing institutions. | The Polity scheme measures: (i) executive recruitment (ii) constraints on executive authority (iii) political competition |

Scholars have identified many problems with these indices.¹⁴¹ Coppedge and Gerring note that “the methodological problems affecting contemporary indices begin at the level of definition”.¹⁴² Since the definition of democracy is essentially contested, the goal of arriving at a uniform method of measurement is illusory. Measuring democracy will remain just as contested as conceptualizing democracy.

¹³⁷ See: <http://www.democracybarometer.org/>

¹³⁸ Available via: https://www.eiu.com/public/topical_report.aspx?campaignid=DemocracyIndex12

¹³⁹ See: www.freedomhouse.org

¹⁴⁰ See: <http://www.systemicpeace.org/polity/polity4.htm>

¹⁴¹ See, e.g., Munck and Verkuilen (2002); Coppedge & Gerring (2011).

¹⁴² Coppedge & Gerring (2011), at 249.

IV. Rule of Law

A. Brief note on the evolution of the concept

The rule of law is a notoriously elusive political-legal ideal. In fact, the rule of law is perceived to embody two ideals, or two “functions”: protecting people from government and protecting people from each other.¹⁴³ The first ideal has the deepest roots: the origins of the notion of the rule of law as a “counterpoint to unbounded power”¹⁴⁴ lie in ancient Greece.¹⁴⁵ “Arbitrary exercise of power”, Martin Krygier writes, “above all, is the evil that it is supposed to curb.”¹⁴⁶ According to this classic reading, the rule of law imposes restraints on the state and on members of the ruling elite.¹⁴⁷ As such, the ideal can be formulated as the rule of law (objective) instead of the rule of man (subjective).

The second ideal is more ambitious. It sees the rule of law as a way of maintaining order amongst people or as a proxy for “social harmony”.¹⁴⁸ This ideal is less longstanding: its roots lie in the Enlightenment.¹⁴⁹ Whether this is also part of the core of the rule of law is a matter of some debate, but recently several prominent rule of law scholars – notably Brian Tamanaha – include it in their account.¹⁵⁰

Conceptions of the rule of law vary across scholarly disciplines and geographic regions. Economists, for example, tend to mean established property rights when they refer to the rule of law.¹⁵¹ In contrast, American legal scholars focus heavily on the role of the judiciary: they are apt to conceive of the rule of law as a “rule of judicial fidelity to law”.¹⁵² This great diversity in approaches should be kept in mind when using rule of law terminology. The next sections will first set out the central conceptual tenets of the rule of law (Part B); then some of the key challenges related to rule of law promotion will be discussed (Part C); and lastly the issue of measurement is briefly raised and the main rule of law indices are listed (Part D).

¹⁴³ Kleinfeld Belton (2005); Bedner (2010), at 50-52; Tamanaha (2007), at 3-7.

¹⁴⁴ Hachez & Wouters (2013), at 4.

¹⁴⁵ For discussion *see, e.g.*, Tamanaha (2004), at 7-14.

¹⁴⁶ Krygier (2004), at 257.

¹⁴⁷ Peerenboom (2005), at 827.

¹⁴⁸ Hachez & Wouters (2013), at 4.

¹⁴⁹ Kleinfeld Belton (2005), at 11.

¹⁵⁰ Tamanaha (2007); Bedner (2010), at 51. But Møller & Skaaning (2012), at 141, for example, do not include it.

¹⁵¹ Haggard, MacIntyre & Tiede (2008); Møller & Skaaning (2012), at 136; Rajagopal (2008), at 1363.

¹⁵² West (2003), at 14.

B. The fundamentals: a contested concept

1. Thin/formal vs. thick/ substantive conceptions

What is required on the ground to attain the rule of law ideals? In rule of law scholarship it is customary to make a distinction between thin/formal and thick/substantive requirements.¹⁵³ Tamanaha described this distinction as follows: “formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law (usually that it must comport with justice or moral principle).”¹⁵⁴ Formalists – including A.V. Dicey, Lon Fuller, Joseph Raz and Antonin Scalia – conceptualize the rule of law as a law of rules: their focus is on form, on the features that law must possess to function effectively.¹⁵⁵ A thin rule of law is perfectly compatible with great evil, as it does not prescribe any substantive agenda. On this conception, for example, the Third Reich was governed by the rule of law.¹⁵⁶ Therefore, many scholars argue that the rule of law requires *good law*.¹⁵⁷ Thus, those who conceive of the rule of law in a more substantive manner read values such as human rights, dignity, freedom, or justice into the concept.¹⁵⁸ Proponents of a thick definition of the rule of law are Ronald Dworkin and Tom Bingham, and – one might add – the United Nations.¹⁵⁹

