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Rule of Law

The rule of law is commonly understood in contrast to arbitrary exercise of power, which is, above all, the evil that the rule of law is supposed to curb. The rule of law, though not always the specific verbal formulation, embodies ideals that have been central to political and constitutional discourse at least since Aristotle, who contrasted 'the rule of the law' with 'that of any individual.' In any of its many versions, the meaning of the rule of law is contested; all, however, share the idea that law can and should contribute in salutary, some say indispensable, ways to channeling, constraining, and informing—rather than merely serving—the exercise of power, particularly public power.

The antagonistic juxtaposition of rule of law and arbitrariness has led many jurists to view the rule of law as a purely negative ideal (Raz 1979), devoted to 'damage control' (Shklar 1998a, p. 5), particularly damage done by government. However that view is not universal. Several writers (e.g., Allan 1993, Dworkin 1985, Selznick 1999) offer a more affirmative, morally ambitious account of what is required to govern according to the rule of law. Negatively, constraint by clear legal rules is central. Positively, space needs to be made to include underlying principles of morality and purpose in legal systems. The differences between these views go deep, involving larger differences over the nature and the point of law. This account begins with the better known negative conception, but seeks to point beyond it.

1. Elements of the Rule of Law

1.1 Scope

Central to most conceptions of the rule of law is the conviction that there should be no privileged exemptions to it. Everyone comes within the scope of the law, even those who make it. This has a political and a social aspect.

1.1.1 Government under law. The political aspect of rule of law is that governments and public officials are subject to the existing law. Legislatures can of

course change law, but even 'sovereign' legislatures must comply with existing law so long as it remains in force, and can only change it in conformity with existing higher-order legal rules. To make this subjection effective, there must exist legal ways of challenging and forcing the government and political officials, even the very highest, to submit to the law.

There have been many polities in which the ideal of subjecting government to law was unknown and would seem outlandish. Even where the idea exists, the extent to which it is realized within a political order will vary markedly between polities and over time. It is, after all, a complex ideal even more complex to realize, not a faithful description of a state of affairs. Where the ideal is professed or understood, differences in attainment are crucial indicators of the sway of the rule of law. To the extent that the idea or the practice is lacking, so is this crucial element of the rule of law.

1.1.2 Equality before the law. The social aspect of the rule of law is the equal subjection of all citizens to the law. This, it was traditionally thought, required that law should take the form of an 'abstract rule which does not mention particular cases or individual nominated persons, but which is issued in advance to apply to all cases and all persons in the abstract' (Neumann 1986, p. 213; see also Hayek 1960, Oakeshott 1983). This is to prevent the use of law against specific groups or individuals, by making all equally liable, in advance, if they come within its terms. A corollary is that adjudicators should then weigh, impartially and impersonally, legal issues that come before them on the basis of such laws. They should be 'blind,' as the bearer of the scales of justice is classically represented, to inequalities of status, power, wealth, and other resources.

These conditions are the source of much controversy. Contemporary law associated with the welfare and regulatory activities of modern governments is frequently neither general nor abstract but targeted, detailed, and specific. A matter of continuing controversy is whether these forms of law are compatible with the rule of law (Hayek 1973–1979, Kamenka and Tay 1975, Neumann 1986, Oakeshott 1983, Unger 1976, but see Selznick 1992, 1999); if so, how, and if not, what should be sacrificed to what. A matter of even longer dispute is whether such formal equalization counts for much if it merely leaves substantive social and economic inequalities to play themselves out with more significant effect, and even if the legal arena allows or ensures that the 'haves come out ahead' (Galanter 1974). Liberals have commonly believed that the existence of social inequalities does not cancel out the worth of the rule of law, and may even make its impartiality more significant; precisely because inequalities confer advantages in the world,

they should not do so before the law. Many on the political left disagree, arguing that differences in the world render the 'blindness' of the law false or inconsequential, or both.

1.2 Character

A second element of the rule of law has to do with the character of laws. It can be expressed with minimal and deceptive simplicity: 'the law should be such that people will be able to be guided by it' (Raz 1979, p. 213). Reflection on that simple condition can generate tomes; it has certainly generated lists (see Fuller 1969, Raz 1979, Walker 1988). In order that law guide behavior, it must exist, that is, it must take the form of general requirements, typically rules, that people can consult before they act. Even where it exists, it will not guide behavior unless its requirements can be known. Therefore it must be public, understandable (by someone—it might take a lawyer), and relatively clear and determinate in its requirements. These requirements must be possible to perform. So the law cannot be internally contradictory (more accurately, the legal system must provide ways to resolve contradictions which inevitably occur). It must be prospective, for if it is retrospective people will neither know it, nor be able to rely on what they do know for fear of it being retrospectively changed. It must be relatively stable, for if it were constantly to change people would be reluctant to trust any present incarnation. Exercises of public power made unannounced, or announced in peremptory or arbitrary decrees, retrospective in effect, in ignorance or in violation of existing law, defy the rule of law.

