

#CODING_A_STATE [FOR THE 21ST CENTURY]

A {VERY} BRIEF MANUAL
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CODE FEDERAL SAFETY CRIMINAL AUTHORITY PENALTIES STANDARDS SOCIAL REFORM
LAWMAKERS PHILOSOPHY ITAL

IMPLIED RULES LOCAL ENVIRONME
WRITTEN REGULATIONS
CRIMINAL PERMITS COURT STATUTES
POLICIES GOVERNMENT ENFORCE
FOLLOW

Introduction

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We today perceive the State as given. We live under its rules and assume that it will protect and help us when we need it. But do we really understand how the State is build and how it functions? What is its essence, its code?

As computer code, the State also possesses core elements and functions. We expect it, in the end, like a computer program, just to function and hope not to encounter to many bugs (dysfunctionalities and errors) . But as any complex computer program, the State is full of bugs. The important difference is that a dysfunctional state can (most of the time) cause severe damage to a wide range of people. These bugs reflect directly on people's daily lives. They are the root of corruption, dysfunctional hospitals, bad infrastructure, insecurity, injustice, poverty etc. This is why coding (building) its core right is of the greatest importance. This is especially important in the 21st century since we expect the states to solve some of the most burning issues like climate change, pandemics, artificial intelligence etc. Basically, problems that the human kind, until know, did not face on such scale.

Although there are (too) many discussions and views what the purpose and scope of a State is, we surely can extract the very basic aims every State tries to accomplish. Every State (at least formally) has in mind the general wellbeing of its citizens. This includes: the protection of lives, health and the promotion of the common welfare and development. One important aim of every State is also, of course, self-preservation since without existence other aims are pointless. To achieve these aims every State develops its own methods, but nevertheless, every State has to follow the same basic logic and building blocks. The core elements of every State are: the common narrative, justice and institutions. They make up the operating system of society.

The Common Narrative

“ Humans are not ideally set up to understand logic; they are ideally set up to understand stories.”

— Roger C. Schank, cognitive scientist

The basic ability of humankind, which distinguishes us from other species, is a complex language, which enables us to convey information and abstract ideas. It empowers us to tell stories to each other, which are the basic glue to our social (collective) identity.

The collective past experience remembered and told over generations becomes our present and shapes our future.

These stories do not have necessarily to be true, but they form the common narrative which enables (almost) every individual in a society to identify himself with the same society and ultimately with the state. The common narrative solves the “collective action” problem.



As *community* (a group of a few hundred people) grows to *society* (which includes even up to billions of people with countless distinctive sub-groups and interests) it becomes impossible to convey the common narrative directly to each of the members of a group, since most of the members of a society do not know each other and do not share the same experiences. It becomes a problem how to make a cohesive society, which can be coordinated to cooperate and work for a common goal.

So new forms of “delivering the message” or information had to evolve. Even the content of the message has to be adjusted or completely innovated in order to reach most of the people of a society. Those new “forms” have to be more sustainable and persistent, capable of surviving centuries. The most convenient way ensuring that the “message” reaches everyone and does not get lost is to write it down and to create institutions that will promote it.

Through history of mankind, different narratives evolved, thrived and disappeared. The level of success of these narratives depended on circumstances, chance and strength of its facilitators. The most successful narratives, for sure, are religious and political. Often different narratives clash within a society but also interact which produces new hybrid forms.

Narratives are, as everything else in society, in constant flux and change over time. One cannot ignore the fact that these narratives were and are the glue of a society. They enable that strangers collaborate by accepting an abstract social

order. This is huge since no other “social animal” but humans is capable to overcome the narrow division ‘us vs. them’ by offering a broader identity applicable for everyone everywhere (think of the great monotheistic religions, commerce, human rights etc.).

Basically, the State uses and adapts existing social narratives or creates new ones to reach the same aim: solves the collective action problem.

Technically speaking, the State is the software for a society because it is influencing and channeling the behaviour of a society, like software does to hardware. To understand each other, software and hardware have to find a common ground (language) for communication. So, a software code has to be compiled (translated) to the machine (computer). In the same manner, the State tries to compile its ideology to the society. It does so through education, religion, media, institutions etc.