Substantive theories include all the elements of the formal theories, but then add more elements.¹⁶⁰ In his classic book *On the Rule of Law: History, Politics, Theory*, Tamanaha has schematically captured the different conceptions.¹⁶¹ The list goes from thinnest to thickest conceptions:

1. *Rule by law*: law as an instrument of government action. Everything the government does, it should do through law. Tamanaha adds that “no Western legal theorist identifies the rule of law entirely in terms of rule *by law*.”¹⁶²
2. *Formal legality*: laws must be prospective, general, clear, public and relatively stable. Thus law can guide the behavior of individuals.
3. *Democracy + legality*:¹⁶³ democratic consent determines the content of the law.
4. *Individual rights*: protection of individual rights, such as the right to property, privacy, non-discrimination, and freedom of speech.
5. *Right of dignity and/or justice*

¹⁵³ See generally about this debate, e.g., Hachez & Wouters (2013), at 7-11; Tamanaha (2004), at 91-113; Peerenboom (2004), at 2-13.

¹⁵⁴ Tamanaha (2004), at 92.

¹⁵⁵ Tamanaha (2004), at 96; Peerenboom (2005), at 827.

¹⁵⁶ Hachez & Wouters (2013), at 8.

¹⁵⁷ Peerenboom (2005), at 828.

¹⁵⁸ Hachez & Wouters (2013), at 9.

¹⁵⁹ For the UN definition, see *infra* Part IV.D.

¹⁶⁰ Tamanaha (2004), at 102.

¹⁶¹ Tamanaha (2004), at 91. Building on Tamanaha’s work, numerous scholars have presented varieties on this scheme. See, e.g. Bedner (2010) (who distinguishes between procedural elements, substantive elements and controlling mechanisms of the rule of law); and Møller & Skaaning (2012), at 145 (who distinguish, in order from thin to thick, between rule by law; formal legality; safeguarded rule of law; liberal rule of law; democratic rule of law; social democratic rule of law).

¹⁶² Tamanaha (2004), at 92.

¹⁶³ In 2004 Tamanaha classified democratic rule of law as a ‘formal’ conception (2004; 91), but in a 2007 paper he implied that this is a substantive definition of the rule of law (2007; 3).

6. *Social welfare*: rights of substantive equality, welfare, preservation of community through group rights.

Other writers, notably Tom Bingham, add *international law* to this list.¹⁶⁴ As one of eight principles which Bingham thinks together constitute the rule of law, he lists the principle that “[t]he rule of law requires compliance by the state with its obligations in international as in national law.”¹⁶⁵ Bingham is of the opinion that: “[t]he interrelationship of national law and international law, substantively and procedurally, is such that the rule of law cannot plausibly be regarded as applicable on one plane but not on the other.”¹⁶⁶ The internationalization of the rule of law will be discussed further below, in Part III.C.

Randall Peerenboom delineates the distinction between thin and thick theories slightly differently than Tamanaha. Peerenboom notes: “In contrast to thin versions of rule of law, thick or substantive conceptions begin with the basic elements of a thin conception but then incorporate elements of political morality such as particular economic arrangements (free-market capitalism, central planning, “Asian developmental state” or other varieties of capitalism), forms of government (democratic, socialist, soft authoritarian) or conceptions of human rights (libertarian, classical liberal, social welfare liberal, communitarian, “Asian values,” etc.).”¹⁶⁷ There is considerable consensus as to the thin definition of the rule of law, but no consensus on a thicker definition of the rule of law, because there is no agreement on political morality, Peerenboom argues. According to Peerenboom, therefore, beyond the second, thin, version of the rule of law sketched above (“formal legality”), there are as many versions of thick rule of law versions as there are flavors in political morality.

