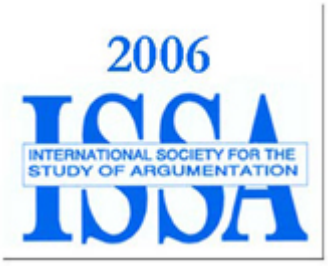
ISSA Proceedings 2006 – The Rule Of Law Argument (Its Elements And Some Open Questions And Cases)



"No, we cannot say: everything that is useful to the people is law, but just the opposite must be said: only what is law is useful to the people."
(*Gustav Radbruch*)

I. *The Concept and Elements of a State Governed by the Rule of Law*
A state governed by the rule of law is a modern state**[i]** where the actions of state bodies are legally determined and where basic (human) rights are guaranteed. The administration and the independent judiciary, which issue individual and executive acts or carry out material acts (especially the administration), are subject to the constitution and statutes passed by the representative body (national assembly, parliament, etc.). It is organized as a democratic state based on the principle of the separation of powers. One of the fundamental principles of the European Union and of its member states is that they are states governed by the rule of law.
The design of the modern state governed by the rule of law is *a result of historical development*, with the most intensive contributions coming from English (later also North American) and European continental law.**[ii]** The original elements of the English (*common law*) rule of law are the *supremacy of the parliament* in relation to other state bodies [together with the principle of the necessity of the legal (not arbitrary!) actions of the organs of state power], *equality before the law,* and *the protection of basic rights* before courts.**[iii]** Basic rights exist already before that power and thus, as the substantive principle, define the limit that the state power must not violate. This insight was also accepted by the continental (especially German) variant of the state governed by the rule of law, which originally put more emphasis on the legality itself of the state organisation (hence the expression *Rechtsstaat*) and the subordination of the administration to

statutes passed by the representative body. It is generally accepted in modern theory that there are no essential differences between the European-continental *Rechtsstaat* and the Anglo-American rule of law.**[iv]** Even more clearly: the rule of law is the result and the aim of both systems and they understand it very similarly as regards its contents, while they approach it in different ways depending on the differences between the two families of law.

In a state governed by the rule of law, *legality* is a quality that is specially emphasized. It holds true for such a state that the constitution, the statutes, and other formal legal sources treat legal subjects equally (the principle of *equality* before the law) and *foreseeably.* Violations of the law are also defined in advance (of special importance is the principle *Nullum crimen nulla poena sine lege certa*) and the procedure used by the responsible state body in order to establish whether a violation of law has taken place and which legal consequence should be pronounced (the principle of legal certainty!). In a state governed by the rule of law *the rights and duties of legal subjects* are defined by law, the most important among them are contained and promulgated as the *basic* rights in a legally formal manner by the constitution or some other constitutional documents. Another element of a state governed by the rule of law are the *legal remedies* used by legal subjects to exercise their rights and achieve the realization of duties.
The design of the state governed by the rule of law is very broad. Its main dimension is a *legal framework* as regards the contents and the procedure within which legal decision-making should take place and state bodies should decide. By way of example, let us look at the elements of the state governed by the rule of law as enumerated by *Herzog* in Maunz/Dürig's commentary. *Herzog* bases his explanations on the original *Maunz' division* defining the following elements as corresponding to the concept and tradition of the state governed by the rule of law: the division of powers; basic rights; the legality of the administration and judiciary also encompassing being bound to "law and justice" (cf. Art. 20/3 of the Basic Law for the Federal Republic of Germany); the restrictability of state activity, which must be measurable and foreseeable (sub-elements of this element are the principle of legal certainty; trust in the law within a limited scope; the prohibition of retroactivity; the principle of definiteness in legislation, and the prohibition of excessive state interventions together with their necessity and proportionality); legal protection together with the principles ensuring an independent and fair trial; *Nullum crimen nulla poena sine lege*; the existence of a formal constitution, which is "the crown of a state governed by the rule of

