

Building a rule of law state in some countries and suggestions for Vietnam

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Abstract: *The paper analyzes the rule of law state model in terms of core ideological values which are universally recognized in certain political, legal, economic, and social conditions of some countries with a long tradition of building the rule of law state, namely, Germany, France, the United States, and the United Kingdom, as well as Russia and China who used to be or are pursuing socialism, respectively. Based on international experience and requirements as well as universal characteristics of the rule of law, some lessons are drawn for state-building in association with the specific context of Vietnam.*

Keywords: Law, Rule of law State, Rule of law, Constitution, Experience, Germany, France, The United States, The United Kingdom, Vietnam

1. Introduction

The rule of law state may have various definitions, but can generally be understood as universal ideas and values or a set of requirements, characteristics, and principles for organizing power on the basis of law (See: Dao Tri Uc, 2022). Another definition was mentioned by the United Nations in the report of the Secretary General on “The rule of law and transitional justice in conflict and post-conflict societies” at the United Nations Security Council on August 23, 2004: “The rule of law refers to a 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” (UN Security Council, 2004: 4). These ideas, values and characteristics of the rule of law state have been formed and developed for a long time in general awareness as well as in historical practice with different context and needs of various countries in different periods of time. The basic requirements, characteristics and principles of the rule of law state are universal and can be applied in different country models related to theirs distinguish needs as well as different political, legal, socio-economic, cultural contexts. However, these contexts do not obscure the basic, universal characteristics and principles of the rule of law state.

2. Experiences of some countries in establishing a rule of law state

2.1. Germany

Germany is a country with comprehensive tradition in the study of the rule of law state than any other country; thus the Germany concept of rule of law (Rechtsstaat) is widely accepted and applied.

Rechtsstaat was originally used to refer to a mode of state organization in which the executive bodies always operate in accordance with the law. Lately, Rechtsstaat has been supplemented and now includes legal principles promoting access to justice, the principle of separation of powers within the state apparatus and the recognition of human rights (See: Ngo Vinh Bach Duong, 2012).

The rule of law state model was further discussed and declared in the Constitution of the Federal Republic of Germany in 1949 after World War II; this Constitution has been revised several times, the latest was in 2012. *To abide the law is only a small aspect of rule of law*, this concept can completely be distorted and abused if there is a lacking of the necessary guarantees of the rule of law principles (Rechtsstaatlichkeit) for the freedom and democracy of the people.

Article 20 of the German Constitution includes several principles, however, it is not the traditional Germany style of rule of law principles. The rule of law principles as understood by the Germans also includes: (i) Prohibition of retroactivity; (ii) Proportionality of the available tools; (iii) Resolving conflicts of authority in the case of personal damage caused by public authority; (iv) Complete and effective review of judgments in cases related to individual liberty and property rights (Article 19 paragraph 4 of the German Constitution). In particular, the principle of

proportionality is considered to be the most exemplary feature of the German concept of rule of law. Currently, the principle of proportionality allows the court to review all legislative or executive actions based on the criteria of human rights protection (Article 1, Clause 3, Article 19, Clause 2 of the German Constitution)¹. Activities related to basic human rights are regulated by the Federal Constitutional Court ('Bundesverfassungsgericht', Article 92-93 of the German Constitution).

Currently, the German rule of law principles are mainly declared in the Constitution. The Constitution not only contains the principle of the Welfare State (Article 20 Clause 1 of the Constitution) but also allows for public supervision (Article 7 of the Constitution); ensuring freedom of information (Article 5 Clause 1 of the Constitution); and protect the right to impart religious values and beliefs (Article 4 of the Constitution). The rule of law principle shall always be bound to the context of a State with a democratic and social Constitution.

2.2. France

For a long time, the term "rule of law" was not used in the legal vocabulary of the French Republic, yet, the country has always been governed by law; and instead, the term "rule of law" can be used interchangeably with "République" or "État". In fact, it was not until the beginning of the twentieth century that a translatable term from the German word "Rechtsstaat" appeared -

¹ See also: Yutaka ARAI-Takahashi (2012), *Proportionality - A German approach*, Amicus Curiae Brief. On the Abortion-Related Provisions of Law 603 of 2006 (Penal Code), presented by Human Rights Watch before the Supreme Court of Justice, Full Court, Issue 19 July 1999, page 2, <http://sas-space.sas.ac.uk/3907/1/1458-1702-1-SM.pdf>, accessed on 30 June 2012.