2. **Advantages and disadvantages of thin/thick conceptions**

The advantages of a thin conception of the rule of law are that it is (a) relatively clear what it entails and (b) that it can count on widespread support. Plenty of scholars have warned against stretching the definition of the rule of law too widely: if the rule of law includes everything, it might be at risk of meaning nothing.¹⁶⁸ It becomes a “meaningless slogan devoid of content.”¹⁶⁹ Moreover, thicker conceptions of the rule of law are even more deeply contested. Peerenboom puts it like this: “Given the fact of pluralism, thick conceptions of rule of law must confront the issue of whose good, whose justice?”¹⁷⁰ Therefore, a “thinner conception of rule of law may provide the basis for meaningful reforms even where there is deep disagreement over democracy and rights issues.”¹⁷¹

A clear disadvantage of a thin conception of the rule of law is that it does not ensure *good law*: as a justice project the thin rule of law is very limited. Because it can be compatible with great evil, a thin conception may potentially defeat the ideal. Moreover, the thick conception of the rule of law might connect better to popular understandings of the concept: Tamanaha is of the opinion that “[w]hile formal legality is the dominant understanding of the rule of law among legal theorists, this thick substantive rule

¹⁶⁴ See also for discussion Tamanaha (2004), at 127-136.

¹⁶⁵ Bingham (2010), at 110-129.

¹⁶⁶ *Id.* at 119.

¹⁶⁷ Peerenboom (2004), at 4; Peerenboom (2005), at 828.

¹⁶⁸ See, e.g., Møller & Skaaning (2012), at 137, n 2.

¹⁶⁹ Peerenboom (2005), at 832.

¹⁷⁰ Peerenboom (2004), at 9.

¹⁷¹ Peerenboom (2005), at 943.

of law, which includes formal legality, individual rights, and democracy, likely approximates the common sense of the rule of law within Western societies".¹⁷²

3. (Guardian) institutions: upholding the rule of law

What kinds of institutions are necessary to successfully establish and maintain the rule of law? Not all scholars enumerate the same elements, but often-mentioned institutions are:

- A supportive culture: to thrive, the rule of law requires a shared belief amongst the people that law does and should rule.¹⁷³
- An independent judiciary: the rule of law requires a skilled judiciary, which is "independent of political manipulation and corruption"¹⁷⁴
- A robust legal profession and legal tradition: the rule of law requires a body of lawyers (working both within and outside of government) committed to upholding it.¹⁷⁵
- Enforcement bodies: judgments need to be executed, and public safety needs to be maintained, usually by police.¹⁷⁶

In an often quoted paper from 2005, Rachel Kleinfeld Belton warns that many rule of law practitioners are inclined to define this concept in terms of its institutional attributes, rather than in terms of the ideals it embodies. When the rule of law is defined in terms of its institutional structures, it is usually not conceived of as an *end* in itself, but as a *means* towards another end – most commonly economic growth.¹⁷⁷

Moreover, Kleinfeld Belton points out that it is a common misconception to think that every reform of legal institutions constitutes a rule of law reform. "This is not true. For instance, goals such as improving global security through police reform and antiterrorist laws are accomplished by reforming rule-of-law institutions – but they are targeted not at improving the rule of law *within* a particular state, but at achieving security for *other* states."¹⁷⁸

C. Challenges relating to rule of law promotion

When the rule of law is promoted, especially when this occurs transnationally, tensions arise between the rule of law as an abstract ideal and between its application in concrete situations. This section will outline some of the main points of a large body of literature that analyzes and criticizes transnational rule of law interventions.

1. Tension between rule of law ideals, rule of law requirements and other goals

Many authors warn against obfuscating the tensions and the tradeoffs between the rule of law and other goals, as well as the tensions between rule of law goals themselves. It is important to acknowledge that the two rule of law ideals might conflict with each other when put into practice. For example, invoking

¹⁷² Tamanaha (2004), at 111.

¹⁷³ See, e.g., Tamanaha (2007), at 13-14.

¹⁷⁴ See, e.g., Kleinfeld Belton (2005), at 16; Bedner (2010), at 67-68; Tamanaha (2007), at 14-15.

¹⁷⁵ Tamanaha (2007), at 15-16.

¹⁷⁶ Kleinfeld Belton (2005), at 16.

¹⁷⁷ See e.g., Haggard, MacIntyre & Tiede (2008); Upham (2004), at 282.