But in a liberal and democratic society it is a two way process because the state derives its legitimacy from the society (its citizens). This is very important to iterate, since only if a balance between state and society is found, the maximal gain for the society and the State can be achieved. Otherwise, an overly intrusive and omnipresent state destroys society (passivity is the result, under which no creative energy can arise in the long run), but on the other side, a too weak state opens room for particular and destructive interests of certain social groups (no cohesiveness and no common coordination is the result).



Justice

"At his best, man is the noblest of all animals; separated from law and justice he is the worst." (Aristotle)



Justice is the proper ordering of people and things. All civilisations and religions include a definition of justice in their codes of law and conduct. Justice is, in fact, the fibre that lies under and above all narratives. It is both: the ultimate goal and tool. Without the intrinsic notion of justice social life would be unimaginable. One of the reasons why this notion exists lies in a simple fact, the scarcity of resources of all kind. There might be circumstances in which justice becomes irrelevant – circumstances in which resources are so abundant that it is pointless to allocate individual shares, or, as Hume also believed, in which resources are so scarce that everyone is permitted to grab what he can in the name of self-preservation.

Justice has to do with how individual people are treated ('to each his due'). Issues of justice arise in circumstances in which people can advance claims – to freedom, opportunities, resources, and so forth – that are potentially conflicting, and we appeal to justice to resolve such conflicts by determining what each person is properly entitled to have.

Although justice is centrally a matter of how individuals are treated, it is also possible to speak of justice for groups – for example, when the state is allocating resources between different categories of citizens.

Just treatment is something due to each person, in other words that justice is a matter of claims that can be rightfully made against the agent dispensing justice, whether a person or an institution. This also means that justice is a matter of obligation for the agent dispensing it, and that the agent wrongs the recipient if the latter is denied what is due to her/him. It is a characteristic mark of justice that the obligations it creates should be enforceable: we can be made to deliver what is due to others as a matter of justice, either by the recipients themselves or by third parties. So the State tries to deliver justice through its law.

Justice is the opposite of arbitrariness. It requires that where two cases are relevantly alike, they should be treated in the same way. Following a rule that specifies what is due to a person who has features X, Y, Z whenever such a person is encountered ensures this. And although the rule needs not be unchangeable – perpetual in the literal sense – it must be relatively stable.

This explains why justice is exemplified in the rule of law, where laws are understood as general rules impartially applied over time.

A distinction that must be drawn is between the justice of the procedures that might be used to determine how benefits and burdens of various kinds are allocated to people, and the justice of the final allocation itself (outcome). The justice of a procedure is to a large extent a function of the justice of the outcomes that it tends to produce when applied. For instance, the procedures that together make up a fair trial are justified on the grounds that for the most part they produce outcomes in which the guilty are punished and the innocent are acquitted. Studies by social psychologists have shown that in many cases people care more about being treated fairly by the institutions they have to deal with than about the procedure's final result. This shows the immense importance of impartial and independent courts as the procedural guarantor of justice (ensuring fairness).

We should not be too hasty to assume that what justice demands is always equality, whether of treatment or of outcome.

As Aristotle among others saw, justice also involves the idea of proportional treatment, which implies recipients getting unequal amounts of whatever good is at issue. If person A is twice as deserving or twice as needy as person B, justice may require that she receives more than B does. So here formal equality of treatment – the same rule applied to both – leads to an unequal outcome.

As evident as it is, we should reiterate that rule of law is all about justice! This is the promise of the modern democratic State to the society. This is its main narrative. This is its method to achieve the overall well-being of its citizens. In essence, the rule of law means that both citizens *and* those who govern them should obey the law. The rule of law is relevant both to relations between those who are governed and those who govern and to the relations between private entities, be they physical persons or legal persons, such as associations and companies. There is a significant difference between the scope of the rule of law in the relations referred to. There are different views with respect to the extent to which law should permeate society. So-called welfare states tend to favour extensive regulation of social and economic affairs by the government, whereas more economically liberal states see a more modest role for the government. But the rule of law does not require that all or even most of the behaviour of citizens is subjected to ever more laws and legal regulations. More laws could mean less freedom of action.

Laws can be made by persons who have been elected by and are accountable to the people – or by persons who have not been elected. Laws can be passed in a democratic manner – or in a system where there is no democracy.

