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SPECIAL ISSUE ARTICLE

Fault Lines in the Rule of Law: Europe's Present and the Presence of its Past

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Abstract

This article critically examines the significance of the relationship between past and present for understanding liberal democratic values in the European context. The article starts by reflecting on the terms used to evaluate the apparent decline in the rule of law in Europe, including 'backsliding'. It argues that these terms are indicative of a conceptual framework of analysis that includes a temporal dimension but is only partly historical, demonstrating a presentist focus and a perception of the past as a separate period. The article links this perception with the conceptual construction of the rule of law itself, as well as national and transnational narratives about it, which evoke Europe's non-democratic past as a definitional point of reference that is distinct from the present. Using examples of the legacies of Europe's dark legal past, the article highlights the artificial nature of this distinction for a range of systems with differing historical experiences. The article argues that interpreting the past in terms of segmented and sequential temporal periods is conceptually contestable and it draws on the philosophy of history to show how the past can instead be understood to have 'sedimentary' layers and to endure over time. Ultimately, the article argues that the relationship between law's past and law's present needs to be reconceptualised in terms of metaphorical 'fault lines' in the rule of law, to acknowledge the potentially disruptive effects of history and to facilitate a critical reimagining of the rule of law's theoretical and factual foundations.

Keywords: rule of law; backsliding; Europe; history; philosophy of history

1 Introduction

As populist, nationalist and authoritarian tendencies become more apparent in political and legal discourse and practice across Europe, the ability of liberal democracy to resist such pressures and preserve its foundational values is an increasing cause for concern. A core component of liberal democracy that has generated much anxious analysis in recent years is the rule of law. A notoriously complex and contested concept on which a vast body of academic literature has been generated, the rule of law lies at the heart of ongoing concerns about undemocratic developments in a number of national systems across Europe and the capacity of transnational systems to address them (Palombella, 2018). Much of the discussion about the rule of law in this context has been focused on how some states are weakening their commitment to it in normative and practical terms, a process often referred to as rule of law 'backsliding' or 'decay' (Bermeo, 2016; Pech and Scheppele, 2017; Waldner and Lust, 2018; Adams and Janse, 2019). However, although the idea of regressive change signified by backsliding and related terms can imply a return to, or reproduction of, a past period of undemocratic government, it does not necessarily correspond with actual historical experiences in specific systems. This arguably points to

underlying difficulties in the idea of the rule of law itself, specifically its assumptions about the present and the past.

This article examines how the concept of the rule of law in the European context can be understood in relation to time and history. It begins by exploring the terms used in the rule of law backsliding debate and shows how they are indicative of a conceptual framework of analysis that includes a temporal dimension but does not always incorporate a historical dimension, which demonstrates a presentist focus based on a perception of the past as a separate period. The article links this perception with the conceptual construction of the rule of law, as well as national and transnational narratives about it, due to the ways in which they evoke Europe's non-democratic past as an evaluative point of reference that is distinct from the present. Using examples of Europe's 'dark' legal past and its legacies for subsequent law and legal culture, the article highlights the artificial nature of the past-present distinction for a range of legal systems with differing historical experiences. On that basis, the article shows how a periodised interpretation of history is conceptually contestable, and draws on the philosophy of history, specifically the work of Reinhart Koselleck and Vladimir Jankélévitch, to explore how the past can be understood to have 'sedimentary' layers and to endure over time. Building on these theoretical insights, the article argues that connections between law's past and present need to be reconceptualised in terms of metaphorical 'fault lines' in the rule of law. Although the term 'fault line' has already been applied to European history (Müller, 2002, p. 9) this article uses it differently, to develop a critical historical analysis of the rule of law that addresses issues of continuity and connection in place of this concept's usual foundation in a segmented interpretation of the past (Gordon, 1997, p. 1024). This is intended not to undermine the rule of law concept, but to recognise its inherent instabilities, reflect on its theoretical and factual foundations and enhance understanding of its contingencies.

2 Time and history in the rule of law 'backsliding' debate

Academic engagement with the meanings of, and changes in, the rule of law in numerous countries worldwide has dramatically increased in recent years. This has mainly been due to the rise of populist governments and the steps they have taken to reconfigure, if not to undermine and erode, constitutionalism, the separation of powers – especially judicial independence (Giannoulopoulos and McDermott, 2022) – access to justice and the universality of human rights (Müller, 2017; Eatwell and Goodwin, 2018; Bugarič and Kuhelj, 2019; Bugarič, 2019). In the European context, attention has focused on Hungary and Poland (Drinóczi and Bień-Kacała, 2019), although challenges to the rule of law have been apparent in other national systems as well. A particularly problematic feature of this literature on the rule of law and the apparent crises affecting it is the diversity of terminology used to describe and evaluate challenges to democratic constitutionalism. The issue of concern here though is not the terminology itself but the conceptual interpretations it represents.

Tom Gerald Daly has recently provided a detailed discussion of the rule of law debate, the range of terms used – of which he notes at least twenty – and how they relate to what he refers to generically as the decay of the structures and substance of liberal constitutional democracy (Daly, 2019, pp. 11, 19; Tóth, 2019, pp. 41–45). These terms include for example abusive constitutionalism, de-constitutionalism, autocratic legalism, constitutional retrogression, authoritarianisation, democratic or constitutional decay or rot, democratic deconsolidation, illiberal democracy, authoritarian constitutionalism, as well as the term that has perhaps received most attention, democratic or rule of law backsliding (Bermeo, 2016; Pech and Scheppele, 2017). As Daly indicates, understanding the significance of these various terms depends on the context in which they are used, such as the meanings of democracy and constitutionalism in the system in question, or how democratic it was before the apparent change began (Daly, 2019, p. 12). Daly's

discussion of these various terms, their intellectual heritage and their underlying concerns has concentrated on their structural or substantive focus, and on how they could be consolidated to identify reliable indicators of constitutional decline (Daly, 2019, pp. 18–32). By contrast, the focus here is specifically on how these different conceptions of democratic decay or backsliding can be seen to reflect particular perspectives on the role of time and its passage (referred to here as temporal dimensions or temporality) and on understanding the past and the relationship between past and present (referred to here as historical dimensions).

