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## The Rule of Law: Prolegomena

Political and social events on both sides of the Atlantic increasingly generate invocations of an ideal that would curb arbitrary rule: Germans would call it the *Rechtsstaat*, essential, even existential, to the country after the ravagings of the Third Reich; Americans would refer to it as the principle of the “rule of law.”<sup>1</sup> To conceive of it, however, as an exclusively occidental concept, would overlook its global appeal. International development policy, in particular, now sees the rule of law generally as one of the hallmarks of good government. Brian Tamanaha calls it “the preeminent legitimating political ideal in the world today,” but immediately notes that there is no “agreement upon precisely what it means.”<sup>2</sup> Since ancient times, however, it has been presented as the preferable alternative to the “rule of men”<sup>3</sup> which arguably pervaded the thinking of ancient communities and autocratic or oligarchic governments over time.

Guidance on the concept of good government or a good social order can be found in Antiquity, both in the Western and the Eastern world. Plato’s theory of the republic counsels rule by a “philosopher-king.” On the other hand, Aristotle focuses centrally on the content of the ruler’s actions, a “good order” of substantive, natural justice. A similar difference is to be found in ancient Chinese jurisprudence. Confucius would argue the latter point, relying on fundamental human goodness and the sanction of shame if one violates *li* – traditional customs and norms of behavior which would ensure a harmonious society. Legalists would espouse a more sinister view of humanity, and thus would need the positive law to restrain humans who would otherwise exalt in selfishness. Both traditions are still of influence in modern China.

Roman jurisprudence featured a similar bipolarity: One strand, represented by Cicero, emphasizes the need to have the rules of law binding all members of the community, including the ruler (“we are all servants of the laws”). Another strand offers the important insight that closest observance of this law could lead to greatest injustice (*summum ius, summa iniuria*).

The American Revolution was not only fueled by the democracy rationale, as expressed in the Declaration of Independence: “To secure these [unalienable] rights [among them Life, Liberty and the pursuit of Happiness], Governments are instituted among Man, deriving their just powers from the

consent of the governed.” Following British author Samuel Rutherford’s ideas expressed in his book *Rex, Lex* (1644), Thomas Paine also stated, in his 1776 pamphlet *Common Sense*, that “in America the law is king. For as in absolute governments, the King is law, so in free countries the law ought to be king; and there ought to be no other.”

King George III thus was to be replaced by a system of laws established by either the members of the new polity themselves (in referenda) or their chosen representatives (the concept of indirect democracy that ultimately prevailed, at least on the federal level). To safeguard this idea of the rule of law, not by men, essential structural provisions were inserted into the new Constitution: the idea of separation of powers, in particular, the independence of the judiciary, soon to be joined by formal guarantees of individual rights, in particular, due process.

These ideas of the American Revolution spread quickly around the world, replacing autocrats with democratically elected leaders or at least shackling rulers with laws set forth either by themselves or by elected representatives of the people. The French Revolution removed a dynasty whose most radiant ruler, King Louis XIV, had, apocryphally, proclaimed his legal identity with the State (“*L’Etat, c’est moi*”). More guardedly, King Frederick the Great of Prussia signaled the entry into a new era by calling himself “the first servant of the State” and allowing his subjects to sue him on the basis of rules he had largely established himself. The time-honored British principle of “The King can do no wrong” was ultimately also cabined not only by Parliament, but also by independent courts.

What, then, is exactly the meaning of this powerful principle of the “rule of law”? Two paradigms of a possible definition have emerged. One school sees it as mandating obedience to all commands of the sovereign, the positive law as defined primarily by John Austin. Some add to it that the law must be publicly declared, have prospective application, and be general, equal and certain. This *formalist concept* has the advantage of limiting rulers and ruled alike. Its major benefits are avoiding arbitrariness, a process of decision making removed from personal preferences/biases, and the tabooing of corruption or other undue influences in the making/application of positive rules. Such adherence to generally binding rules has often been the first accomplishment in transitions from dictatorial or totalitarian regimes. It replaced systems of “telephone justice,” in which court cases were often *de facto* decided by political leaders directing judges to desired outcomes. Whether this new adherence to the notion of abstract and general legal norms will be lasting or ubiquitous is empirically questionable.