Of course, whatever the character of the laws, the rule of law will amount to little unless laws are taken seriously, and enforced. So the law must be authoritative, that is, taken as binding by those whom it claims to bind. To make it so, it must be treated so, at least by the legal institutions that administer it, and it must be administered in ways that conform to its publicly announced terms.

1.3 Institutions

In the most influential English account of the concept in the last several centuries, Dicey (1961) took the rule of law to be a peculiarly English virtue associated with peculiarly English institutions, unavailable across the Channel but successfully implanted across the Atlantic. From what Judith Shklar aptly describes as this 'unfortunate outburst of Anglo-Saxon parochialism,' the rule of law emerges, 'both trivialized as the particular patrimony of one and only one national order, and formalized, by the insistence that only one set of inherited procedures and court practices could sustain it' (Shklar 1998b, p. 26).

As an ideal of some degree of generality, longevity, and abstraction, however, the rule of law is tied neither to any one national experience nor to any set of institutions. Rule-of-law regimes have often embodied different judgments about how to implement rule-of-law ideals, and have been realized within different legal and other histories and traditions that have influenced the particular shapes of the institutions that emerge. Institutional variety and possibility are too rich, and local traditions often too dense and particular, for it to be fruitful to identify the rule of law with just those particular institutions and arrangements which seem to work at home. Moreover, even within one society, problems change, and so do the solutions most appropriate to solve them. These differences are not automatically fatal, since the rule of law is not a recipe for detailed institutional design. It is rather a value, or an interconnected cluster of values, which might inform such design, and which might be—and have been—pursued in a variety of ways (see Selznick 1999).

This is not to deny that the ideal has been better served in some nations and by some institutions than by others. Institutional learning can and does occur. Some arrangements have been shown to work well in many contexts; others less so or only in some contexts. It is, therefore, appropriate to ponder the relationship between particular, realized, institutional forms, and rule-of-law ideals. Success does not, however, depend upon faithful mimicry (for even if whole institutional complexes could be duplicated, it is another job to graft them), and it often thrives on innovation, even misinterpretation. Montesquieu understood the English to have prospered because of the institutional separation of powers he mistakenly attributed to them. Even though this was not quite so, the Americans were so impressed with the philosopher's account that they institutionalized a strict institutional separation of powers embedded in that other American innovation in aid of the rule of law, a binding, written constitution. They have been widely copied. The details vary, but there is a rather simple and generalizable institutional insight at the bottom of this: at the very least, those who judge the legality of exercises of power should not be the same as those who exercise it; and they should be shielded from interference. This is why the separation of the judiciary from other branches of government is seen as central in rule-of-law states, even where they do not follow America in other aspects of the separation of powers. It is also why the rule of law is thought to depend on measures to secure the independence of the judiciary from political and other pressures. Further resources, often institutional traditions and conventions as much as written laws, are important in order to ensure that judicial decisions are grounded within plausible interpretations of existing laws. Institutional measures to guarantee litigants a fair hearing are also crucial. Access to legal institutions should be available to those who would make use

of them. The details can go on forever, but it is better not to amass them aimlessly, as though such means, rather than the values that inspire them, were the point. Rather, it is preferable to think to them in their particular contexts, from the stand point of the idea of the rule of law, and of the values it is thought to serve, together with close, but not slavish, attention to stories of institutional success and failure.

1.4 *Legal Culture*

As lawyers often forget, but social scientists never should, the rule of law depends upon more than the scope, character, and institutions of the law. It also depends upon a host of—apparently ‘soft’ but actually crucial—cultural supports, among them socialization into the values of the rule of law, at least of the professionals who have to administer it, and assumptions more or less widespread in the society that laws do and should count. Such assumptions are commonly revealed in the degree of willingness to use laws ‘on the books’ to protect and advance one’s interests, in demand for law as much as in supply as well as in levels of unreflective but routine law abidingness in a society. These crucial aspects of legal culture and practice are variable among and within societies and we know little about how to affect them in ways that might advance the rule of law. Lawyers give more thought to laws and institutions than to what might be necessary to make them count, but if no one is listening it does not matter too much what the law is saying. And who listens, why and how, and with what effects are empirical questions to which the law offers few answers, though the sociology of law might. If the answer is ‘only lawyers,’ the rule of law is not in good (see Örkény 1999).