The diverse ways in which apparent shifts in approaches to democracy and the rule of law have been labelled are intended to describe change and at the same time evaluate what it signifies normatively, that is, movement away from liberal democratic standards. This change is deemed to occur as a result of governmental reforms that produce an incremental deterioration in a politico-legal system and its supposedly foundational values and liberal democratic credentials. For example, some of the terms used in the democratic decline debate, such as 'backsliding' and 'retrogression', seek to signify negative change through the suggestion of backwards movement, as opposed to the usually positive connotation of forwards movement as progress. The 'sliding' in 'backsliding' is also arguably suggestive of furtive, deceitful and 'slippery' conduct, reinforcing its pejorative implication. Other terms suggest a sense of negative change through a vocabulary of decay (Adams and Janse, 2019), whereby a constitutional condition has been corrupted or degraded, or through words indicative of dismantling, deconstructing, undermining or weakening, such as 'de-constitutionalism' or 'deconsolidation.' Yet other terms highlight negative change through the use of non-liberal-democratic adjectives, such as 'illiberal', 'autocratic' or 'authoritarian', to describe new situations following interferences with democracy and the rule of law. However, although almost all of these terms have a temporal dimension, in that their critical evaluations refer to changes in state practices occurring over time and involving different timeframes (i.e. 'before' and 'after' the changes in question), their historical dimensions and their representations of the past and the past-present relationship differ.

For the studies of change to democracy and the rule of law that use a terminology of decay, temporality is relevant, but not necessarily history. This is because these studies are not expressly concerned with a system's past but rather focus on its apparent decline or degradation in the present, which occurs over time. Such negative change is not expressly presented as an apparent return to a past time, or historical state of affairs, but as a corruption of systemic standards and values that results in a new, deteriorated version of them. In contrast, the other sorts of study noted above can be seen to have a more evident historical dimension. The conception of 'backsliding' in particular can be understood as a pulling back from a current commitment or reneging on liberal democratic undertakings (Bermeo, 2016; Haggard and Kaufman, 2021). The idea of backwards movement can though also be understood to mean that the erosion of liberal democracy has returned the state in question to a particular stage of its past. Similarly, in the studies that expressly refer to 'non-democratic' descriptors, including illiberalism, autocracy and authoritarianism, the terms used can be understood not only to suggest an anti-liberal turn in the present, but also to imply a connection with historical examples of those sorts of system. While the politico-legal change being evaluated might involve a new form of authoritarianism or autocracy, these sorts of studies also seem implicitly to evoke Europe's past non-democratic experiences.

In addition to these differences of representation, the apparent historical dimensions in the above evaluations of the rule of law do not always correspond with actual historical experiences in the context of specific systems. As Daly notes, the term 'backsliding' 'carries the unhelpful connotation of regression to a previous less democratic (or undemocratic) state' (Daly, 2019, p. 17). This connotation is 'unhelpful' because in some states where apparent 'backsliding' occurs there is not an identifiable non-democratic past, and in others where there is a non-democratic past the 'backsliding' identified does not take the form of a return to what that past involved (Daly, 2019; Cianetti and Hanley, 2021). Also, as Kim Lane Scheppele has suggested, a historical reference to the non-democratic past when evaluating changes in the rule of law in a particular

country might not merely be unhelpful, but dangerously distracting (Scheppele, 2018). She has argued that attacks on the rule of law today will not necessarily involve the tactics of past assaults on liberal democracy, and that references to history can risk distracting attention from the new ways in which governments incrementally undermine the rule of law from within (Scheppele, 2018, p. 582; cf Albright, 2018; Skinner, 2022a).

The various terms and approaches used in the rule of law backsliding debate can thus be understood as indicative of an underlying conceptual framework that distinguishes between time and history. While a temporal dimension is universal, a historical dimension is less common and, where it does arise, more problematic. In addition, the approaches to changes in the rule of law outlined above primarily demonstrate a presentist focus, to which the past is only considered to be of indirect concern, if at all. Together, these features of the backsliding debate show that the present and the past are mainly understood in terms of separation rather than connection. This raises the question of how and why this perception of past and present is central to analyses of the rule of law.

3 History and the rule of law

Addressing the presentist focus of the rule of law debate and its distinction between the present and the past requires engagement with its apparent dependence on a particular sort of historical understanding, based on politically contingent claims of difference and discontinuity over time. This understanding is arguably both an inherent component of the rule of law concept itself, and a key element of national and transnational narratives of its foundational importance and meaning. When compared with examples of the legacies of Europe's 'dark' legal past, however, the limits of that conceptual and narrative approach become clear.

3.1 The rule of law as norm and narrative

The concept of the rule of law is highly contested and has been discussed from multiple perspectives, most of which fall beyond the scope of this article. Although there are technical distinctions between the various forms of 'rule of law', '*état de droit*' and '*Rechtsstaat*', they share a core set of components, including inter alia legal certainty, non-retroactivity, judicial independence and the commitment to and protection of human rights.[1] While most commentators discuss the rule of law's constitutive elements from a 'thick' substantive and cultural (Geertz, 1993, pp. 6–10, 18) perspective or 'thin' procedural perspective (McCorquodale, 2016, pp. 282–283), others emphasise its purpose of preventing arbitrary exercises of power (Krygier, 2011, pp. 67–81; Krygier, 2019, pp. 758 *et seq*), primarily by the state (Krygier, 2011, pp. 88–89). In this crowded field of academic analysis, the ideological origins, ascendance and politico-legal scope of the rule of law as a foundational concept in liberal democracy have been examined in depth (Loughlin, 2018) and the possible differences between its formal and substantive meanings have also been extensively examined (Craig, 1997; Tamanaha, 2004; Costa and Zolo, 2007). Against this backdrop, the aim here is to focus more specifically on the conceptual construction of the rule of law in relation to the past, which is addressed here in two stages. The first concerns how the rule of law concept depends on an element of historical contrast with systemic attributes of past orders that are understood to represent liberal democracy's opposites. The second involves the meaning of the rule of law in politico-legal narratives about the foundations of national and transnational legal orders in post-Second World War Europe.

[1]European Commission for Democracy through Law (Venice Commission), *Report on the Rule of Law* (Venice, 25–26 March 2011) Study no 512/2009, CDL-AD (2011) 003rev (Council of Europe, 2011) 9, para 36. The Venice Commission mainly draws on Bingham, 2010. Compare Fairgrieve, 2015; Dicey, 1885; Fuller, 1975, p. 39.