law".**[v]**

II. *The (In)definiteness of Legal Regulation*

In the practice of the Constitutional Court of the Republic of Slovenia the standpoint can be found that legal rules must be defined "clearly and definitely, so that they can be applied without arbitrary conduct by the executive power, and that they define unambiguously and definitely enough the legal position of individuals to whom they refer (the principle of definiteness)."**[vi]** In another decision we can read that "the norms must be determined in a manner enabling their implementation, that the contents of a regulation may be established by interpretation, and that the action of state bodies be thus determined."**[vii]** Even more "radical" is the following standpoint: "One of the fundamental *rules of a state governed by the rule of law* is that *statutory rules must be clear, understandable, and unambiguous*. This especially applies to regulations directly regulating the rights and the legal position of a wide circle of the population. A regulation from which *an average citizen, unskilled in law, cannot reliably decipher his legal position,* but which could be – also in the legislature's opinion – correctly applied, though in contrast to its explicit text, only after an interpretation of the statutory provisions at the enforcement thereof, i.e. in the responsible legal bodies, causes legal uncertainty and a lack of trust in the law and violates *the principles of a state governed by the rule of law* (italics in all places added by M.P.)."**[viii]**

The standpoint that *"statutory rules must be clear, understandable, and unambiguous"* and designed so as to be understood by "*an average citizen, unskilled in law*" is rather naïve and does not correspond to reality. Legal norms – however perfect and well expressed they may be – are only a result of an understanding of the law. The rule of law argument *cannot require anything that is against the nature of law* and against the nature of legal understanding, but it can require that the legal message contain enough elements to make possible an understanding of the contents of the message and the normative realization of the message. The legal message is arbitrary if its contents do not direct the recipient and also restrict him. It would be unrealistic to expect the meaning of a legal text to be completely clear and unambiguous. It is more realistic to require the legislature to provide *such degree of certainty* that will enable rational and foreseeable legal argumentation at least at the level of legal understanding and decision-making. Laws that do not fulfil even these criteria do not correspond to the rule of law (the principle of trust in the law).

In a state governed by the rule of law, criminal offences, the rights and legal duties of legal subjects [especially the limitations of rights and the regulation (in more detail) of duties], as well as the jurisdiction and proceedings used by state bodies to decide on rights and legal duties all have to be defined with relative certainty (*lex certa*!). It is of special importance that the meaning of legal norms be based on criteria contained in legal texts (in the constitution and/or statutes), i.e. on criteria that can be activated by established methods of interpretation. If the legal text does not offer any support on how it is to be understood, one cannot speak about interpretation: in this case teleological interpretation cannot replace other arguments of interpretation and, on the basis of itself (as the goal), create a legal norm as a means to achieve a certain goal. In such a case one could, at best, speak about a legal gap that has to be recognized as such and filled by means provided for filling legal gaps.

Teleological interpretation cannot be a solitary method of interpretation, like a "shining goal" that can be manipulated just as one wants. It is in the legal nature of teleological interpretation that it must also be based on other elements incorporated into the legal system.**[ix]** The more such elements that define its meaning exist and the more these elements supplement each other, or the less they exclude or even contradict each other, the more coherent the teleological interpretation. The interpreter's task is to work out these criteria, to combine and evaluate them and to justify the solution he judges to be most well-founded and most rational. These findings are especially binding for the interpretation of legal texts by the constitutional court.

It is natural and legally correct that the interpreter first seeks the criteria for the purpose of the legal norm in the legal text itself. Logical interpretation will tell him whether the criteria is consistent and help him to encompass, by persuasive arguments, also cases that are not directly regulated (e.g. by *argumentum a contrario*). Historical interpretation will remind him of the purpose attributed to the statute (the legal norm) by the legislature or of the purpose determined by the historical circumstances that gave rise to the law and in which the law was created. In a broader sense, the historical interpretation will also give rise to the dilemma whether the interpreter is bound by the "intention of the historical legislature", by the "intention of the current legislature" or by the purpose of the independent text at the time of interpretation (an objective-dynamic interpretation). Within this broad range of possibilities, which can also be divergent or even contradictory, a systematic interpretation will, last but not least, remind one of the meaning of legal principles, of the meaning of the legal

norm in view of its position in the system, and of the "inner logic" binding the parts into a whole and thereby determining them with regard to their intended function.

