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Volume 69

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SCANDINAVIAN STUDIES IN LAW
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RULE OF LAW

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Foreword

Rule of Law as a legal concept has been highly debated in the past decade, not least due to the current backslide in democratic ideals being witnessed in Europe and globally.¹ What the concept of Rule of Law actually entails remains rather unclear. It is certainly true that the Rule of Law is a backbone and an essential principle according to which the modern state and its apparatus has to be built. At the same time, the concept is vague and it is widely accepted that even non-democratic legal cultures tend occasionally to proclaim their adherence to an idea of a state based on the Rule of Law. From a historical perspective, the Rule of Law is one of the oldest principles regulating the functioning and exercise of public powers, with some authors tracing its origins back to article 39 of the Magna Charta signed in 1215.² At the same time, the idea of the Rule of Law, its requirements, and its implications is still one of the most debated concepts in modern legal scholarship and discourse. For instance, it is still an unsolved dilemma whether Rule of Law (as originally designed in an Anglo-American context) is the same or overlaps with the idea of *Rechtsstaat* (more common in continental Europe and in neo-Latin speaking countries around the world).³ This dual feature of the concept of the Rule of Law is also present in the Nordic European part of the world. It is certainly one of the most employed and classical concepts in both legal and political discourse. Also in Nordic legal scholarship its meaning, components, and contours tend to be quite blurry, once one has left the widely shared idea as to the goodness of the Rule of Law and starts to dive into its concrete elements and application. Due to this embedded strain between its wide use and broad set of positions as to what Rule of Law is and means, the editors have decided to divide the rather heterogeneous contributions to this volume into four sections.

In this anthology, we have asked scholars from the Nordic countries to reflect on the concept of Rule of Law, if and how the recent societal developments have affected the law within their respective fields. Keeping with the traditions of the Scandinavian Studies in Law series, the question was formulated openly. The aim of the series is to present the diversity of Nordic legal scholarship to English speaking readers outside the Nordic countries, reflecting the debate which is taking place in this part of the world. As a result, the structure of the anthologies which have been published by the Scandinavian Studies in Law series since the 1950s tends to have an open character. This open structure suits this volume and its focus on the idea of the Rule of Law in the Nordic countries particularly well. We have left to the various authors to define their own questions, what theories to apply, and what methodologies to make use of when tackling the topic under

¹ See DEMOCRACY REPORT 2023, DEFIANCE IN THE FACE OF AUTOCRATIZATION, Gothenburg: V-Dem Institute, available at https://www.v-dem.net/documents/29/V-dem_democracyreport2023_lowres.pdf.

² See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS THEORY, 2004, Cambridge: Cambridge University Press, 26. *But see* REINHOLD ZIPPELIUS, ALLGEMEINE STAATSLHRE, 1991, 11th ed., Munich: C. H. Beck Verlag, 281.

³ See Neil McCormick, *Der Rechtsstaat und die rule of law*, 2 JURISTEN-ZEITUNG 65-66 (1984).

discussion in the volume. The result is the rich discussions found in the contributions to this anthology.

Even though the authors are all specialists in their specific fields, a recurring theme in the contributions is that the current Rule of Law-debate has affected the Nordic legal orders not merely individually field by field, but in a more structural manner. The contributions have therefore been divided into four sections representing different horizontal themes. The first section sets *The Arena* for the entire volume. The contributions critically question and discuss what, on a superficial investigation, would appear to be the obvious content of the idea of the Rule of Law (Hafsteinn Dan Kristjánsson, *The Governing Idea of the Rule of Law*). This concept is also set within a Nordic European historical context, both in light of the outcomes of World War Two (Kjell Å Modéer, *From Unlaw to Law*) and within the current debate (Joakim Nergelius, *Remarks on the Recent Rule of Law Debate in the Nordic States*).

Having set the theoretical, historical, and contemporary contexts, the second section of this volume focuses the attention on *The Actors*, more specifically on the role that some of the key institutional legal players may and/or should play in establishing and implementing the Rule of Law. This section starts off by focusing on the task of the legislative bodies in creating the legal framework for establishing and implementing the Rule of Law, including through their general guardianship role of national administrative agencies (Joonas Widlund, *More Than Just Blind Guardians?: A Legal Analysis of Finnish Parliamentary Oversight of Intelligence*) and through the tool of statutory interpretation (Mark Ørberg, *The Promulgation Theory on Statutory Interpretation and the Rule of Law in Denmark*). Attention is then focused on the role that the judicial bodies play in ensuring an effective and real implementation of this fundamental principle, focusing both on the traditional operations of national courts (Anna Nylund, *Civil Procedure and the Rule of Law in Scandinavia*) and on the interaction between national judiciary systems and supra-national courts (Graham Butler, *Tribunals in the Nordic States and Referrals to the European Courts* and Antonina Petrova Bakardjieva Engelbrekt, *Rule of Law and Judicial Independence in the EU*). Finally, the focus is upon public administration and the challenges posed by and to the Rule of Law (Richard Sannerholm, *Rule of Law and Public Administration in Sweden*).

The third section tackles some components of *The Play* of the Rule of Law-discourse within the Nordic and European legal landscape. In particular, the various contributions in this section point out three major factors that affect (or may affect) how such a fundamental principle is diffused into the various national communities, namely, the role of time in the functioning of the Rule of Law (Agnes Hellner and Karolina Stenlund, *Two Visions of Time*), its embedded multilevel dimension (Ester Herlin-Karnell, *The European Arrest Warrant and the Rule of Law*), and the effects of the technological developments (Stanley Greenstein, *Artificial Intelligence Destroyed the Rule of Law?* and Peter Alexander Earls Davis, *Rule of Law Rhetoric in Encryption's 'Going Dark' Debate*).

Once the major components of the idea of the Rule of Law are presented, the fourth and final section investigates and critically analyses the concrete application of the principle in some legal areas. In particular, the focus is upon the regulatory regimes of fields which can be considered as cornerstones for the

welfare systems characterizing all the Nordic countries. As a result, the contributions focus upon the relevance of the Rule of Law in taxation law (Teresa Simon-Almendal, *The Rule of Law in a State of Flux*), in family law, with particular attention to the rights of the child (Johanna Schiratzki, *The Rule of Law and Custody of Children in Sweden*), and the labour legal discourse (Jenny Julén Votinius, *Rule of Law Discourses in Swedish Labour Law*). Finally, this section and the volume concludes with a sort of general academic self-reflection as to what the Rule of Law means and what it implies. While most of the other contributions offer a Nordic or European perspective on the Rule of Law and its impact upon society, the final contribution evaluates how such a fundamental principle affects the area where all the contributors operate professionally, namely the sector of higher education (Niina Mäntylä, Jari Autioniemi, and Jonna Kosonen, *Academic Freedom and the Rule of Law*).

Stockholm, 20 April 2023

Jane Reichel and Mauro Zamboni

The series Scandinavian Studies in Law is published by a non-profit trust. The first volume was presented in 1957 and to date nearly 1,000 articles have been made available in the series. The overall objective of the series is to present Scandinavian law and legal theory to a wide English-language readership. The volume editors for this volume have been Professor Jane Reichel and Professor Mauro Zamboni, Stockholm University.

More information about Scandinavian law and the series is available at scandinavianlaw.se.

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The Arena