First, to an important degree the normative meanings of the rule of law are established negatively by reference to what a system respecting the rule of law should not do. These negative references encompass in a narrow sense the sorts of harm against which the rule of law should protect (Krygier, 2011, pp. 87–88; Tamanaha, 2004, p. 115), and more broadly the systemic features and types of conduct that the rule of law is supposed to prevent. This negative definitional approach is rooted in a historical perspective, in that the rule of law is deemed to establish and uphold principles and practices that were developed to replace the rejected attributes of previous systems. The rule of law in common law systems, and *état de droit*-type concepts in civil law systems, originally emerged historically as a set of (selective and narrowly construed) responses to (or compromises with) preceding autocratic, arbitrary or authoritarian monarchies (Loughlin, 2010, pp. 316–322; Van Kley, 1994, pp. 5–7). In the post-Second World War era, the rule of law came to be associated with governmental constraint, accountability and universal human rights that were considered to embody the opposites of the excesses and abuses associated with the regimes defeated in that conflict (Loughlin, 2010, p. 321). Similarly, in post-1989 Europe and especially in post-communist systems, the rule of law came to represent the liberal democratic standards that communist governments had rejected (Loughlin, 2018, p. 661). In these senses, the meaning of the rule of law is largely established in opposition to historical practices and abuses of power. The name of the concept itself, the rule of law, is primarily understood to mean a form of rule that is not that of an arbitrary individual but of the supposedly neutral, autonomous and equally applicable law itself (Palombella, 2018, p. 10), thereby indicating the substantive and procedural opposite of past autocracy. Historical experiences are thus a key part of the matrix of references that constitute the rule of law's normative meanings but are framed in a way that consigns them to a closed chapter of past time.

Second, and closely related to this conceptual construction of the rule of law, national constitutional systems are similarly grounded in foundation narratives that emphasise a break, or development away from, a previous period or regime. Constitutional law involves its own conception of time and history. Codified constitutions, which represent a new beginning, consign the previous order to the past, erect a formal legal barrier to prevent its return and establish a new timeframe in which its rules and principles are intended to shape the present and face the future (Douzinas, 2006, pp. 16–17). Even an unwritten constitutional order, such as the United Kingdom's, which has a distinctive sense of historical tradition and longevity, includes temporal markers in the form of statutes or judgments that indicate new starting points.

Similarly, at the transnational level in Europe, the main post-war regional organisations intended to uphold the rule of law were originally constructed following the defeat of Nazism and Fascism in the Second World War and were later extended in the aftermath of military dictatorships in southern Europe and the fall of Communism in Central and Eastern Europe. These transnational organisations were rooted in declarations that a dark chapter of history had closed, and that a new beginning was possible, based on historical narratives of European values according to which a common heritage preceded and survived the non-democratic period, grounding a shared ambition to establish or renew liberal democratic values.[2] While the general aim was to leave the horrors of war and totalitarian repression behind, Europe's painful twentieth-century history has remained as a perennial, explicit and implicit point of reference in these narratives, as the negative benchmark against which the rule of law, together with liberal democracy and human rights, have been interpreted and developed in transnational politico-legal discourse (Morsink, 1999, pp. 1–40; Günther, 1999, p. 117; Greer, 2006, pp. 12–17; Dupré, 2015a, pp. 57–62; Skinner, 2019, pp. 59–62, 125–127; Aust, 2021, p. 7).

[2]United Nations Universal Declaration of Human Rights, 1948, Preamble (para. 2); Statute of the Council of Europe, 5 May 1949, Preamble and Article 1, Article 3; Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), 4 November 1950, Preamble; Council of Europe, Warsaw Declaration, 2005, Preamble and Article 1; Treaty on European Union after the Lisbon Treaty 2009, Preamble and Articles 1a, 2, 6, 61.

These national and transnational foundation narratives are though shaped to a large extent by processes of identity construction. The post-war and post-communist political and legal discourse of liberal democracy and the rule of law, peace and justice, as well as appeals to supposed common traditions, have involved selective narrative reconfiguration of historical experience, which could even be called mythologisation (Fitzpatrick, 1992, p. 65; Marks, 1996; Müller, 2002, p. 3; Douzinas, 2006, p. 16; Skinner, 2019, pp. 61–62). These processes have sought to highlight the positive while minimising or obscuring the negative, and to promote evolutionary stories that are not entirely rooted in fact (Přibáň, 2017; Judt, 2002; Loxton, 2021). This has resulted in the construction of an artificial time of law that focuses on the present identity of a new politico-legal order, which is partly defined in relation to the past but is claimed to be distinct from it.

3.2 Law and the legacies of its past

The limitations of the conceptual construction of the rule of law, and the selective approach of rule of law narratives, can be demonstrated by four examples of the legacies of law's dark past in Europe. These examples illustrate system-specific features of law's past and its connection with the present and, taken together, point to a more general need to overcome the conceptual past-present distinction in rule of law analysis. The first of these examples focuses on the predominant context of the rule of law backsliding debate. In Central and Eastern Europe, despite the foundational ideological claims of Marxism that law would cease to exist as soon as the proletarian revolution was complete, legal provisions persisted as tools of Communist government, but in contradiction with liberal tenets of the rule of law (Gorlizki, 2018). Since 1989, the transition from Communist rule has involved a reconfiguring of the legal status of and connections between pre- and post-1989 political orders and an occultation of jurisprudential continuities in legal thought and culture (Müller, 2001; Cercel, 2018, pp. 5–12, 204; Graver and Čuroš, 2021; Fleck, 2021, pp. 1298–1299, 1315; Gardos-Orosz, 2021, pp. 1342–1343). While in the aftermath of 1989 most states in the region sought to adopt the politico-legal trappings of liberal democracy, as well as liberal free market capitalism (Dupré, 2003, pp. 15–38; Tamanaha, 2004, p. 44), this did not involve a complete, root-and-branch process of reform and rebirth, despite extensive and radical changes in some systems (Iancu, 2021, pp. 1212, 1216, 1230). The formation of governments after 1989 involved compromise. New states proclaiming themselves to be grounded in the rule of law were born from Communist predecessors 'which operated with no respect for law,' while the 'problem of continuity' was hidden behind claims 'of a so-called "thick line" between present and past' (Czarnota, 2005, p. 125). Legacies of non-rule of law practices, together with anti-pluralistic and illiberal political culture have meant, however, that over thirty years on from the seismic shifts of the post-1989 period, some post-Communist governments have increasingly imitated, in direct and indirect ways, various political and legal features of the systems they supposedly consigned to history, such as concentrating constitutional power in a single organ of government, eroding rights and eliminating accountability (Dupré, 2015b; Scheppele, 2018; Drinóczi and Bień-Kacała, 2019; Loxton, 2021). Although history is predominantly marginal in the backsliding debate, the relationship between past and present requires closer attention than the rule of law concept and related periodised narratives tend to recognise.