It would be ideal if these and other interpretative arguments acted in a harmonizing manner and confirmed thereby that the legal text has a relatively clear and definite meaning. In legal practice, however, it often happens that the arguments do not work together and result in the discovery of two or even more meanings in the legal text. If a collision occurs between the interpretative elements, the teleological argument is of crucial importance. It is generally accepted in theory and legal practice that in such a case one has to choose, from among the several linguistically possible solutions, the one corresponding to the purpose of the legal norm in the most intensive manner. The condition for such is, however, that this is not a purpose based on the interpreter's assumptions or even his wishes, but that this purpose is already expressed in the legal text itself or can be gathered from it or from its value (teleological) context in a relatively (i.e. sufficiently) defined manner.**[x]**

III. *The Significance of Basic (Human) Rights*

1. *The Expressiveness of the Constitution*

The *starting criterion* of the rule of law argument are *basic (human) rights*. The expressiveness of modern constitutions is not so strong that basic (human) rights would be defined therein in much detail, but they are rather a matter of understanding and further normative concretization. What constitution-makers can do is to be aware of this problem and to incorporate the criteria for a suitable constitutional interpretation into the constitution itself. In the following section I would like to touch upon three general aspects that can contribute to the rule of law argument.

2. *The Central Position of Human Dignity*

Human dignity as the central criterion of interpretation is most clearly emphasized in the German constitution (Grundgesetz, Art. 1/1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. (Die Würde des Menschen ist untastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.)" The first sentence is the basic one, the second one could be even broader and could emphasize that this is the duty of everyone. This is really what it is all about, and the whole spirit of the constitution (the Basic Law) in general, and of the first chapter on basic rights (Art. 1-19) in

particular, is in accordance with this approach. Historical reasons required and still require that the one who is the most powerful and can repress basic rights in the most severe way should be mentioned first.

The ambivalence of the law and basic rights is just an additional reason for establishing human dignity as the central criterion with regard to content for the interpretation of the constitution and basic rights (cf. Treaty Establishing a Constitution for Europe, Art. II-61: "Human dignity is inviolable. It must be respected and protected.". *Human dignity* is the common value starting point on which the whole constitutional structure is based: it refers to the protection of the dignity of the living as well as of the dead, and it is also a topical value criterion with regard to our duties to future generations – e.g. regarding the protection of a healthy living environment, the protection of the natural and cultural heritage, or the dilemmas concerning gene technology and technical influences upon human embryos. In countries with a totalitarian past the protection of human dignity is an especially sensitive issue in (criminal and other) proceedings before state bodies and during the enforcement of a custodial sentence.

3. *Human Measure is the Measure of One's Fellow Man*

Human dignity has a very broad meaning which has to be theoretically, and practically, operationalized and developed in concrete cases. The general starting point is that the *human measure is necessarily the measure of one's fellow man*: the other side of rights are duties that impose upon us the consideration of the rights of other persons to the same qualitative extent.

The human measure in law may take on very *different complexions*. I have in mind e.g. the questions of difference and distinction, which cannot be evaluated by the same general yardstick if we deal with privacy and autonomy, that show consideration for the equal rights of others. I am furthermore thinking of a collision of two or more basic rights, which are either proportional if we deal with rights of the same importance (e.g. the collision of two rights to the freedom of movement), or exclusive if some basic rights are weightier than others (e.g. the priority of the right to privacy over the right to the freedom of expression in publications). And, last but not least, I am thinking of the subtle questions of the social state, where the initial unequal starting points should be equalized by a rearrangement of the income created, yet this should be done in such a manner that it would not bring the creativity of the market economy to a standstill and that possible social goals as "higher goals" would not drown out basic rights and