“État de droit”. Since the establishment of the Constitutional Council in 1958 (amended in 2008), France has been fully described as an État de droit, where each body of power, including the legislature, operates under the control of a judge to ensure that the all constitutional principles are to be respected and implemented. Similar to Germany, the concept of État de droit in France stands for the principle of constitutional supremacy and the responsibility to protect basic human rights by any public authority, especially the legislature (See: Pech, 2004).

The rule of law has become a dominant principle of the legal system in practice. Not only does it establish a hierarchical legal order, but it also becomes a set of fundamental rights and freedoms. This logic has been affirmed in the principle of “priority of law”. Such approach has created the version of rule of law that is built on the basis of freedom, the fundamental principles of public freedom, democracy and the role of the State in establishing the foundation of the legal order (See: Nguyen Linh Giang, 2012).

The basic principles of the French rule of law include: (i) Strengthening the legislation. Executive and administrative submission to the law is the core of the rule of law doctrine; (ii) Principle of independence of the judiciary: Judges cannot be dismissed, there is a High Council to manage professional affairs and ensure procedural order at the Court; The judicial branch is independent of the executive and legislative branch; (iii) Principles of inspection and supervision: Judicial control measures are the basis to ensure the effectiveness of the rule of law (Chevallier, 1996).

Ensuring the supremacy of the Constitution: The Constitutional Court

helps to reduce the workload of other courts and promotes the integration of the French legal system into the international legal system. The Constitutional Council has the following main powers: Reviewing the constitutionality of legal documents; distinguishing the jurisdiction between law and regulation; declaring on the conformity of international commitments to the Constitution; reviewing the validity of agency elections, Parliamentary elections, Presidential elections and referendums.

2.3. The United Kingdom

According to the doctrine of British scholars, the rule of law stated that all people must obey the law, regardless of background, gender, religion or financial ability. The United Kingdom does not have a written Constitution. The rule of law, together with the supreme authority of Parliament, is a pillar of the British Constitution; the rule of law principles are considered as unwritten law¹.

The rule of law is the basis for an open, just and peaceful society where citizens and businesses can prosper. It essentially ensures that: Public authorities are bound and accountable to the law, which must be clear and predictable; citizens are treated equally before the law; human rights are protected; citizens can access to effective dispute resolution mechanisms; laws and directives have universal value (See: Le Mai Thanh, 2012).

The Government must be responsible and transparent with well-functioning judicial institutions to establish an open and fair social foundation where legal standards

¹ See: *Suicide Act 1961*, <http://www.legislation.gov.uk/ukpga/Eliz2/9-10/60>, accessed on 20 October 2021.

and citizens' experiences of the law and legal services are improved¹.

The United Kingdom guarantees human rights and freedoms based on the Human Rights Act 1998².

2.4. The United States

The Constitution of the United States is the fundamental law; systematize core human values. The courts are responsible for interpreting the meaning of the Constitution, as well as the meaning of any law passed by the Congress. Federalist no. 78³ stated that, if any law passed by the Congress contradicts the Constitution, then "The Constitution must take precedence over the law, the will of the people is placed above the will of their public authorities". This does not mean that in this country, the judicial power is superior to the legislative power. It shows that the power of the people is superior to both; thus, if conflicts arise between the will of the legislative declared in the law and the will of the people declared in the Constitution, the judges must always adhere to the Constitution. They must make their judgment based on this basic law⁴.

The supremacy of the United States Constitution: The Constitution of the United States was drafted in 1787, passed in 1788 and has been in effect from 1789 up till now. The most prominent feature

of the United States Constitution on describing the rule of law is the supremacy of the Constitution and the separation of powers as a system of checks and balances the branches of power⁵. Constitutional oversight is vested in the United States Federal Supreme Court. Constitutional review is an important measure to ensure the supremacy of the Constitution.

Control of power in the United States apparatus: Control of power is one of the important values that is uniquely expressed in the American legal practice. The United States government's apparatus is designed to ensure that each branch of power is controlled by another and controlled internally in different ways.