The conceptually more problematic downside of this “thin” concept of the rule of law is its absence of any judgment on the substance, the content of the rule of law, or the processes by which the laws are made. Some have pejoratively called this notion not rule *of* law, but rule *by* law. Such dystopias of the “rule of law” include, in the formative stage of the law, the making of the norms by self-interested rulers, tyrants, corrupt dictators, and the like (not Plato’s “philosopher-king” who

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1 For a comparative approach to the idea of law, see Siegfried Wiessner, *Introduction, in* GENERAL THEORY OF INTERNATIONAL LAW (Vol. 1, AMERICAN CLASSICS IN INTERNATIONAL LAW) 1-78 (Siegfried Wiessner ed., 2017).

2 BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 21-22 (2004). For a valuable introduction to the topic, see Gordon Butler, *The Essence of Human Rights: A Religious Critique*, 43 U. Richmond L. Rev. 1255, 1276-78 (2009).

3 John Adams, the drafter of the 1780 Massachusetts Constitution, inserted this language: “In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a *government of laws, and not of men.*” (emphasis added). CONSTITUTION OF MASSACHUSETTS 1780, Part The First, art. XXX, available at <http://www.nhinet.org/ccs/docs/ma-1780.htm>.

would be guided the common interest of the community). Such dysfunctions also include oligarchic decision-making processes that produce laws benefiting only a small number of members of the community. Even when formal rules of decision making by all members of the community are observed, the choices may be severely curtailed (either to one party or to one candidate per elective district); access to the ballot may be excessively limited *de jure* or *de facto*; freedom of expression, association and assembly as well as the freedom of the media may be so restricted that the key principle of a free democracy, the chance of the minority of today to become the majority of tomorrow, turns into an unreachable dream. Substantively, an elected majority may impose shocking rules on minorities or individuals in clear violation of what the latter see as their inalienable rights. Should these rules be followed? A narrow view of the “rule of law” would appear to mandate nothing less. On the other hand, as Justice Louis D. Brandeis once cogently remarked, “If we desire respect for the law, we must first make the law respectable.”

A more *substantive*, or “thick,” *concept* of the rule of law would aspire to filling the idea of the law with notions of substantive justice. As with the concept of natural law, the difficulty lies in finding consensus on the content of this irreducible core of the law to be followed.

In 1885, A.V. Dicey formulated three substantive requirements of the rule of law: (1) Punishment should only be meted out if the breach of the law was proven in an ordinary court; (2) everybody is equal before the law; and (3) the law to be followed includes court decisions on rights of private persons<sup>4</sup> – a bow before the common law, but an element hardly transferrable to systems of the civil law tradition. Other scholars focused not only on the prospective nature of the law, its stability and clarity, but also on the independence of the judiciary, the principles of natural justice, including due process, the power of judicial review, the prohibition of the denial of justice, and the limitation of the discretion of police and law enforcement.<sup>5</sup> A most recent report for the European Commission for Democracy through Law (Venice Commission) argues that “there is a rule in (regional) customary international law that demands the rule of law from the states as a precondition for membership in international organizations.”<sup>6</sup> It includes the following seven requirements: (1) independence and impartiality of the judiciary; (2) legal certainty; (3) non-discrimination and equality before the law; (4) respect for (judicial) human rights; (5) separation of powers; (6) State is bound by law; and (7) substantive coherence of the legal framework.<sup>7</sup> The New Haven School posits as a substantive goal the approximation of access by all to the processes of shaping and sharing of all things humans value.

For the United Nations, the rule of law is defined as:

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. It requires, as well, measures to

ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.<sup>8</sup>

Whether individual countries meet these standards, is subject to qualitative and, sometimes, quantitative inquiry. Valuable comparative studies have been published periodically by institutions such as Transparency International (focusing particularly on the extent of corruption), Freedom House and the World Bank.<sup>9</sup>

The most intense strain on any concept of the rule of law is exercised in times of crisis. It has been argued that, especially in times of war and similar emergencies, the law recedes or even vanishes (*inter armis silent leges*). In times of international armed conflict, this is no longer true, given the fact that the Four Geneva Conventions have largely grown into customary international law and now restrict any state’s behavior. For other emergencies, Article 4 of the International Covenant on Civil and Political Rights has allowed for certain restrictions on human rights, but upheld several rights as “emergency-proof.”