other historically established principles of a state governed by the rule of law.
The questions dealt with here also belong to the area of legal culture. In the legal world of continental Europe and of the West in general, the thinking is rather dualistic and bipolar: the right is set against the legal duty and the legal duty is set against the right. Behind this rather coarse vision of *a correlation between rights and legal duties* the measure of one's fellow man stands, which tells us that – at least in a certain sense – the entitlement of A is always connected to his legal obligation, whereas the legal obligation of B is always connected to his legal entitlement. The holder of a right is really entitled to act freely within legally allowed limits, yet he is simultaneously obliged not to go beyond these limits. On the other hand, someone subject to a legal duty is obliged to act in a certain manner, yet he is simultaneously also legally entitled to demand of others that they not put obstacles in his way. What has been said wholly applies to unilateral as well as to bilateral obligatory legal relationships; the difference between both kinds of relationships is a quantitative one and does not refer to the legal quality of rights and legal duties, the quality being the same in either case.
A correlation is not characteristic only of the relationships between rights and legal duties. It applies to any *mutual dependence of conduct and behaviour between two or more legal subjects.* Correlation also exists between the holders of rights and the holders of duty entitlements (e.g. the relationships between parents and children) as well as between holders of legal obligations that are connected to one another with regard to their contents. Especially administrative and other public law is embodied by *duty correlation*. Thus, in public law relationships citizens are often holders of legal obligations (e.g. of tax obligations), which are in accordance with the "entitlements" of state bodies that citizens meet their obligations. The "entitlements" of state bodies are, with regard to their contents, legal obligations that state bodies cannot discard, because this would already represent a violation of the law.

4. *What is not prohibited and commanded, is permitted*
Behind the areas of what is permitted (Germ. erlaubt), *commanded* (Germ. geboten), and *prohibited* (Germ. verboten), the relation between the world of legally regulated behaviour and *the world of legally free behaviour* stands. A legal consequence can only arise on condition that one moves in *the world of legally regulated behaviour* (also in the area of legally permitted behaviour, which is an object of legal protection just due to its legality). If there is no such support, one is in the world of free behaviour (e.g. in the world of intimate and friendly

relations between people), which lies completely outside any legal enforcement and legal consequences. Of no lesser importance is the knowledge that the dividing line between the worlds of legally regulated and legally free behaviour is differently defined for individuals and their associations on the one hand, and for the state and its bodies on the other hand. The *individual* is legally free if he is not limited by legal prohibitions, legal commands, and the rights of others (the prohibition of the abuse of rights!) and if he has not legally committed himself. It stems from the nature of modern law and of the state governed by the rule of law, however, that it is just *the other way round concerning the state* and its bodies. They are only allowed to do what falls within their legally foreseen jurisdiction, everything else is forbidden to them. Another question is how strongly this jurisdiction can be defined and how elastic the language characterizing it is. Nevertheless, the difference is evident: it is assumed for the individual that he is legally free if he is not subordinated by law in the above-explained manner or if he himself does not take on legal obligations (*Pacta sunt servanda!*), whereas with state bodies one must always find an appropriate legal criterion that entitles or obliges them to carry out a certain activity. This is, certainly, of special importance for the state governed by the rule of law.

IV. *The Rule of Law Argument as a Legal Principle*

The rule of law argument is, by its nature, *a legal principle*, which differs from a legal norm. One can say for legal principles that they are value criteria directing the definition of legal norms as regards their contents, their understanding, and the manner of their enforcement. In positive-law theory and in legal practice, legal principles are often not sufficiently observed. For many the main legal guideline is still the legal norm (for some even just the "legal regulation", "legal provision", "constitutional provision", "article" of the constitution, etc.) and not also the legal principle, though both legal guidelines are closely connected to each other: norms without principles would lose their direction, principles without norms would lose their variety with regard to content (as well as their foreseeability and the firmness of their meaning), which would result in *unprincipled* and *arbitrary* legal adjudication. In short, the law is a system of legal principles and legal norms and within this whole there are differences that have to be considered.