It goes without saying that the rule of law can only be fully realised in a democratic political system. The other crucial element is that the rule of law requires respect for human rights. It is hard to imagine, for example, how the rule of law can exist without respect for the rights to free speech and association. But also other human rights come into play here, including economic, social and cultural rights. In general, rule of law ‘uses’ human rights as a concept that formalises the protection of the very essence of a human being’s intrinsic interests (life, health, property, family etc.). This is also the substance of justice in a system that adheres the rule of law. It is also the moral yardstick to decide what is right and what is wrong within a society.

A basic requirement of the rule of law may be labelled constitutionalism. In essence, this means that there must be a body of fundamental laws in a legal system, which defines the executive, legislative and judicial powers of the state. The fundamental laws must lay down which bodies in the state are responsible for the exercise of these powers and how these powers are to be exercised, both among these bodies and vis-à-vis citizens as well as other private entities. Most importantly, this legislation must define in general terms what the limits of the exercise of the various powers are. In other words, the constitution must provide the basic structure and rules of the legal system and tell who is entitled to exercise which powers and how. Without such a basic legal framework, it is not possible to measure with reasonable accuracy the government’s fidelity to the rule of law.

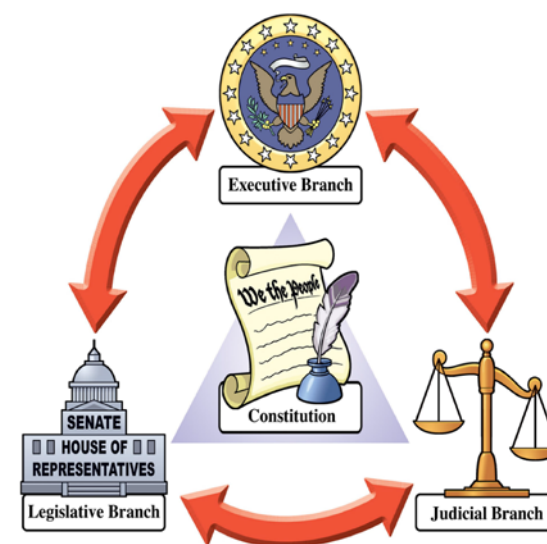
Furthermore, laws and in particular constitutions must be stable over time, understandable and predictable. They must not be amended or changed too often. If laws change frequently, it will be difficult to follow them. Frequent changes also lead to permanent uncertainty about the content of the law. Moreover, actions which involve long-term planning become impossible. Also, a law that no one understands makes no sense since hardly anyone would know how to behave in a particular situation.

The rule of law requires that governmental power is exercised as much as possible through laws, which are general, being adequately made known well in advance, etc. But political power cannot in all cases be exercised through laws. Discretion and the exercise of power through particular orders is an inevitable part of governance. To satisfy the standard of the rule of law, however, the authority to exercise such discretionary power or make orders needs to be circumscribed by general rules.

A main controlling mechanism to discretionary powers is also the checks and balance principle entailed in the notion of the *separation of powers*. The rule of law requires that the three main powers, the executive, the legislative and the judiciary branches, are separated. This separation not only means that these powers are exercised by different institutions (for instance the government, the parliament and the judiciary), but also that individuals cannot be member of more than one of these institutions (for instance the prime minister cannot also be a judge at the same time).

Of course, an absolute and strict separation of powers has never in fact existed: in every country, there are institutions, which take part in the exercise of two powers. A common feature is that the executive can issue certain types of rules (decrees, executive orders etc.) or have joint authority to issue certain types of rules. Moreover, in both civil law and common law countries, case-law is regarded as part of the existing laws through the way these laws are interpreted and applied in a specific case. This means that when judges exercise their judicial powers, they also contribute to the development of the law at the national level.

An indispensable requirement of the rule of law is the presence of an impartial and independent judiciary which, in the last resort, is able to resolve disputes and assures respect for the law.



Furthermore, the rule of law requires that laws are generally strictly enforced and seen to be enforced. The rule of law requires that *laws are respected by and backed by power*. If people are expected to obey the law, it is important that they in turn see that the law is in fact respected. If they learn or experience that law is not in fact obeyed, in other words that officials and citizens in reality apply “norms” in a manner that is entirely different from what “the law in the books” requires, they cannot be expected to respect the law themselves. An independent judiciary plays an important role in ensuring congruence between applicable rules and actual behaviour. In particular, the judiciary plays a role in checking excesses of executive power.