¹⁷⁸ Kleinfeld Belton (2005), at 23.

the second more ambitious “social harmony” ideal of the rule of law, some states and international bodies are now pursuing an aggressive security/anti-terrorism agenda, which directly conflicts with the first ideal of “government bound by law”.¹⁷⁹ Simultaneously, some of these anti-terrorism measures also violate the right to a fair trial (which is a requirement of the rule of law).¹⁸⁰ Another example is that an economic development agenda tends to value the second rule of law ideal over the first one.¹⁸¹

2. Hypocrisy and imperialism of transnational rule of law intervention

Transnational promotion of the rule of law by certain countries or organizations (like the UN or the EU) has been criticized on grounds of hypocrisy and neo-imperialism.¹⁸² Stephen Humphreys, for example, notes that transnational rule of law promotion is often premised on the idea that “we” have the rule of law, and we “help *them*” attain it.¹⁸³ Moreover, Humphreys writes, “whereas – at least at the rhetorical level – the rule of law at home is a good in itself, an *end*, the rule of law abroad is rather a *means*, motivated by other goods, notably prosperity (a market economy) and stability (‘peace and security’).”¹⁸⁴

Relatedly, scholars also object to attempts to promote the rule of law as something that is “beyond politics”.¹⁸⁵ Rajagopal notes that in the widely different fields of development, security and human rights there is a strong “desire to escape from politics by imagining the rule of law as technical, legal, and apolitical.”¹⁸⁶ In contrast, critical scholars claim that transnational rule of law promotion is pursued for both political and economic ends. In this context, Humphreys has compared current rule of law promotion with corresponding practices during the colonial era¹⁸⁷ and concluded that both aim at exporting legal forms for economic ends.

Kleinfeld and Nicolaïdis nuance this argument in relation to the EU, as they recognize that the EU faces a dilemma which stems from “a constant ambivalence on the part of its partners themselves between perceiving the EU as doing ‘too little’ and evading its post-colonial responsibility, and doing ‘too much’ and using its power in a neo-colonial manner.”¹⁸⁸

3. Rule of law and (legal) pluralism

Related to the debate about the imperialistic dimensions of transnational rule of law interventions, are discussions on the relationship between indigenous justice and rule of law. Debates about the rule of law inevitably raise the question “what is law?”.¹⁸⁹ “Rule of law projects, which focus almost exclusively on building state legal systems, are implicitly informed by an unstated assumption that the trajectory in developing nations matches that of Western countries – that law will be (must be) consolidated within

¹⁷⁹ See, e.g., Gearty, (2013), Chapter 3.

¹⁸⁰ See e.g. Peerenboom (2004), at 931-932.

¹⁸¹ See e.g. Bedner (2010), at 53. “If the rule of law means anything”, Haggard, MacIntyre & Tiede write, “it must mean in the first instance the security of person”. Haggard, MacIntyre & Tiede (2008), at 209.

¹⁸² See, e.g., Brooks (2003); Humphreys (2010); Rajagopal (2008).

¹⁸³ Humphreys (2010), at 10.

¹⁸⁴ *Id.* at 9-10.

¹⁸⁵ See, e.g., Bedner (2010), at 53; Rajagopal (2008), at 1349; Humphreys (2010), at 13.

¹⁸⁶ Rajagopal (2008), at 1349.

¹⁸⁷ Humphreys (2010), at 109-121.

¹⁸⁸ Kleinfeld and Nicolaïdis (2009), at 165.

¹⁸⁹ See e.g., Hachez & Wouters (2013), at 12.

the state.”¹⁹⁰ Legal anthropologists, however, have extensively documented indigenous justice and how law co-exists in various forms. Rule of law scholars debate to what extent the rule of law and legal pluralism are compatible and to what extent they are in tension.¹⁹¹ On the level of the ideal, rule of law seems compatible with legal pluralism, but on the level of its requirements the rule of law can clash with local justice practices.

Tamanaha maintains that a thin account of the rule of law – as meaning that government officials and citizens are bound by and abide by the law – can be compatible with legal pluralism: “basic rule of law functions can be filled by these legal forms irrespective of whether they are officially recognized as part of the state legal system. The core ‘horizontal’ (person to person) functions of the rule of law – to help coordinate behavior and resolve disputes between members of a community – are achieved by these local norms and institutions.” However, he writes: “With respect to vertical (government-to-person) functions, these institutions cannot replace an essential benefit provided by the rule of law: erecting legal restraints on government officials (which is also poorly achieved by state legal systems in many development contexts). Customary and religious legal institutions cannot do this because usually they do not address or enforce state legal norms, and their coercive power is limited.”¹⁹² He views the rise in legal uncertainty as the negative implication of legal pluralism for the rule of law.¹⁹³ Due to the fact of (legal) pluralism, there is no one-size-fits-all approach to rule of law promotion, scholars warn.¹⁹⁴