It must not be said either of legal norms or of legal principles that the former are applied directly because they are ready for subsumption from the very beginning, whereas for the latter just the valuation or value consideration (assessment,

nuancing, etc.) is of central importance. In *either case it is subsumed in the end* and legal consequences are deduced; with *legal norms* the interpretative path is, as a general rule, shorter and less complex, whereas with *legal principles* the interpretative procedure is, as a general rule, longer and more complicated. In either case the decision is only possible once the norm/principle has been chosen and when also its meaning – as undemanding as it may be – has been accepted.
A few examples will follow to illustrate how legal principles (also the rule of law principle) are *used* in practice. The *legislature* (the lawgiver) has the most leeway; its duty is to remain within the limits of the legal principle, but at the same time it is the one to concretize the principle as regards its contents and to operationalize it. It (co)depends on the contents where the principle ends and where its limit is. Similar is the role of the *constitutional court* when it judges whether a statute or some other normative legal act is in accordance with a legal principle (e.g. the rule of law principle). When the constitutional court decides on a constitutional complaint, it judges whether a concrete decision is in accordance with a corresponding basic right. The duty of the constitutional court is to consider those constitutional principles (again e.g. the rule of law principle) that co-determine single basic rights regarding their contents, at the same time it must gauge the basic rights themselves which are under discussion. Many a basic right has largely the nature of a legal principle if it contains value standards (e.g. the principles of human dignity and of trust in law), which are characteristic of legal principles. Before *regular courts* (and other state bodies) it is, as a general rule, impossible for a decision to be directly based on fundamental legal principles (an exception are legal gaps). Regular courts use legal principles indirectly i.e. *via* legal norms on which they directly base their decisions. Here, the rule of law principle can have an important role; its influence is especially felt in pre-criminal and criminal proceedings, before administrative bodies, and before the administrative court (e.g. the question of using one's power of discretion).

V. *The Constitutionality of the Legal Game*

It is also a question of principle how *intensively* single elements of a state governed by the rule of law are already *designed in the constitution* and how far the understanding and a possible further improvement of the constitution may go. In principle, it can be said that the further improvement of the elements of the state governed by the rule of law should be in inverse proportion to the degree of their constitutional legal implicitness or explicitness. If some elements (e.g. the

question of substantial justice) are only implicit, it is correct that the constitutional court is restrained and only supervises the constitutionality of the legal game.

Recently it has been the professor and German constitutional judge *Hassemer* who has very distinctly stressed the constitutionality of the legal game. Hassemer's standpoint is that also in democratic societies "the majorities have lost the self-evident dignity of being the source of the right law (Germ. *richtiges Recht*)."**[xi]** Also in a democracy the majority is limited in the sense that it must consider the substantial and procedural norms of the game that are constitutionally consolidated. Hassemer's emphasis is clear and meaningful: in the term constitutional democracy "the adjective 'constitutional' is not just an *epitheton ornans* or a mild change of the noun meaning of the word such as, for example, the adjective 'liberal' in the concept of the liberal state. The adjective 'constitutional' in the concept of the constitutional democracy represents a real intervention into the noun itself. It determines nothing more and nothing less than the limit of the democratic principle; it expresses that the judgement whether the majority decisions are right will in future be subject to a basic reservation, namely the reservation whether these decisions are in accordance with the constitution."**[xii]**