These sorts of issues are also readily identifiable in other systems that were reconstructed in the aftermath of antidemocratic regimes. As a second example, the National Socialist, or Nazi era in Germany entailed distinctive approaches to law that have been deemed paradigmatic of totalitarian flexible legality and the erosion of liberal constitutional constraints, including rule by decree, reasoning by analogy and the racially motivated annihilation of rights, freedoms and human dignity (Stolleis, 2018, pp. 1076–1093). Such was the supposed divergence of Nazi legal measures from presumed liberal democratic norms and practices that they were widely considered to be 'non-law' (Fraser, 2005, pp. 77–78; Lavis, 2018) and as such a key part of the antithetical references grounding and justifying post-war measures to protect human rights and the rule of

law. However, since the 1960s, critical commentary has pointed to the lasting impact of Nazi legal thought and the problematic status of that regime's legislative norms as recognisable law (Stolleis, 2018, pp. 1092–1094; Lustgarten, 2003). Despite the constitutional fabric of post-war West Germany, its 'never again' ethos and efforts to 'overcome' the Nazi past, that period of history and its legal components have nevertheless cast long shadows, not only over German law but also the normative orders of law and the rule of law more generally (Stolleis, 1998; Joerges, 2003; Fraser, 2005, pp. 419–443). Consequently, this example also indicates how law that was supposed to be confined to the past has not been entirely distinct from law and legal culture that were considered to be subsequent and separate, that is, part of the present, at the national and transnational levels.

As a third example, the Fascist period in Italy was characterised by reliance on law as a key vector of authoritarian state power, involving new legislation and codification, broadly drafted criminal offences, increased repression and more severe punishments, as well as the co-operation of legal institutions (Schwarzenberg, 1977; Neppi Modona, 2007; Cassese, 2010, pp. 16–21; Cavallo, 2019). Critical studies have shown though that law under Fascism was not an anomalous exception in the longer term Italian legal order, in that it demonstrated continuities from the preceding Liberal period and has had a lasting impact on law under the post-war Republic, in terms of substance, method and professional culture (Piasenza, 1979; Sbriccoli, 1998; Sbriccoli, 1999, pp. 842–50; Cassese, 2010, pp. 13–15, 82; Livingston, 2015). Despite becoming a constitutional liberal democracy after the fall of Fascism, Italy's transition from the dictatorship was arguably incomplete (Pavone, 1974; Battini, 2007) and one of the most visible continuities has been the survival of legal codes which have not been completely revised to remove all Fascist traces (Skinner, 2011). As in Germany before and after reunification, these legacies of the past have continued to affect the normative integrity of the rule of law, not only in Italy but arguably also in a deeper trans-European sense (Skinner, 2016) demonstrating the limitations of the periodised conceptual and narrative construction of the rule of law.

As a final example, the impact of law's presumed past on law's perceived present is not only a feature of post-totalitarian systems but also of states with supposedly long traditions of adherence to liberal democratic principles, such as the United Kingdom, which has often been considered (or considered itself) to be a benchmark for the rule of law. For example, foundational narratives of the rule of law in Western European national and transnational systems tend to overlook how that concept was closely connected with such systems' defining feature, that is, an exclusive conception of the nation and a related territory (Fitzpatrick, 1992, pp. 111–118; Fitzpatrick, 1995, pp. xiv–xv). In other words, the rule of law brings a nationalist focus with it into the heart of liberal democracy. Foundational narratives of the rule of law also tend to ignore or marginalise states' historical practices in colonial 'possessions' overseas that demonstrated the limits of law itself, and of the values of constraint and protection that it supposedly represented (Fitzpatrick, 1992, pp. 107–111; Wiener, 2012; Lobban, 2021). Similarly, ongoing racial discrimination in long-standing European democracies reveals a residue of the imperial past, undermining equality before the law and challenging the embeddedness of the liberal values that it is claimed to reflect (Fitzpatrick, 1987; Bhattacharyya *et al.*, 2021, pp. 57–67). Liberal democracies have also demonstrated a willingness to resort to authoritarian measures curtailing legality and liberty when they are considered to be necessary (Spaulding, 2019), thereby demonstrating the fragility of the rule of law. This has included measures in the name of security (Fraser, 2005, pp. 419–443; Blanchard, 2016; Skinner, 2022b) and, during the Covid-19 pandemic, public health (Serna de la Garza, 2020; Cercel, 2021; Grogan and Donald, 2022). In these ways, connections between the undemocratic tendencies of the past and the liberal democratic present are apparent, even in systems that have not transitioned from totalitarianism.

These four examples thus demonstrate how forms of law and related practices that had supposedly been left behind in the past have continued to have an impact on the substance and methods of law in the present, as well as on legal culture and collective memory (Karstedt, 2009, pp. 1–7; Skinner, 2011, pp. 436–439; Aragoneses, 2017). These continuities in national systems

highlight the artificial distinction between past and present at the mythic core of the rule of law concept, as well as the limitations of national and transnational narratives of a common rule of law heritage. Where representations and evaluations of the rule of law uncritically echo an underlying conceptual and narrative compartmentalisation of historical periods they can be seen in some circumstances to be factually and epistemically contestable. Although facts and norms are distinct, and histories of law in practice can and should only partly inform the rule of law concept's prospective normative content in principle, it is argued here that analysis of the rule of law needs to acknowledge and reflect the contexts and realities to which it is applied. As a first step, this requires reflection on how the past-present relationship can be understood in terms of connection rather than distinction.