4. **International rule of law**

Nowadays, legality can no longer be considered a purely national affair. International lawyers, global governance experts, and others study how the rule of law can be adjusted to the increasing globalization of many issues, such as environmental protection, conflict resolution and economic growth. To what extent can we speak of an international rule of law?¹⁹⁵ Peerenboom calls this idea a “distant aspiration”,¹⁹⁶ whereas Bingham implies we already have it.¹⁹⁷ Simon Chesterman distinguishes three meanings of a possible international rule of law:

- “the “international rule of law” may be understood as the application of rule of law principles to relations between States and other subjects of international law”;
- “the “rule of international law” could privilege international law over national law, establishing, for example, the primacy of human rights covenants over domestic legal arrangements”;
- “a “global rule of law” might denote the emergence of a normative regime that touches individuals directly without formal mediation through existing national institutions.”¹⁹⁸

¹⁹⁰ Tamanaha (2011), at 14.

¹⁹¹ See, e.g., Grenfell (2013).

¹⁹² Tamanaha (2011), at 8.

¹⁹³ *Id.* at 15.

¹⁹⁴ See, e.g., Brooks (2003), at 2285.

¹⁹⁵ See also Tamanaha (2004), at 127-136.

¹⁹⁶ Peerenboom (2005), at 944.

¹⁹⁷ Bingham (2010), at 110 et seq.

¹⁹⁸ Chesterman (2008), at 356.

Whichever way international rule of law is conceptualized, international rule of law is already practiced. The UN has established a “Rule of Law Coordination and Resource Group”, which is supported by the Rule of Law Unit.¹⁹⁹

D. Measurement: main indices

As with other ideals such as democracy, measuring the rule of law is a challenge. Martin Krygier warns against dichotomous thinking in this respect: “rule of law is not something you either have or not . . . rather, like wealth, one has more or less of it. Whether one has enough of it is a judgment to be made along continua – multiple continua – not a choice between binary alternatives.”²⁰⁰ Kleinfeld Belton emphasizes that we need to be looking for proxies to measure the right things: The ends – not the institutions or an amalgamation of the two – are the proper goals to measure.”²⁰¹ What follows is a brief overview of three of the major rule of law indices.

| Title of index (alphabetic) | Conception of Rule of Law | Measurement |
|--------------------------------|--|--|
| United Nations ²⁰² | 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. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency. | Assesses the functioning of the police (41 indicators), judiciary (51 indicators), prisons (43 indicators) by looking at the following elements: (i) performance, (ii) integrity, transparency and accountability, (iii) treatment of vulnerable groups and (iv) capacity. |

¹⁹⁹ See: <http://www.unrol.org/>.

²⁰⁰ Krygier (2004), at 261.

²⁰¹ Kleinfeld Belton (2005), at 27.

²⁰² United Nations, *Rule of Law Indicators: Implementations Guide and Project Tools* (2011). Available at: http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf

| | | |
|---|---|--|
| World Bank ²⁰³ | Rule of law captures perceptions of the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, property rights, the police, and the courts, as well as the likelihood of crime and violence. | The Rule of Law index is part of the wider World Governance Indicators Project. The measurement is based on a variety of external sources. For the Rule of Law index 11 external sources have been used. |
| World Justice Project ²⁰⁴ | System where the following four universal principles are upheld: (i) government, individuals and private entities are accountable under the law; (ii) laws are public, just, clear, evenly applied, protect fundamental rights; (iii) the enacting of the laws process is accessible, fair and efficient and (iv) justice is delivered timely, by competent and independent representatives who are sufficient in number, have adequate resources and reflect the makeup of the communities they serve. | 48 indicators organized around nine conceptual dimensions: (i) limited government powers, (ii) absence of corruption, (iii) order and security, (iv) fundamental rights, (v) open government, (vi) regulatory enforcement, (vii) civil justice, (viii) criminal justice and (ix) informal justice. |

²⁰³ See: <http://info.worldbank.org/governance/wgi/index.aspx#doc>

²⁰⁴ See: http://worldjusticeproject.org/sites/default/files/WJP_Index_Report_2012.pdf

V. Interrelation between human rights, democracy and the rule of law

Because of the proliferation of conceptualizations of human rights, democracy and rule of law, the interconnections between these concepts are difficult to fathom. Many (if not all) scholars struggle to grasp the relationship between these concepts.²⁰⁵ The next sections briefly discuss the overlaps and tensions between human rights, democracy and rule of law (Part A), and identify the cross-cutting themes that emerge in the literature on these concepts (Part B).