All the before-said ensures that the rule of law as its main ingredient contains justice. Otherwise we cannot speak of the “rule of law” but merely of a “rule by law”.

Behind the concept of justice lies the *notion of balance* – that people get what is right, fair and appropriate. We all feel we deserve equal and impartial treatment. What exact treatment we deserve for ourselves (what we perceive as justice) depends on the context. It depends of our education, cultural background, the circumstances and our experience. So it is sometimes very difficult for the State to deliver to all people at all time the desired (subjective) outcome, which is *substantial justice*.

That is why a state delivers, foremost, *procedural justice* (equal and fair treatment). Delivering substantial justice (the outcome) is more complex and depends on the previous mentioned context and the narrative that a state adheres (e.g. a more egalitarian narrative would seek social justice in redistribution of resources whereby a more liberal narrative would see justice in more liberty). The ultimate challenge for the State is to strike a fair balance between all individual-group interests and the common interest (which is the base line for any meaningful and effective social cooperation). Common (public) interest is in its essence the scale that contains the human rights of a substantive part of a society. If these rights are violated in a disproportional way, the so caused misbalance endangers the overall social cohesion and in the end questions the reason for a State to exist. Where a clear agreed definition of the common interest and the common purpose is lacking, there is no real constitution (in the sense as a social contract). Again, the underlining narrative of the State and the respective society play here a key role. Achieving the balance means having a just State.

The love of justice is, in most men, nothing more than the fear of suffering injustice.

- Francois de la Rochefoucauld

Institutions

“No institution can possibly survive if it needs geniuses or supermen to manage it. It must be organised in such a way as to be able to get along under a leadership composed of average human beings.” (Peter F. Drucker)

Institutions are stable, valued, recurring patterns of behaviour that persist beyond the tenure of individual leaders. They are, in essence, persistent rules that shape limit and channel human behaviour. One cannot imagine a modern state without its institutions.

But why does a state need institutions? The answer is quite simple: public institutions key role is to determine the allocation of public resources in a country. A very powerful and important role, right?

For example, there are public institutions that determine how a public office hires new civil servants; or that determine who is qualified for early retirement from the state-run pension fund; That is the reason a state needs strong institutions.

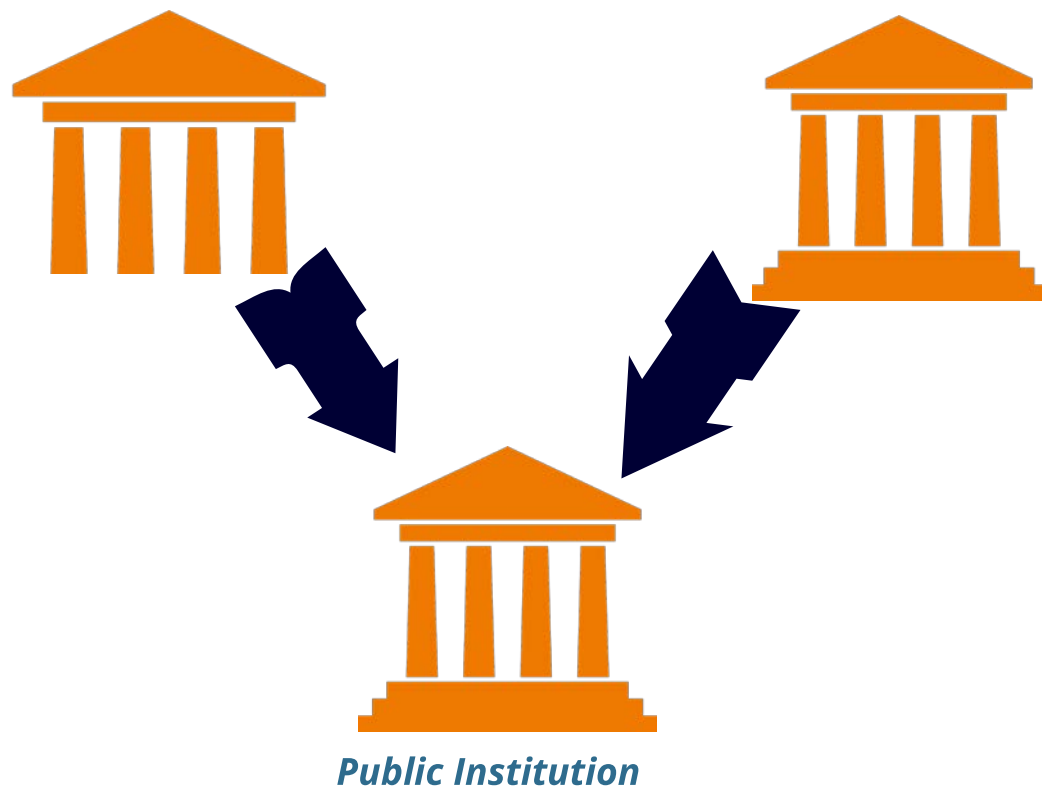
So, basically, a state is a set of institutions with a clear hierarchy and it is these institutions that make up the state. It is a dense interconnected network of institutions