4 Rethinking the past and the present

The importance of understanding the past as part of the foundation for present and future liberal democracy was notably underlined by Jürgen Habermas and has been influential in subsequent critical studies of law's history in the democratic context (Habermas, 1988, pp. 43–44; Joerges and Ghaleigh, 2003, p. ix). To some extent, the relevance of law's history to its present and future is a self-evident and intrinsic part of how law functions as a system. Legal rules are formulated in statutes, codes and judgments that can have lasting validity and influence. Their meanings and interpretations are transmitted through professional practices and training processes that pass on principles, techniques and attitudes. Similarly, legal institutions frequently endure over time in form and function, and to some extent also in terms of personnel, procedure and culture. Changes to the nature of the system can entail legal, professional and institutional rupture and reform, although sometimes elements of a legal system continue with minimal or merely nominal change, which can be understood as providing stability, or indicating inertia (Bloch, 1954/1992, pp. 32–33). In these various ways therefore, law's history is important, and the past is often present and influential in law's substantive and structural dimensions.

However, as the previous section has shown, the very idea of the rule of law and evaluations of apparent changes in it are conceptually based on assumptions that the present can be distinguished, or is distinct, from the (negative) past. While this plays an important normative role in declaring a desire to break from the undemocratic past, and laying normative foundations for doing so, it artificially establishes a sense of distinction that is problematic to the extent that it hides or ignores continuities. Consequently, this section argues that the conceptual foundations of the rule of law in the European context need to be critically reconsidered, to make space for recognising how the past might influence the present. This argument involves firstly challenging the supposed past-present distinction in theoretical terms, and secondly exploring two ways in which past and present can be understood as being interconnected.

4.1 Challenging the past-present distinction

The concepts of 'present', 'past' and the idea that they are temporally circumscribed and distinct from each other is predominantly based on a sense of the linear nature of time and the sequential occurrence of events. This means that the experience of time is usually understood to involve a forward motion through a series of moments and incidents, with each leading into the next and deemed to be finished when it has passed, thus becoming part of the past. Fundamental to this way of understanding history, therefore, is the idea that events and experience become separated from the present by the passage of time. As Chris Lorenz observed (Lorenz, 2010, p. 77):

> 'Because time is conceived as a continuum of fleeting moments – or in other words, as a flux or a flow of discrete points – time is *destructive* of the here and now, as it "passes by" and "carries" it "away", just like a flowing river carries away everything it contains. "Fleeting" time by itself creates *distance* between the present and the past, by the very act of 'flowing'.'

The term 'history' refers both to past occurrences (facts and events) that have happened and the body of knowledge of past occurrences (as record and interpretation). As the conceptual historian and philosopher of history Reinhart Koselleck stated, 'The peculiar meaning of history, such that it is at the same time knowledge of itself, can be understood as a general formulation of an anthropologically given arc linking and relating historical experience with knowledge of such experience' (Koselleck, 1985, p. 92). That 'knowledge of itself' is deemed to be reflected in, and verifiable by reference to, evidence that enables past events to be reconstructed and recounted in ways that are truthful even if contingent on an interpretive perspective (Koselleck, 1985, pp. 132, 140, 142, 155). In that regard, history is considered to be a form of knowledge that is more certain than memory, which is sometimes presented as a fragile and uncertain domain of subjective and fallible interpretations of past events (Müller, 2002, pp. 22–24). The cognitive process of remembering dissolves the distance between past and present, connecting sensory impressions of what happened in a period of time gone by with the current self and its state of being in the perceived here and now. Yet memory is not deemed to demonstrate the contingency of those temporal categories but rather its own fragility. At the same time, although history is considered to be more reliable, it is important to recall that memory, especially in its collective sense, is nevertheless recognised to be a powerful force, socially and culturally (Karstedt, 2009, pp. 1–7).

However, while history is generally understood to be both a category of, and a way of categorising, events and experiences that are considered to be distinct from the present and to belong to a separate and past time, such a temporal classification depends on contingent choices about when the past, or sections of it, begin and end. The process of choosing how to classify past time is known as periodisation and involves representing the passage of time in terms of distinct periods (temporal compartments) into which events can be organised for interpretive purposes. As historiographers have argued, periodisation of the past is contestable (Gerhard, 1956, p. 900; Blackbourn, 2012; Jordheim, 2012), and its role in analysing processes of continuity and change depends on, and varies according to, the scope and aims of the historical study in question (Green, 1992; Epple, 2021). Critical studies of periodisation have focused on how the compartmentalisation of time past is an artificial process based on interpretive choices about distinguishing features, connections and the relative significance of events (Burnham, 1986, p. 265; Sklar, 1991, pp. 180–181). Although the contingency of periodisation in understanding recent European legal history has been recognised in discussions of changes and continuities in state systems (Graver and Čuroš, 2021, pp. 1149–1151), it is important to underline that the determination of historical periods and the boundaries between them is not just an intellectual or evidence-based construction but an inherently political choice. As Herbert Reid noted, if social scientists 'make a framework of external temporality normative for interpreting and "explaining" human activities' they must be aware of the implications of doing so (Reid, 1972, p. 470). This sort of historical analysis, Reid argued, involves a 'politics of time' inherent in the choices made about constructing temporality, which must be recognised as both 'matrix and perspective' (Reid, 1972, pp. 472, 478). Similarly, Johannes Fabian argued that the construction of objects of knowledge through temporal frameworks 'is a political act; there is a Politics of Time' (Fabian, 1983/2014, pp. xxxviii, 143–144; Davis, 2008, pp. 1–6; Lorenz, 2010, pp. 93–94). In other words, history does not provide its own self-evident temporal framework, but instead time frames are interpreted and imposed on history from the specific perspectives of its interpreters.