A. Overlaps and tensions

The notions of human rights, democracy and rule of law overlap to a certain extent in the academic literature. These three notions can all be described in terms of each other: human rights needs to be upheld by a democratic system and the rule of law; rule of law would include democracy and human rights;²⁰⁶ and democracy can also be said to entail human rights and rule of law.²⁰⁷ They are all three part of a family of ideas which reflect a certain conception of political and legal morality.

Conceptual overlap is by no means the same as conceptual conflation, however. The three notions should not be collapsed into each other: they are not synonyms.²⁰⁸ When human rights, democracy and rule of law are conceptually considered part and parcel of each other, or at least considered to be in a “virtuous relationship”,²⁰⁹ the tensions between these three ideals risk getting obscured. Nor need the concepts go hand in hand empirically. For example, there are countries that score high on rule of law indices and low on democracy indices, and, conversely, countries that score high on democracy and low on rule of law.²¹⁰

B. Contested concepts: cross-cutting themes

So far, we have seen that these are all contested concepts. Discussing them together is useful, because it enables us to see that – to some extent – they are *contested in similar ways*. That is to say, there are critical themes that cut across all three concepts.

Fundamentally, human rights, democracy and rule of law have in common that, as ideals, they *both restrain and empower the State*. All three concepts are therefore inherently precarious, as their different goals/conceptions simultaneously demand more and less government power.²¹¹ They are destined to perpetually balance the need of in some ways more and in some ways less government power.

As a matter of implementation, scholars of all three concepts emphasize that human rights, democracy and rule of law depend not only on formal (legal) procedures, but on culture. The realization of these ideals requires more than just putting in place formal procedures. The success of human rights,

²⁰⁵ See, e.g., Rajagopal (2008), at 1361.

²⁰⁶ See, e.g., Bedner (2010).

²⁰⁷ See, e.g., Coppedge & Gerring (2011), at 255-256.

²⁰⁸ See, e.g., Raz, “The Rule of Law and Its Virtue”, 1979. Quoted in Hachez & Wouters (2013), at 8; Fallon (1997), Rajagopal (2008).

²⁰⁹ Cf. Hachez & Wouters (2013), at 10.

²¹⁰ Peerenboom (2005), 861-864

²¹¹ See e.g., Bedner (2010), at 51-52.

democracy and the rule of law depend on their being acknowledged and supported by the people and on becoming embedded in everyday life.²¹² This has many implications. One implication is that these concepts are not technologies that can be readily transposed elsewhere;²¹³ another implication is that they take time to root in a society. Policies that aim to promote human rights, democracy and rule of law must take this into consideration: promotion of these ideals takes time, flexibility and sensitivity, lest it becomes counterproductive or meaningless.

Substantively, the most fundamental cross-cutting theme is the *tension between universalism and particularism*. This tension is probably most clearly articulated in human rights scholarship, but all three concepts struggle between their claim to universal validity as ideals on the one hand, and the recognition of cultural, historical, social and developmental difference in their practice on the other hand. As an overarching theme, the tension between universalist and particularist approaches can be felt in many different areas. In this literature review we have encountered four cross-cutting topics in particular. Those are:

- Vulnerable groups
- Sovereignty
- Legal pluralism and informal institutions
- Neo-imperialism and hypocrisy

When looking at the concepts of human rights, democracy and rule of law together, these seem at the moment four of the most contentious areas. As such, these themes are all relevant for the further FRAME research.

Vulnerable groups: within human rights scholarship a persistent question is how to construct human rights law in such a manner that it affords effective recognition and protection of the human rights of vulnerable groups of people.²¹⁴ Indeed, human rights are often used as tools to challenge the power of dominant norms (as for example when gender-based norms are challenged) and dominant groups. In democracy theory a similar issue is at stake: how to ensure that vulnerable people, including people from minority groups, are heard in the democratic process?²¹⁵ How to make sure that the democratic system does not succumb to powerful special interests? In regard to debates on the rule of law, the issue of vulnerable groups refers to several aspects; mainly in relation to the aims of the concept such as the provision of social order (how to ensure that members of vulnerable groups enjoy the same security of person as members of dominant groups) and equality before the law (which ensures that everybody, regardless of their social status, is held accountable to the same laws).