In domestic law, several constitutions have allowed, or allow, for sweeping restrictions of civil liberties and assumption of full powers by the Executive Branch. The Argentine Constitution of 1853 survived various “interruptions” of democratic governance by dictators and military juntas due to its provisions on states of exception. In formal compliance with stated emergency powers under the 1919 Weimar Constitution, President Hindenburg dissolved the Parliament in 1935 and made Hitler the “Führer” – the dictator of the German Reich. As U.S. Supreme Court Justice Jackson, returning from Germany where he served as the Chief Prosecutor of the Nuremberg Tribunal in 1946, aptly remarked, in the 1952 *Steel Seizure Case*, “emergency powers would tend to kindle emergencies.”<sup>10</sup>

The United States Constitution does not include express emergency powers. Over time, however, especially in times of war, including the Civil War, the political branches, in particular the Executive Branch, have claimed and exercised such powers. In the *Steel Seizure Case*, the Supreme Court has arguably allowed for such powers in times of a “grave and imperative national emergency,”<sup>11</sup> a contingency that didn’t exist in the case at issue in the eyes of the majority of the Court. In any event, the Court has generally looked at such assertions of emergency powers and concomitant repercussions on the rule of law with very skeptical eyes.

Acts of terror on a global scale are, however, straining to the breaking point the due process guarantees of the legal systems of modern democracies, especially after September 11, 2001.

4 A.V. DICEY, AN INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION (1885).

5 See, e.g., Joseph Raz, *The Rule of Law and Its Virtue*, 93 L. Q. REV. 195 (1977).

6 Frithjof Ehm, *Rule of Law: Concept, Guiding Principle and Framework*, Report for the European Commission for Democracy through Law (Venice Commission), 6 December 2010, available at [http://www.venice.coe.int/docs/2010/CDL-UDT\(2010\)022-e.pdf](http://www.venice.coe.int/docs/2010/CDL-UDT(2010)022-e.pdf), at 16.

7 *Id.* at 8-11.

8 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 23 August 2004, U.N. Doc. S/2004/616.

9 Daniel Kaufmann, Aart Kraay & Massimo Mastruzzi, *Governance Matters VI: Aggregate and Individual Governance Indicators 1996–2006*, World Bank Policy Research Working Paper 4280 (July 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=999979#](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=999979#). This project measured more than 200 countries’ compliance with the rule of law.

10 *Youngstown Sheet & Tube Co. et al. v. Sawyer*, 343 U.S. 579, 650 (J. Jackson, concurring).

11 *Id.* at 662 (J. Clark, concurring), combined with the rationales of concurring Justice Burton and dissenting Justices Vinson, Reed and Minton. Cf. Siegfried Wiessner, *The Powers of the President*, 1 LMU L. Rev. 103 (2013).

The rule of law itself may, sometimes, hang in the balance. Thus, the various reactions of targeted countries and societies to the terrorist threat, as well as their legal evaluation by domestic courts and international decision-making bodies are important parts of the analysis of the modern-day understanding of the rule of law.<sup>12</sup>

Whether in peacetime or in war, or in the grey zone between both, a careful analysis of the problem that impinges upon the rule of law, however defined, is needed to develop a recommendation that promotes a public order of human dignity. Positivistically inclined lawyers would see their guiding lights for such a substantive solution in the International Bill of Rights, as updated through treaties for special situations of vulnerability, and the interpretations of its provisions through authoritative bodies. More generally, and unmoored from the

shifting tides of governments' consent, a "jurisprudence for a free society" would aim for a law that would maximize access by all to the processes of shaping and sharing all things humans desire in life.<sup>13</sup> This law would indeed serve human beings, not the other way around,<sup>14</sup> and thus anchor the rule of law properly in our very own needs and aspirations.

<sup>12</sup> For a detailed analysis of this cluster of issues, see ROZA PATI, DUE PROCESS AND INTERNATIONAL TERRORISM (2009).

<sup>13</sup> Cf. HAROLD D. LASSWELL & MYRES S. MCDUGAL, JURISPRUDENCE FOR A FREE SOCIETY: STUDIES IN LAW, SCIENCE AND POLICY (1992). W. Michael Reisman, Siegfried Wiessner & Andrew R. Willard, *The New Haven School: A Brief Introduction*, 32 YALE J. INT'L L. 575-582 (2007), available at [http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1996&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1996&context=fss_papers)

<sup>14</sup> Siegfried Wiessner, *The New Haven School of Jurisprudence: A Universal Toolkit for Understanding and Shaping the Law*, 18 ASIA-PACIFIC L. REV. 45, 51 (2010), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2011130](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011130); Siegfried Wiessner & Andrew R. Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity*, 93 AM. J. INT'L L. 316 (1999).

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