Public (state) institutions may be under the *strict surveillance of controlling (state) institutions* (anti-corruption agencies, judiciary etc.) They also, in a different manner though, control how public institutions allocate public resources. Public and controlling institutions may be integrated and harmonized. If they are—in that that the latter oversees what the former does with the public money—we talk about *inclusive institutions* that generate responsible behaviour amongst public officials. If the two are detached (you can spend money, but nobody controls you), we can talk about *extractive (grabbing) public institutions*.

Anti -Corruption Agency

Judiciary



If public institutions are extractive, they will enable a misuse of public resources, generate irresponsible public spending, and, as a consequence, a high level of corruption. In contrast, if they are inclusive, they will promote prudent use of public resources and the accountable behaviour of public officials, which will result in a lower level of corruption.

The strength of public institutions determines also the strength of a democracy. What happens with democratic institutions depends on what kind of public institutions the political elite finds when it wins elections and gets into office. If elites find public institutions that are well-regulated by controlling institutions (you can spend, but there is someone who controls you), they will leave democratic institution intact. If, in contrast, public institutions are extractive (you can spend, and there is no one to control you), the elites will try to insulate the privileged access to public resources and keep it only for themselves.

It is with almost certainty that when political officials find themselves surrounded by extractive public institutions, they will try to protect and insulate them from the opposition, which compete for access to the same institutions and the same resources.

We have seen that one of the characteristics of strong institutions is *accountability*. The other important one is *efficiency*.

When rules are not enacted and enforced by effective and trusted institutions, then resources are wasted, services are not delivered, and people (especially the poor) do not receive the required protection. Efficiency in public institutions is a quite complex topic with many variables at play, but for sure, a key factor is human capital. Selecting the right leadership and other key persons for a public institution, based on merits and values oriented to the common good, is essential for having a thriving and effective institution.

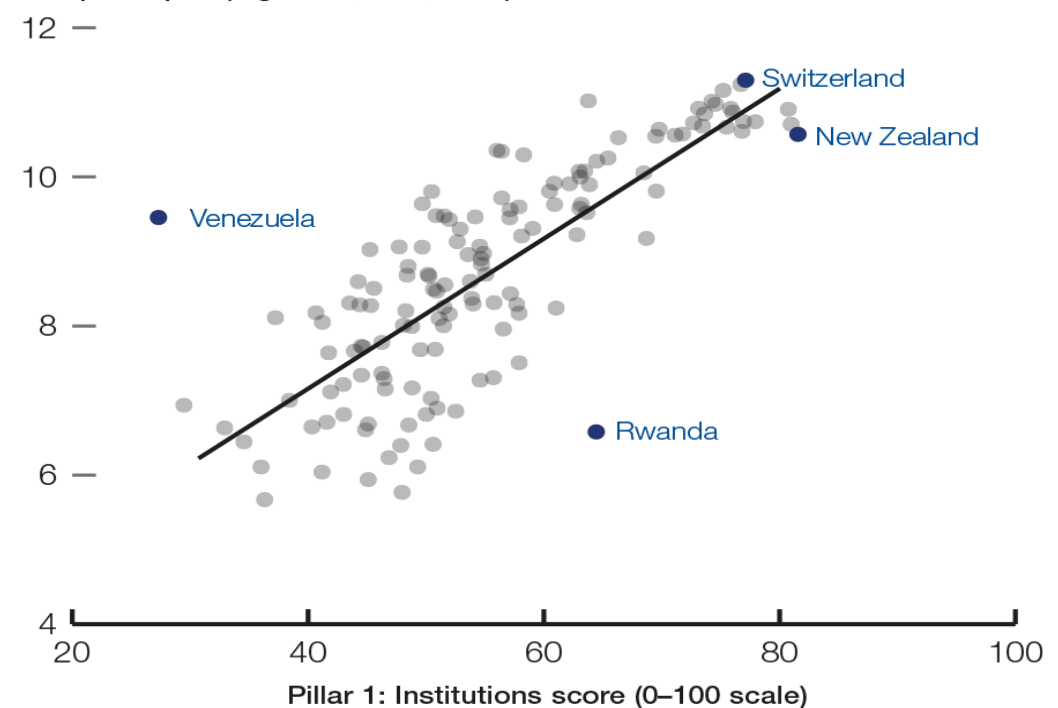
Strong public institutions are important for economic growth. Differences in institutional quality underlie many of the reasons for differences between countries in technology and physical and human capital, which can explain a large part of cross-country differences in income.