In addition, the idea of boundaries and differences between past and present is also questionable in terms of human perception and interpretation. Cerebral reception and decoding of sensory information and processes of cognition give an impression of immediacy as experiences unfold, yet perception lags behind occurrence, so that any event that seems to be lived through instantaneously is already (albeit fractionally) in the past. In that sense, the demarcation between present and past is fragile and ephemeral and tends to overlook the temporal filament that links 'now' with 'time gone by'. Furthermore, understanding of historical events can be subjectively variable and culturally specific, so that the idea of an objectively identifiable history is elusive,

perspective-dependent and open to challenge (Giordano, 2016; Shagan, 2019, p. 73). Events deemed 'past' may have shaped events deemed 'present' in causal and contextual terms, that is, issues of origin and conditions of existence that are matters of interpretation. Also, the ways in which people perceive and interpret occurrences in one time period can be influenced by their experiences or perceptions during another period, so that understanding the present can be shaped by the past, and understanding the past can be (re)shaped by the present (Bloch, 1954/1992, pp. 32–39; Keane, 1988, p. 204 as cited in Müller, 2002, p. 3). According to Koselleck (Koselleck, 1985, pp. 274–275):

> 'Thus experiences had once in the past can change in the course of time. The events of 1933 have occurred once and for all, but the experiences which are based upon them can change over time. Experiences overlap and mutually impregnate one another. In addition, new hopes or disappointments, or new expectations, enter them with retrospective effect. Thus, experiences alter themselves as well, despite, once having occurred, remaining the same.'

For these various reasons, the apparent distinction between past and present is at least questionable, if not artificial and porous, in ontological and epistemological terms. The implications of contesting this distinction for the rule of law can be elucidated by turning to two alternative ways of conceptualising the past and its relationship with the present.

4.2 Conceptualising history as layered and enduring

Reinhart Koselleck sought to reinterpret the nature of time in history as a necessary theoretical step towards understanding how historical analyses represent and discuss the relationship between the past and the present, as well as (specifically for the broader purposes of his work) the future. In so doing, he proposed an interpretation of time and history as multi-layered. He sought to move away from what he referred to as historians' usually 'bipolar' understanding of time, according to which it is portrayed either as (in the Judeo-Christian tradition) something linear that heads 'towards an open future' (albeit determined by God) and represents 'an irreversible form of sequential unfolding', or (in Ancient Greek thought) as something 'recurrent and cyclical' (Koselleck, 1994/2018, p. 3). Instead, Koselleck used the metaphor of sedimentary layers, referring 'to geological formations that differ in age and depth and that changed and set themselves apart from each other at differing speeds over the course of the so-called history of the earth' (Koselleck, 1994/2018, p. 3). He argued that '[b]y transposing this metaphor back into human, political, or social history as well as into structural history, we can analytically separate different temporal levels upon which people move and events unfold, and thus ask about the longer-term preconditions for such events' (Koselleck, 1994/2018, p. 3). In so doing, he aimed to 'circumvent the linear-cyclical dichotomy' and instead present an interpretation of historical time as consisting 'of multiple layers' of experiences and their outcomes 'that refer to each other in a reciprocal way, though without being wholly dependent upon each other' (Koselleck, 1994/2018, p. 4). His intention was to find 'a way of seeing how different epochs might be able to change in different ways and at different rates' (Olsen, 2012, p. 229).

For Koselleck, human experiential time can be understood to involve three layers. The first relates to the 'singularity' of events that 'are experienced primarily as surprising and irreversible' (Koselleck, 1994/2018, p. 4). In Koselleck's interpretation, such singular events can be understood in linear terms, as occurring in 'succession' and being locatable along a 'time line' (Koselleck, 1994/2018, p. 5). The second layer involves deeper 'structures of repetition' or recurrence that make singular events possible (Koselleck, 1994/2018, p. 5). Koselleck illustrated this idea with the example of the singularity of a letter bringing bad news and how its delivery depends on the underlying regularity and continuity of a postal service; and the singularity of a judicial decision against the backdrop of laws in general and the legal system (Koselleck, 1994/2018, pp. 5–6).

According to Koselleck, awareness of both singularity and deeper structures of recurrence allows the identification of different velocities and modes of historical change and thus a more complex sense of time (Koselleck, 1994/2018, p. 6). The third layer involves even deeper structures or 'preconditions of experience' that operate on a level beyond an individual or even generational lifespan (Koselleck, 1994/2018, p. 8). Koselleck stated that such factors include the biological processes of human reproduction as a species and cultural beliefs, perceived truths and worldviews (Koselleck, 1994/2018, pp. 8–9). Such things can change, noted Koselleck, but at an even slower rate than the other two layers. Considering these three layers with their short-, mid- and longer-term nature and 'different speeds of change and transformation' challenges the more usual linear perception of time and, importantly, suggests the overlapping of dimensions of human experience in history (Koselleck, 1994/2018, p. 9; Olsen, 2012, p. 227).

Importantly though, even the singularity of events and individual experiences, which Koselleck suggested can be understood in a more linear way, can be questioned in terms of their relationship with and effect on the perception of time and the apparent separation of past, present and future. In this regard, the philosopher Vladimir Jankélévitch, in his reflection on time and human recollection, identified two ways of understanding past experiences (Jankélévitch, 1974). One relates to what Jankélévitch considered to be the defining characteristic of time and its passing, namely 'irreversibility'. This involves a sense of the 'having taken place' meaning 'having been', a transient experience that has been and gone, and that having passed becomes part of the past and as such cannot come back (Jankélévitch, 1974, pp. 7 *et seq.*). This is a linear perspective on the passage of time in which experiences and events occur but then recede into history as time continues. Yet Jankélévitch also proposed an interpretation of experiences and events according to which some of them do not become solely consigned to the past once they have occurred but continue into the present. This perspective on time and experience involves a sense of the 'having taken place' meaning 'having been done', which Jankélévitch calls 'irrevocable' (Jankélévitch, 1974, pp. 260 *et seq.*). Whereas in Jankélévitch's conceptual order time is always irreversible, it is irrevocable from time to time. In other words, a past experience is perceived as irrevocable 'when it involves an important event' or a 'privileged' or 'exceptional' moment that continues to exert an influence in the present (Jankélévitch, 1974, pp. 280–281). In this sense, although time always continues in its inexorable passing, some events and experiences that occur at a particular time do not recede into the past but, due to their significance in human consciousness, endure beyond the moment of their happening, challenging the temporal and epistemological categories and boundaries which are generally deemed to distinguish history from memory (Lorenz, 2010, pp. 83–84).