Constitutional democracy is incorporated into the design of the state governed by the rule of law. A political and legal game which does not accept the rules of *constitutional democracy,* but which moves beyond them or arbitrarily subjects them to itself, returns to the condition of a totalitarian state. One should not forget that an important condition of constitutional democracy is also an open and objective argumentation which can listen to the other (*Audiatur et altera pars!*) and is at the same time tolerant of the views of the other (the principle of tolerance). A typical example of legal intolerance can be a *change in the level* of decision-making. In legal practice it can happen that what should be regulated at the level of legislation is taken to the constitutional level. Thus, also the decisions of the constitutional court and the norms of the valid constitution can be trumped, and a decision can be reached which more reminds one of a *constitutional divide et impera* than of a tolerant constitutional democracy. We are at a point that even the highly elaborate design of a state governed by the rule of law cannot avoid. Only those responsible for the political and legal game can avoid this point. It depends on them whether they remain within the limits of the rule of law or the legal form is for them just a facade to hide arbitrary political and legal decision-making.

VI. *The (Non)political Nature of Legal Decision-Making*

It would be unconvincing and unrealistic to say that making value decisions is apolitical and that it is just a technical legal question how to "merely" recreate a typical legal norm (e.g. a constitutional or a statutory norm) and "mechanically" transfer it into a concrete legal decision. If the activity of state bodies refers to matters connected to the existence, operation, and directing of the *polis*, it is evident that any decision-making taking up these matters is political. *Mutatis mutandis* this applies to any decision-making in smaller or broader communities such as states, and this decision-making is especially sensitive when the decision influences the quantity and the quality of the power of individuals and individual state bodies.

Open argumentation does not hide that legal decision-making is also political decision-making and/or that legal decision-making also has political dimensions.**[xiii]** If we are aware of this fact and admit it to ourselves, the main emphasis of the problem is on the arguments that are allowed and the limit that legal decision-making must not go beyond. The degree of political sensitiveness is much higher in the area of public law (e.g. constitutional, administrative, and criminal law) than in the area of civil law, concerning individual proceedings, however, it is by far the most intensive with some matters within the jurisdiction of constitutional justice.

The fact that legal decision-making is also political decision-making *does not mean that we are leaving the ground of law* and entering the world of politics, which is not restricted and directed by law. I am speaking about a world that is a wholly *legal world,* but which deals with questions that are (also) politically charged. It would be very bad for law if this charge were overlooked and one would want to give the impression of a pure application of the statute. Behind such veil there is an ideology that exploits the lawyer, whereas it shows him outwardly as a politically neutral decision-maker led by a statute with perfect content.

Making decisions about politically sensitive questions of law requires a careful survey of the meanings that can be attained with the help of interpretative arguments. By way of example, it can be said that among all the possible arguments, the following have special weight: the *argument of linguistic interpretation, which* reminds us that the meaning must be one of the linguistically possible meanings; the *argument of basic rights, which* prevents us from increasing legal duties and/or decreasing the scope of rights (at the same time knowing that they are limited by the same rights of others); *the argument of*

sense and purpose, which urges us, however loose the legal text may be, to discover solutions that are immanent in the law; and the *rule of law argument*, which imposes on us that we remain within constitutional (legal) possibilities and that we make decisions in proceedings that are within the limits of the constitutional procedural game.

It is essential that already in the *determination of the competence* of individual state bodies it has to be considered who should be competent for what. Legislative questions that are of a political as well as of a legal nature are decided by the constitution-maker and the legislature, but not by courts (including the constitutional court), who are protectors of constitutionality and legality. Legislative questions are, at least directly, an object of judicial and constitutional court review in the negative sense; the responsibility of the courts is to remove regulations that are unconstitutional and/or unlawful. It is in the nature of law that the separation of competences is not watertight and that also matters with political dimensions fall within the jurisdiction of the courts. This cannot be avoided even in the most elaborate state governed by the rule of law. This circumstance is an additional reason for a prior determination of competencies and that the criterion for a possible current exclusion of matters cannot be the degree of their politicalness; the criterion for a possible current exclusion of matters can only be the degree of legal importance (especially in proceedings before the constitutional court).

