

The Rule of Law in France

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Parallel to what happened in other countries of continental Europe, the expression “Etat de droit” first appeared in France as a translation of the German “Rechtsstaat”. For the most part of the Twentieth century, its usage was confined to the work of Public Law scholars, often in connection or in reference to German legal thought. Not until the late 1970s, with the rise of the Constitutional Council and the extension of judicial review to parliamentary legislation, did the expression become part of mainstream legal and political discourse. As elsewhere, politicians, scholars and judges tend to invoke it as a self-congratulatory rhetorical device. The “Etat de droit” is meant to be something good, but what it exactly means is not quite clear. To the extent that it is not wholly devoid of descriptive content, the phrase loosely denotes the idea of legality and the imperative that governmental acts be subject to judicial review, in particular judicial review by a constitutional court.

I. The Rule of Law in the Constitution and in the Statute Book

Fashionable as it may have become, the expression *Etat de droit* does not come up in either the Constitution or the statute book. Judges regularly appeal to the notion, but only in informal settings. One would search in vain for this consecution of words in the decisions of the Constitutional Council – the French constitutional court – or the jurisprudence of the *Conseil d’Etat* – France’s top administrative court. Though this may be

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explained by the courts' adherence to an extremely terse style of opinion writing (a hallmark of French legal culture), it nonetheless means that the *Etat de droit* has no specific anchor point in positive law. On the other hand, when we move away from the expression itself and start to look for the features of the legal system to which it could relate, we encounter a number of provisions and guaranties which seem to fit traditional, formal understandings of the rule of law.

First, the Declaration of the Rights of Man, which the Constitutional Council began to turn into hard law in the 1970s, provides:

- that the limits of liberty can only be determined by law (Article 4),
- that no person shall be accused, arrested, or imprisoned except in the cases and according to the forms prescribed by law (Article 7),
- and that punishments shall be inflicted only in virtue of a law passed and promulgated before the commission of the offence (Article 8).

In addition, the Constitution proper (i.e. the 1958 text independently of the preambles and declarations to which it refers) guarantees the equality of all citizens before the law (Article 1) as well as the immovability of judicial offices (Article 64).

II. Constitutional Provisions at Variance with the Ideal of the Rule of Law

The Constitution of the Fifth Republic also contains provisions that seem to run counter to classical understandings of the rule of law. First, Article 16 grants the President ample emergency powers. When the President considers that the country's independence, political institutions and international commitments are under serious and immediate threat, he may take all measures deemed necessary to address the threat, including the creation of courts-martial and the adoption of emergency legislation. In other words, Article 16 gives the President near-dictatorial powers. Until 2008, both the duration and the appreciation of the conditions under which Article 16 powers could be resorted

to were left to the President's discretion. The 2008 constitutional reform introduced limitations and allowed parliamentarians to refer the matter to the Constitutional Council after 30 days of exercise of the emergency powers. Another constitutional provision arguably at odds with the imperative of the rule of law is Article 37, which grants the executive an 'autonomous regulatory power'. All matters that are not explicitly allocated to parliamentary legislation may be regulated by executive decrees without the need of legislative authorisation. Inspired by a desire to strengthen the executive branch, Article 37 meant to split the law-making authority of the state. Two factors, however, have greatly limited the practical impact of the provision. One is the emergence of large and cohesive legislative majorities. By effectively subordinating the legislative majority to the government, it gave the French political system a more majoritarian outlook. This in turn made the necessity to bypass Parliament to enact regulations less compelling. Second, both the Constitutional Council and the *Conseil d'Etat* have interpreted the Constitution's grants of powers to Parliament's generously. As a result, few decrees are issued on the basis of Article 37.

III. The Rule of Law as the Rule of Judges: The Expanding Scope of Judicial Review

Despite its proximity to the executive branch and the fact that it doubles as government's consultative body in the preparation of both primary and secondary legislation, the *Conseil d'Etat* has acquired a remarkable degree of autonomy in reviewing executive and administrative acts. Decrees and individual decisions must not only conform to statutory legislation but also to the various – judge-made – 'general principles of law', which include the right to a fair hearing. Over time, the *Conseil d'Etat* has gradually abandoned its political question doctrine, which made certain executive acts (known as "*actes de gouvernement*") immune from legal challenges. Liberal rules of standing ensure that judicial scrutiny of administrative action is effective and comprehensive.

Regarding the judicial review of legislative acts, an interesting development has been the courts' increasing willingness to invoke European Treaties and the European Convention of Human Rights (ECHR) in par-

ticular against statutory provisions of all kinds. By virtue of Article 55 of the 1958 Constitution, international treaties take precedence over ordinary legislation. Civil and administrative courts have used this provision to constitutionalise EU law and to transform the ECHR in a judicially enforced bill of rights. Yet the most conspicuous evolution of late is not the development of diffuse review by ordinary courts but the extension of the Constitutional Council's jurisdiction. Emancipating itself from the subordinate role it had been assigned by the regime's founding fathers, the Council began in the early 1970s to enlarge the body of constitutional norms that legislators had the duty to observe. To the 1958 document, the Council added the Preamble of the Constitution of 1946, the Declaration of the Rights of Man as well as the Fundamental Principles Recognized by the Laws of the Republic. The impact of the Council's jurisprudence, however, was severely limited by restrictive access rules. Initially restricted to the executive and to the presidents of the two legislative chambers, the right to refer a bill awaiting promulgation was extended to the opposition MPs in 1974, which significantly enhanced the Council's influence over policy-making. More recently, the 2008 constitutional reform introduced a form of concrete review. The reform, effective as of 1 March 2010, enables the parties to a legal dispute to challenge the constitutionality of a statute already promulgated. Similar to the preliminary ruling mechanism before the European Court of Justice, the new procedure allows civil and administrative courts (under the supervision of their respective supreme court) to send a reference for a preliminary ruling to the Constitutional Council.

IV. A Not-So-Thick Understanding of the Rule of Law

Because the concept of the rule of law was primarily invoked by judges, politicians and legal scholars to justify and legitimise judicial review by the Constitutional Council – a practice running contrary to the doctrine of parliamentary sovereignty that had prevailed since the French Revolution – the expression *Etat de droit* tends to be used as a synonym for constitutionalism. The French mainly identify the rule of law with the existence of a catalogue of constitutional rights enforced by a constitutional court. In part because it competes with older and more entrenched expressions such as *Etat* and *République* for the title of most

popular catchphrase, *Etat de droit* has not taken on the rich, comprehensive meaning that *Rechtsstaat* assumes in the German context. On the one hand, it does not clearly incorporate all the principles traditionally attached to formal understandings of the rule of law. That laws should be clear, stable and prospective is sometimes treated as a requirement distinct from the rule of law referred to as the principle of legal security (*sécurité juridique*). On the other hand, the extent to which the rule of law denotes substantive – as opposed to merely procedural – rights is unclear, although it seems certain that it does not include welfare rights.

Further readings

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