For Berber Bevernage, in his discussion of Jankélévitch's analysis, the emergence of a conception of the past as irrevocable can be located in collective memories of historical atrocity, primarily since the Holocaust and especially in the context of transitional justice since the end of the Cold War (Bevernage, 2012, pp. 13–14). The idea of the irrevocable past has thus been particularly influential in cultural, political and legal efforts to address past wrongs or other traumatic events that have engendered an enduring memory and impact on perceptions of (in) justice. Notably, other works inspired by the memory of the Holocaust advance a similar idea of an irrevocable past. For example, Lawrence Langer distinguished between the concepts of 'chronological' time and 'durational' time (Langer, 1993, pp. 265–270). He states that 'the lingering of durational time distinguishes it from the evanescent flow of chronological time, with its before, during and after' (Langer, 1993, p. 272). For Gabrielle Spiegel, chronological time is the sort of time assumed in history and that is perceived as passing (that is, involving the apparent flow of events into the past), whereas 'durational time resists precisely the closure – the putting an end to the past – that chronological/historical time necessarily effects; durational time persists as a past that will not pass, hence as a past always present' (Spiegel, 2002, pp. 158–159; Lorenz, 2010, p. 84).

The conceptions of the irrevocable past and durational time thus bring to light the significance and effect of past experiences and events that have been and are gone, but that remain alive and active in the present. Importantly, while these conceptions of the continued existence or indelibility of memory are particularly relevant to understanding (in)justice, they are also more broadly indicative of the past's potential to influence the present, including not only perceptions but also practices. This is not intended to imply a sort of historical determinism, in the sense of present behaviours being unavoidably shaped by the past, but to indicate how past and present can sometimes be interconnected rather than always and only being distinct.

These ideas of temporal layers and irrevocability can be illustrated with reference to one of the major events in Europe after 1989. Koselleck notably explained his concept of the sediments of time by referring to the merging of the former East Germany (the German Democratic Republic or GDR) with the former West Germany into the unified Federal Republic. He noted that while the reunification formally occurred in a specific timeframe, change in the deeper economic and cultural conditions of the former East took longer to address (Koselleck, 1994/2018, pp. 6–7). In terms of his three layers, a singular event occurred based on underlying systemic structures and against a backdrop of even deeper societal and human conditions. To view this example in Jankélévitch's terms, while the end of Communism in the GDR was experienced as an event that moved into the past and as such was temporally irreversible, the effects of Communism were so profound, in terms of culture and memory, that they could be considered irrevocable, thus continuing into the present. The alternative perspectives of Koselleck and Jankélévitch thus provide a way of understanding and conceptualising time and history, past and present, that highlights their layered and overlapping dimensions. This can in turn usefully ground a critical reinterpretation of the rule of law and its conceptual dependence on a past-present distinction.

5 Fault lines in the rule of law

Pulling the elements of the preceding discussion together, it is argued here that the rule of law, particularly when considered evaluatively, such as in the 'backsliding' debate, needs to be reconceptualised in a way that overcomes its periodised distinction between past and present. This requires rethinking the foundational assumptions of the rule of law concept itself and recognising the limitations of politico-legal narratives about it. As outlined in section 3.2, the rule of law across different systems in Europe is marked by echoes and continuities from the legal past. To acknowledge and make sense of these, the conceptual framework of the rule of law needs to incorporate the ideas of history's layers and longevity outlined in section 4.2. Specifically, the rule of law concept needs to accommodate the effects of singular and structural changes occurring in the legal context, not only at different rates but also in ways that conflict with each other, as well as the effects of past legal experiences that endure into the present in destabilising or disruptive ways. This can usefully be explored by way of a cross-disciplinary analogy, which recalls but disturbs Koselleck's sedimentary metaphor, by likening the effects of law's past on law's present and thereby on the rule of law to geological frictions and pressures, known as 'fault lines.'

5.1 Fault lines and metaphorical (re)thinking

To use a term that normally denotes a geological feature to refer to a theoretically framed problem in the rule of law concept is, as Koselleck noted, to engage in the use of metaphor (Koselleck, 1994/2018, p. 3). This sort of figure of speech involves using a word or term to describe something to which it is not usually applied so as to imply or evoke a similarity of characteristics (Philippopoulos-Mihalopoulos, 2016, pp. 45–50). Although this sort of cross-disciplinary borrowing can risk clouding a discussion by plucking a term from its original context and using it as a substitute for actual analysis, especially in legal argumentation, it is a common technique that is usually intended to represent a complex idea abstractly and succinctly so as to generate a new

critical perspective (Hanne and Weisberg, 2018, pp. 4–5; Olson, 2018, pp. 29–36).[3] Koselleck himself relied on the metaphor of sediments to make different conceptual forms of time visible and therefore 'analytically separate' them, to support more precise discussion and understanding (Koselleck, 1994/2018, p. 3). A resort to metaphor nevertheless requires careful explication to avoid obfuscation and interpretive slippage.

In geology the term 'fault line' can mean a line or zone of collision, pressure, tension or friction between tectonic plates or rock formations. These impact zones can have different forms, in that one layer of rock can slip beneath, be pushed over, strike or slide against another, with the resulting friction between them causing a disturbance to the surrounding rocks and wider area (Bobrowsky, 2013; Huggett, 2017, pp. 151–155).[4] The term fault line also denotes a landscape feature that can reveal the effects of past pressure and instability and indicate areas of potential upheaval or weakness, subject to the intensity, duration and frequency of impact between underlying forces. For purposes of legal critique, the metaphor of a fault line in the rule of law is intended to support an alternative perspective on the layers of past time and interconnections between the past and present that are apparent in experiences of law and systemic continuity or change.

Koselleck's image of sediments of time was intended to draw attention to how change might occur at different levels of human experience and existence at different speeds, and how short-term events may be shaped by or depend on deeper conditions. While those metaphorical layers were therefore not static and conveyed a sense of interconnection, the aim here is to highlight the potentially disruptive nature of different rates of change and, in Jankélévitch's terms, of the irrevocable past and its enduring impact on the present. The metaphor of fault lines is thus intended to highlight the idea that when legal experiences and activities change at different rates or endure over time, they can generate frictions, tensions or collisions with each other or with subsequent experiences and activities. Rethinking the relationship between past and present in these ways has various implications for critical engagement with the rule of law in the European context.

5.2 Analysing fault lines in the rule of law

Using the idea of fault lines to reimagine the concept of the rule of law and take into account the sorts of continuities and legacies outlined in section 3.2 brings with it a number of requirements and challenges. These are distilled here into four elements, namely an overarching critical intention, the rejection of artificial periodisation, the challenge of identifying and examining continuity, and the importance of 'thick' analysis. Addressing these factors in abstract and systematic terms, the focus here is on laying foundations for critical historical engagement with the rule of law, as well as further work on evaluating shifts in compliance with it in the European context.