But their benefits extend well beyond economics, affecting people's well-being on a daily basis. Weak institutions continue to hinder competitiveness, development and well-being in many countries. Unnecessarily burdensome regulation creates delays, raises transaction costs, reduces accountability, and disproportionately penalises smaller businesses and average citizens. It creates room for corruption and arbitrary decisions. And the 2011 World Development Report makes a strong case for the link between weak institutions and conflict, showing that ineffective governments are more likely to experience extreme violence.

Effective and accountable public institutions are necessary to establish rule of law. Since public institutions generate rules by applying rules, it is of uttermost importance that these institutions obey the principles of the rule of law. On the other hand, rule of law would be only a declaration on a piece of paper if there are no effective and accountable public institutions that can enforce it on the ground. We shall not forget that the most basic form of redistribution that a state engages in is *equal application of the law*.

Figure 9: Institutional strength and income

GNI per capita (log scale, US\$, 2017)



Sources: World Economic Forum analysis; World Bank, 2018; national sources.

Note: N=140, $R^2 = 0.63$.

There is a great variety of administrative officers and agencies that apply the law and make decisions that affect citizens. It goes without saying that the *law must be applied* and obeyed by the administration *at all levels*, from the ministers to the public prosecutor, the police officer on the street, the tax officer, the urban planning officer, the environmental protection agency, etc. The decisions of many of these agencies have a deep impact on the lives of citizens. It is therefore of utmost importance that these agencies operate within the boundaries set by law, and that they ensure that the law is in fact respected. They are essential to make the rule of law work.

There are two types of institutions that could impact the rule of law. These are *observable formal institutions* and *less observable informal institutions*. The operation of formal and informal institutions is often thought to be interdependent. Law and other formal institutions cannot bring about the desired results without the support of informal institutions and norms. If institutions are to be effective to set up the rule of law and thereby bring about economic and social development we should not exclude customary law and the other informal ways. It is important to say that institution-building is context-specific, meaning that while general ideas around institutions may travel well, the specific dimensions of better institutions may not.

In the end, one should bear in mind that institutions are the part of the State (the software) that shape a society (the hardware) most profound since they can produce real change in a society.

Every kind of peaceful cooperation among men is primarily based on mutual trust and only secondarily on institutions such as courts of justice and police.

- Albert Einstein

Sources and citations

Pavlović D. 2016. Extractive Institutions in the Western Balkans. European Fund for the Balkans. available at: <https://www.balkanfund.org/publib/other/Extractive-Institutions-in-the-Western-Balkans-web.pdf> [citations used in the part about institutions]

Acemoglu D.& Robinson J.A. 2012. Why Nations Fail. Crown Business. New York

Harari Y.N. 2011. Sapiens: A brief history of Humankind. Vintage. London [citations used in the part about the common narrative]

Fukuyama F. 2014. Political Order and Political Decay. Farrar, Straus and Giroux. New York [citations used in the part about the common narrative and institutions]

The Raoul Wallenberg Institute of Human Rights and Humanitarian Law and The Hague Institute for the Internationalisation of Law. 2012. Rule of Law: A Guide for Politicians. Available at: <https://rwi.lu.se/app/uploads/2012/09/Rule-of-Law-a-guide-for-politicians.pdf> [citations used in the part about justice and rule of law]

Stanford Encyclopedia of Philosophy. Available at: <https://plato.stanford.edu/index.html> [citations used in the part about justice]