Sovereignty: all three concepts raise concerns about national sovereignty, especially in their international dimension. International human rights law, democratic global governance, international rule of law; these three concepts are sometimes in conflict with the principle of national sovereignty. When organizations, like the EU, endeavor to promote these values from the outside, this raises the question of whether that constitutes an encroachment on sovereignty or a legitimate effort to build a better world.

²¹² See, e.g., Anderson (2009).

²¹³ Haggard, MacIntyre & Tiede (2008), at 221.

²¹⁴ Especially – but not only – scholars in the tradition of Dembour’s “*protest school*” emphasize the importance of this question. See *supra* Part II.B.2.

²¹⁵ Especially – but again not only – the theorists who support an *egalitarian model* of democracy emphasize this point. See *supra* Part III.B.

Legal pluralism and informal institutions: In pursuing the ideals of human rights, democracy and rule of law, one is confronted with the reality of legal pluralism and the reality of informal institutions. There appears to be an emerging consensus amongst scholars from all three areas that informal rules and institutions are relevant in general, not only when there is an absence of formal institutions.²¹⁶ Sometimes informal rules and institutions can be conducive to establishing human rights, democracy, and rule of law (e.g. by enhancing participation), but at other times these informal structures can hinder the development of human rights, democracy and rule of law. The challenge is to work with these informal institutions: this is likely to entail walking a fine line between collaboration and (attempts at) transformation.

Neo-imperialism and hypocrisy: the projects of promoting human rights, democracy and rule of law lose legitimacy when they are perceived to be a form of neo-imperialism. Put differently, when human rights, democracy and rule of law promotion are wielded as ideological tools to justify Western dominance and ensure Western economic interests, then these projects lose credibility. Coupled to the charge of neo-imperialism is the charge of hypocrisy: critical scholars comment time and again on the arrogance and hypocrisy of the attitude that “we” (Europe/Western countries) already have human rights, democracy and rule of law, and that we should help “them” (the rest of the world) get to where we are. Blind to its own faults, the West is often perceived to point its finger at others. Moreover, the charge of hypocrisy is also due to the fact that these ideals are often promoted for less than idealistic reasons, such as economic gain or global security.

²¹⁶ See, e.g., Azari and Smith (2012), at 38.

VI. Conclusion

When reading academic literature on human rights, democracy, and rule of law, one is confronted with an obvious dilemma: these notions have received an unprecedented amount of support in the past decades, yet their full implementation remains a distant ideal. What makes implementation so difficult is that these concepts have “radically different meanings, with radically different consequences for practice”.²¹⁷ It is by now a cliché to say that these are essentially contested concepts, yet that is true. It means that on a general conceptual level, it is impossible to pinpoint which conceptions have most to offer. As others have pointed out, the answer to this question depends on one’s purpose; on the research or practical question that one is interested in.²¹⁸ If one is ambitious and interested in capturing the ideals of human rights, democracy and rule of law, thicker definitions of these concepts are more useful. If, on the other hand, one looks for analytical clarity, thinner conceptions seem to better suit the purpose.

Broadly speaking, the implication of this literature review is that there are many challenges to the EU’s agenda of human rights, democracy and rule of law promotion. The EU will have to make choices as regards its conceptualization of these three notions, and all these conceptualizations carry certain dangers with them. The main challenges emanate from the tension between universalism and particularism. More specifically, these challenges – which cut across both human rights, *and* democracy *and* rule of law promotion – are (i) how to take into account the position of vulnerable groups, (ii) how to deal with concerns about national sovereignty, (iii) how to act in situations that are shaped by legal pluralism and informal institutions; and (iv) how to pursue these three ideals without lapsing into neo-imperialism and hypocrisy.²¹⁹ In these ways the implementation of the three concepts still remains a challenge. There is no room for complacency about human rights, democracy and rule of law.²²⁰

²¹⁷ Gaventa (2006), at 21.

²¹⁸ Møller & Skaaning (2012), at 145; Peerenboom (2004), at 10.

²¹⁹ See *supra* Part V.B.

²²⁰ Cf. Hammarberg (2011).

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