Along with establishing control mechanisms between the branches of power, the Constitution also grants relative independence to each of the branches of power. This is most evident in the independence of the judicial from the legislative and executive, as reflected in the election of judges. Accordingly, Justices of the Supreme Court of the United States will be appointed by the President of the United States for a lifetime term and shall only be dismissed on the account of misconduct. This has ensured the fulfillment of constitutional review of the Federal Supreme Court.

Freedom, democracy and human rights: The Constitution with the First 10 Amendments⁶ is a tool to guarantee human rights and limit the power of the State. No branch of power in the United States

¹ See: *What is the rule of law*, ROLE UK (Rule of Law Expertise), <https://www.roleuk.org.uk/what-is-the-rule-of-law>, accessed on 20 November 2020.

² See: <http://ukinvietnam.fco.gov.uk/vi/visiting-uk/about-uk/people-and-politics/human-rights>, accessed on 20 November 2020.

³ See: *FEDERALIST NO. 78*, <https://guides.loc.gov/federalist-papers/text-71-80#s-lg-box-wrapper-25493470>, accessed on 20 November 2020.

⁴ See: *Overview - Rule of Law*, US Courts, <https://www.uscourts.gov/educational-resources/educational-activities/overview-rule-law>, accessed on 20 November 2020.

⁵ See: *Constitution of United States*, US Senate, https://www.senate.gov/civics/constitution_item/constitution.htm, accessed on 20 November 2020.

⁶ See: *The bill of rights: what does it say?*, <https://www.archives.gov/founding-docs/bill-of-rights/what-does-it-say#:~:text=The%20Bill%20of%20Rights%20is,speech%2C%20press%2C%20and%20religion>, accessed on 20 November 2020.

is absolute and uncontrollable. Thus, the United States has selectively absorbed legal ideas from the United Kingdom, the fundamental values of rule of law along with its own values of freedom to establish a practical and effective power organization model (Le Mai Thanh, 2012).

2.5. China

In modern Chinese society, the view of “rule by law” is gradually being replaced by the concept of establishing “rule of law”. The 1982 Constitution of the People’s Republic of China, was revised several times (most recently in 2018), states that China governs the country according to the law and develops the country into a “socialist” rule of law state¹. The socialist rule of law state that China is establishing has the general characteristics of the rule of law model, but also has its own characteristics of the Chinese rule of law model, which lies in the leadership role of the Communist Party of China along with the law². According to Chinese researchers, the rule of law state that China is establishing has the following characteristics: (i) The leadership of the Communist Party of China; (ii) The People’s interests are at

the central; (iii) Commit to the rule of law - govern the country according to the law; (iv) Good enforcement of the law and the Constitution; (v) Promote governance of the country according to the rule of law...³. According to several researchers, the Chinese rule of law state is in the stage of experimentation, review and speculation (Le Mai Thanh, 2012).

2.6. Russia

Russian scholars interpret the concept of rule of law based on the reference to the German concept of “Rechtsstaat”, which emphasizes the supremacy of the Constitution and the compliance of the State; The Constitution must aim at the goal that the State ensures the peaceful and happy life of the people along with their property rights fully intact (See: Nate, 2009). The rule of law is a basic Russian term, concept and principle (See: Петр Баренбойм, 2010); is scientifically explained in a multidisciplinary manner (See: П. Баренбойм, А. Захаров, 2010) and is constitutionalized in Article 1 of the current Constitution of the Russian Federation. This Constitution was adopted in 1993 and amended on July 1, 2020⁴.

¹ See: Section 7, Preamble, Constitution of The People’s Republic of China (revised in 2018), National Assembly Website of the People’s Republic of China, <http://www.npc.gov.cn/englishnpc/constitution2019/201911/36a2566d029c4b39966bd-942f82a4305.shtml>, accessed on 20 August 2021.

² See also: “Experience and practice of the Communist Party of China on persevering the Party’s leadership in comprehensively managing the country according to the law” by Prof. Dr. Chu Tinh, Central Party School of the Chinese Communist Party at the online workshop between the Foreign Affairs Department of the Communist Party of Vietnam and the Foreign Affairs Department of the Communist Party of China, on July 22, 2022, at the online meeting room of the Foreign Affairs Department of the Communist Party of Vietnam.