VII. *Si in ius vocat, ito!*

When one finds oneself surrounded by questions that are also politically important, one cannot avoid the political atmosphere in the society (which may also be strongly electrically charged and tense). In such circumstances the attitude and role of the legal profession is of special importance. A prototype of such attitude is the role of the judge in general and especially the principle of judicial self-restraint. The *judicial attitude* does not depend just on the judge's personality, but always also on the education of lawyers, on political conditions and the legal culture, and, to a large extent, on the legal institutions and principles that guarantee and strengthen judicial impartiality and independence (together with the permanence of judicial office as one of the most important legal guarantees).

Judicial self-restraint is synonymous with acting with moderation: the judge should be neither an activist intervening in the competencies of the other two branches of power nor a passivist diplomatically shirking from showing with

determination how far the other two branches of power may go. Either attitude becomes clearest with the constitutional court. If the constitutional court is activistic, it takes over the role of the positive legislature or declares its position on political questions that are outside its jurisdiction. If the constitutional court is too cautious, it takes refuge in milder decisions without directly saying where the legal mistake is.

Courts breathe with the time and place in which they act. The zeitgeist marks them and co-determines the directions of the interpretation of statutes. The *objective-dynamic interpretation* which is accepted by the majority, is not conservative but is restrainedly open to changes in time and place. The objective-dynamic interpretation is not an interpretation in the service of daily politics, but an interpretation that admits in the long term that the understanding of old legal texts changes. The self-restraint requires the judge to not anticipate the time and to not bring novelties into the understanding of a statute that the text does not support with regard to the meaning.

It is evident from the above that the judiciary does not have only a constitutional and generally legal framework, but is always rooted in a certain social and legal culture. It is of decisive importance that the legal mechanism strengthens the checks and balances system, which is the central dimension of the separation of powers. The judiciary can have a very important role in social conflicts. It is crucial for the rule of law whether the central political subjects act within the limits of constitutional democracy and whether they are ready to subject themselves to the decisions of the highest courts (especially of the constitutional court, in the systems that know such a court). The co-dependence of the state governed by the rule of law, as a normative phenomenon, upon the society, the state and legal tradition, politics, the economy, and culture is strongly evident in the so-called transition countries (since the fall of Berlin wall).**[xiv]**

NOTES

[i] Cf. Brand, Hattenhauer (ed.) 1994.

[ii] About the origin and design of the state governed by the rule of law, see e.g. Dicey 1927, p. 179ff.; MacCormick 1984, p. 65ff.; Šarčević 1991; Benda 1994, p. 720ff.; Varga 1995, p. 159ff., and Troper 2001, p. 267ff.

[iii] See Dicey 1927, p. xxxviiff, p. 179ff, p. 402ff.

[iv] See MacCormick 1984, p. 65ff

[v] Herzog, in: Maunz, Dürig 1994, p. 266-269.

[vi] OdlUS (Decisions of the Constitutional Court of the Republic of Slovenia)

XI/1, 1.

[vii] OdlUS VIII/1, 105.

[viii] OdlUS VII/1, 78, p. 494

[ix] See e.g. Müller, Christensen 2004, p. 349. Cf. Weinberger 1988, p. 186: "Die teleologische Argumentation für die Entscheidung zwischen Interpretationsalternativen darf nicht als schlüssige Begründung angesehen werden, sie kann jedoch dazu dienen, die Plausibilität einer vorgeschlagenen Interpretation zu erhöhen." (The teleological argument for a choice between alternative interpretations may not be considered as a conclusive reason, but it can serve to increase the plausibility of a proposed interpretation.)

[x] See and cf. Pavčnik 1993, p. 71ff.

[xi] Hassemer 2003, p. 217.

[xii] Ibidem, p. 214.

[xiii] See Bell 1985, p. 269 and Heyde 1994, p. 1632.

[xiv] Cf. Přibáň, Roberts and Young 2003 (concerning Slovenia, see the contributions of M. Novak, p. 94ff., and Igličar, p. 180ff.) and Pavčnik 2005.

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