The idea of reimagining the rule of law and its historical dimensions through the metaphor of fault lines is above all critical in its intention. This means that it aims to foster a questioning approach to the rule of law's conceptual foundations and the assumptions that underpin evaluative analysis of states' adherence to it. This requires recognition that the rule of law is not a seamless concept or mode of governance but is instead always already imperfect and unstable. The rule of law is marked and at times hindered by historical experiences that shape the systemic and cultural landscapes in which it is developed and embodied, that is, it is traversed by fault lines that

[3]Hanne and Weisberg, and Olson, cite Justice Benjamin Cardozo's warning in *Berkey v. Third Avenue Railway Co*, 155 N.E. 58, 61 (N.Y. 1926) that '[m]etaphors are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it'.

[4]See also US Geological Survey explanation of faults. Available at: https://www.usgs.gov/faqs/what-fault-and-what-are-different-types.

disrupt and destabilise its interpretation and application. This critical approach is not intended to undermine the rule of law's normative value, as the concept remains an essential component of liberal democracy that needs to be applied in the present and striven towards in the future. Rather, the aim is to strengthen engagement with the rule of law by recognising that liberal democracy, as an evolving, aspirational and future-oriented system, requires critical reflection and historical awareness to challenge the contingencies of national and transnational political narratives (frictions within fictions) and learn from its past (Frankenberg, 2004). To that end, the critical analysis of fault lines is ultimately intended to open an interrogative space around the rule of law in which the intersections of past and present that shape it can be called into question (Frankenberg, 2020, p. xvi). Specifically, this involves addressing the conditions of possibility established by the legal past, as well as its continuities, which as shown above are not only features of post-totalitarian systems but also those with a supposedly longer democratic heritage.

This critical application of the fault lines metaphor directs attention to the ways in which historical features of law affect the present. This means that past non-liberal democratic experiences need to be considered not as periodised definitional points of reference within the rule of law concept or narratives of its development, or as marginal details at the edges of the backsliding debate. Instead, they need to be addressed directly in terms of their layers of significance and their effects for the short-, mid- and long-term substantive, institutional and cultural conditions in which the rule of law is supposed to exist, and which affect its operation in real terms. This can give rise to different sorts of instability, as the original geological meaning of fault lines suggests. For instance, as noted above with reference to Koselleck's concept of sediments of time, shorter- and longer-term changes in a legal system occur at different rates, but not necessarily in harmonious parallel. A short-term change to some elements of a system may overlay deeper structural components, such as profoundly engrained forms of legal reasoning, that are resistant to change, generating friction (for example Piasenza, 1979; Cercel, 2018). Similarly, elements of legal culture or collective memories that endure, in Jankélévitch's terms, can be at odds with the proclaimed values of the moment, or conflict with legal residues of the undemocratic past, again causing friction or tension within the system (for example Skinner, 2011). Consequently, analysing the rule of law in terms of fault lines requires rejection of a periodised approach and engagement with the possibility of continuities and their disruptive effects.

Recognising forms of continuity is though both a critical opportunity and a challenge. As the examples of past-present connections in European legal systems in section 3.2 above indicated, Europe's legal history cannot be neatly segmented and is frequently marked by underlying substantive, cultural, structural and interpretive continuities. Although legal systems can change, and the past can be left behind, continuities in national law and related practices in Europe have often been suppressed, ignored, or at the very least insufficiently acknowledged. However, although a critical approach to the rule of law thus requires reflection on the possibility of disruptive connections with the supposed past that constitute the concept's fault lines, such an approach must also recognise the potentially negative impact of instrumental suggestions that continuities exist. For example, efforts to erode the rule of law in post-Communist states have included using a 'frame of continuity' with the Communist past to delegitimate constitutional developments and undermine change (Bucholc, 2019, p. 96). Analysis of the rule of law's fault lines needs therefore to be clear in its objectives. A major concern in developing any reflexive critique of liberal democracy is to avoid (inadvertently) feeding an illiberal or anti-democratic agenda.

Bringing an awareness of fault lines into analysis of the rule of law is also significant because it requires analysis of the concept's background and context. This requires engagement with the complexity of the behavioural, systemic and cultural matrices within which the rule of law can be understood to exist and operate at a particular time and over time, thus comparing and connecting past and present manifestations and experiences. These requirements suggest that only a 'thick' conception of the rule of law (see section 3.1 above) can be adequately meaningful for an analysis

of its fault lines. They also suggest in methodological terms that the rule of law needs to be examined through culturally embedded comparative analysis, in order to take account of the range of factors and systemic specificities that shape the rule of law in its broad contextual landscape (Legrand, 1996, pp. 55–63; Legrand, 1997, pp. 116–124; Tomlins, 2009, pp. 30–31).

Drawing attention to the idea of fault lines in the rule of law, or the critical idea that the rule of law is not an infallible or seamless benchmark in principle and practice, but marked by historical fault lines, is therefore a critical corrective to a periodised concept and selective narratives. When questioning changes in the rule of law across Europe, whether in terms of backsliding, decay or other related denominations, critical evaluation needs to consider both time and history, and to be open to the possibility of inherent frictions and tensions in all types of system. Liberal democracy is precious and worth upholding, and so critical reflection on its foundations must form a key part of that endeavour.

6. Conclusion

This article has argued that analysis of the rule of law can usefully be developed by rethinking this concept's temporal and historical foundations, in terms of the past-present relationship. Generating insights into current democratic practices needs to include reflection on how the past is understood, not only with regard to events and their interpretation, such as the history and historiography of democratic and non-democratic legal experiences, but also the interconnections and frictions between past and present. The article has focused on Koselleck's idea of history's sedimentary layers, together with Jankélévitch's exploration of the enduring effects of past experiences, and has combined them to form the basis for a new critical perspective. By developing the metaphor of fault lines, the article has proposed a framework for analysing the rule of law in terms of the inherent instabilities that arise within it when the legal past and present intersect. The article has thus sought to enhance understanding of the rule of law as a vital component of liberal democracy, a politico-legal system that can progress through reflection and learning. To do so, liberal democratic systems, together with analyses of their values and activities, must not only avoid overlooking the legacies of their pasts, but must also actively address them.

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