³ See also: “Overview of comprehensive State management policy in accordance with the law” by Prof. Dr. Vuong Nhuoc Loi; “Experience and practice of the Communist Party of China on persevering the Party’s leadership in comprehensively managing the country according to the law” by Prof. Dr. Chu Tinh, Central Party School of the Chinese Communist Party at the online workshop between the Foreign Affairs Department of the Communist Party of Vietnam and the Foreign Affairs Department of the Communist Party of China, on July 22, 2022, at the online meeting room of the Foreign Affairs Department of the Communist Party of Vietnam.

⁴ See: Конституция Российской Федерации (с изменениями, внесенными в соответствии с Федеральным конституционным законом № 1-ФКЗ от 14.03.2020 г.)

According to the Constitution, Article 1.1: The Russian Federation is a democratic federal rule of law State with a republican form of government; Man, his rights and freedoms are the supreme value; Article 2: The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State; Article 10: The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial power. The bodies of legislative, executive and judicial power shall be independent; Article 11.1: The state power shall be exercised by the President, the Federal Assembly, the Government, and the courts of the Russian Federation.

The Russian Constitution contains the basic principles of the legal mechanism governing the most important social relations in order to establish the rule of law and civil society (See: Дави́тадзе М.Д., 2020).

From a different angle, the rule of law can also be understood as the State is established on the basis of law and must comply with the law. The State organizes itself according to the law and upholds the law as the supreme power of the society, not as a product of the State. The principle of the supremacy of the law with the Constitution in the highest position is a universally recognized principle and an expression of social values as well as the law in accordance with the standards of international law. Laws are effective when they are humanities, responsive to the needs of society and enact in a democratic order. The practice of Russia's rule of law model is seen by many Western scholars as a "Russian-style rule of law" model (See: Hendley, 2009) or a "Putin-style rule of law" (See: Popova, 2017). These assessments are also related to the ranking

of rule of law implementation in Russia in 2021 by the World Justice Project¹. Based on Western scholars' view and universal criteria, Russia's legal change is influenced by political power as well as the lack of independence in judicial practice (See: Popova, 2017; WJP, 2021); this contributes to Russia's low ranking in the rule of law index according to the World Justice Project.

3. Perceptions of the rule of law of some international organizations

The International Commission of Jurists (ICJ) has introduced the concept of the rule of law since the 1950s. Later, the ICJ has defined and interpreted the concept of the rule of law through the ICJ Congress Declaration (from the Athens Act 1955 to the Tunis Declaration 2019). The ICJ believes that in order to promote the rule of law worldwide, it is necessary to enact measures to protect the law and its procedures in order to strongly develop a national rule of law culture; as well as establish objective criteria to evaluate the effectiveness of the rule of law (ICJ, 2019). In addition, as cited above, in 2004, the Secretary General of the United Nations - the largest intergovernmental organization and plays an important role in the multilateral international system - also observed that, the rule of law is a governing principle for a country in which all public (including the state) and private actors must

¹ In 2021, WJP ranked the rule of law index of 139 countries around the world based on a survey of 138,000 households and 4,200 lawyers, legal experts as well as based on primary information gathered from opinions and experiences of ordinary people. The ranking results are as follows: Germany - 5; England - 11; France - 23; United States -27; Vietnam - 88; China - 98; Russia -101 (See: WJP, 2021: 9-11). This ranking does not change much compared to the ranking in 2020 (See: WJP, 2020).

obey the law. In particular, this law must be publicly announced to ensure transparency and predictability; be applied equally and the judicial branch must be independent, persistent with international human rights principles and standards (UN Security Council, 2004: 4).

The rule of law is understood as a set of common standards for all legal-based activities. Laws are enforced in practice through reliable, predictable procedures and mechanisms while making sure that “governance through the law”¹. The rule of law is seen as an accurate measure of a country’s quality and governance (See: Santos, 2006).

To measure the quality of national governance, the international community recognizes and applies four universal principles of the rule of law researched and developed by the World Justice Project (WJP) into a set of Rule of law Index (WJP Index) (See: WJP, 2015: 9). The WJP Index has been reduced from the original 9 factors to 8, due to the 9th factor is difficult to quantify (See: WJP, 2018)².

¹ See: OECD(2013), “Rule of law”, in: OECD(2013), *Government at a Glance 2013*, Paris, p.44, https://www.oecd-ilibrary.org/docserver/gov_glance-2013-9-en.pdf?expires=1664519358&id=id&ac-cname=guest&checksum=7E6C3EEA2193B45CE-2326DA93F51F1A5.

² The shortened set of WJP Index include: (i) Constraints of government powers (Government power is limited by the legislature and the judiciary; limited by independent auditing and review; government officials are sanctioned for misconduct; government powers are subject to non-governmental check; transition of power is subject to the law); (ii) Absence of Corruption (Government officials in the executive, judicial and legislative branches do not use public office for private gain. For member of the executive branch, they must not accept bribes, be transparent in procedures, must not abuse public resources); (iii) Open Government (Publicized

4. Conclusions and implications for Vietnam

The rule of law through international perception is a combination of universal requirements, characteristics and principles to organize state power according to law, but specific models of each country may differ due to their specific needs and conditions, which leads to the differences in some of the non-basic features from the universal rule of law model. Depending on the rule of law model and the power organizational structure, the views on the separation of power, the specific conditions as well as the legal basis for the organization of power in each country may differ from one another.

The United States is influenced by the United Kingdom views on the rule of law, but has developed its own rule of law model with successful separation of powers and mutual control, along with an effective mechanism to ensure democracy and human rights. The supreme role of the

laws and government data; ensure the right to information; ensure civic participation; ensure complaint mechanisms); (iv) Fundamental Rights (Ensure the rights to equal and non-discriminatory treatment; the right to life and human security; due process and the rights of the accused; the right to freedom of speech and expression; freedom of belief and religion; right to privacy; freedom of assembly and association; basic labor rights); (v) Order and Security (Crime is effectively controlled; civil conflict is effectively limited; people do not resort to violence to redress personal grievances); (vi) Regulatory enforcement (Regulatory enforcement practice can be assessed using the Provincial Governance and Public Administration Performance Index (PAPI)); (vii) Civil Justice (People can have equal, non-discriminatory access to civil justice, can rely on the enforcement of civil justice decisions and have an affordable court fee); (viii) Criminal Justice (Criminal justice system effectiveness is based on the entire system of police, lawyers, prosecutors, judges and prison guards).

United States Constitution is the basis for the government authorities to exercise their power within the scope of the constitution. The constitutional protection mechanism does not need to be assigned to a specialized agency and should belong to the judicial branch. Both the United States and the United Kingdom law are aimed towards clarity and accessibility.

France is influenced by the rule of law ideology of Germany with specialized constitutional protection mechanism, promotes democracy and human rights as prerequisite factors in developing the rule of law model.

The rule of law model in the United States and the United Kingdom are oriented towards practicality and efficiency; while Germany and France model of the rule of law aim for the welfare state, democracy and promotion of civil society.

The rule of law model of China and Russia with specific conditions have many things in common with Vietnam; thus, like Vietnam, these countries are also studying and perfecting the model to accommodate their needs and interests.

In conclusion, it can be said that the universal rule of law model is built based on common characteristics and principles; and the application of such model under different specific conditions does not change those universal characteristics. Based on specific conditions, the rule of law model of each country also has their own characteristics, but that does not change the universal requirements, characteristics and principles of the rule of law in general. For Vietnam, the unique feature of the rule of law model is the leadership role of the Communist Party of Vietnam based on Article 4 of the Constitution. According to Vietnam's legislative tradition, constitutional norms

are always explained and stipulated by specific legal norms to ensure consistency in implementation. In addition, this unique feature is also related to the role of administrative justice in a typical Eastern society - always avoiding confrontation and favor other administrative-legal methods. In order to diminish the public's doubts when accessing administrative justice, it is necessary to improve the position of administrative justice in the judicial system, strengthen the supportive role of the trial panel in collecting documents and evidence of the petitioner, strengthen the practical effect of administrative decisions as well as continue to make other reforms in this area □

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