2. *The Value of the Rule of Law*

Though the rule of law carries the patina of age and the danger of congratulatory cliché, what it expresses are not truisms. Neither the goal nor the means of the rule of law are self-evident goods. Many have thought that what mattered was who had power, not whether or how that power might be constrained. Indeed, if the right people had power, they should be unconstrained. Charismatic leaders, as Weber points out (1968, p. 243) are the sort who say ‘it is written ... but I say unto you ...’; often they have been happier when ‘it’ was not written at all. Nor was it, for example, a Russian tradition that the ruler, whether Tsar or Party, should be constrained, either by laws or to produce laws.

For anarchists, on the other hand, constraint was not enough. Institutions of public power had to go; this was Marx’s long-term view too. In the meantime,

like many radicals, he considered fraudulent those claims that law significantly restrained the power of the powerful within capitalist societies. In bourgeois societies, many Marxists have alleged, the rule of law is an ideological mystification which masks the truth: that the bourgeoisie rules, typically with aid of the instruments of law (see Krygier 1994). Many subsequent ‘critical’ thinkers, Marxist or not, have tended to agree on this point.

In the modern world, it is the liberal tradition that values the rule of law most highly. Liberty being central to liberalism, liberals are concerned with ways of averting threats to it and with securing it. An overarching source of such security is taken to be the rule of law. What is at stake here?

2.1 *Freedom from Fear*

According to Thomas Hobbes, fear of others is what drives people to agree to subjection to a political sovereign, and in turn justifies that subjection. The sovereign, by being empowered to issue and enforce laws, saves us from others, and them from us. Moreover, and therefore, it saves us and them from a major reason to fear each other. When we all are equally subject to known laws, both we and they have assurances which would otherwise be unavailable.

Many thinkers who agree with Hobbes on little else agree with him that this is a necessary and salutary work for states to do. But as John Locke observed, if we have reason to fear our neighbors who are just individuals, how should we avoid terror of that ‘mortal God,’ the state, which Hobbes called Leviathan? The solution is to arrange an institutional order which both consolidates power, and then curbs it, so preventing its arbitrary exercise; the challenge is to achieve such a solution. One very old attempt to achieve it—suggested by liberalism though not its invention—is to require rulers to operate under law, and by means of laws of a character that conforms to the rule of law.

The stakes on this view are high. According to those belonging to the tradition Judith Shklar calls the ‘liberalism of fear,’ we have a simple and stark choice,

a very basic dichotomy. The ultimate spiritual and political struggle is always between war and law. ... The institutions of judicial citizen protection may create rights, but they exist in order to avoid what Montesquieu took to be the greatest of human evils, constant fear created by the threats of violence and the actual cruelties of the holders of military power in society. The Rule of Law is the one way ruling classes have of imposing controls upon each other (Shklar 1998b, p. 25).

Reflecting on the blood-stained twentieth century, the eminent Marxist historian E P Thompson voiced similar sentiments, in the process scandalizing many

other Marxists, who traditionally had little time for law. He insisted that

the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good. To deny or belittle this good is, in this dangerous century when the resources and pretensions of power continue to enlarge, a desperate error (Thompson 1977, p. 266).

What Shklar, a lifelong liberal, and Thompson, a somewhat rueful Marxist or ex-Marxist, share is the insistence that the value of the rule of law lies primarily in what it shields us against. When they warn complacent beneficiaries of the rule of law to value what they have, it is by comparison with the perils that they believe to flow from its lack.

2.2 *Coordination and Cooperation*

Fear is not, however, the only reason for the rule of law, nor is government its only subject. We all are. Madison wrote that if we were angels we would not need any laws. Unfortunately, so the familiar argument goes, we are not, so we do. However, even angels and indeed all but the omniscient, particularly if there are a lot of them about, might benefit from the rule of law. We can all become confused and lose our way, not necessarily due to our or others' evil but merely to the superfluity of possibilities in an unordered world. All the more when that world is, as ours is, one of large and mobile societies full of strangers, where ties of kinship, locality and familiarity can only partially bind, reassure, or inform.

The predicament of a member of such a 'civilized' society, identified by Adam Smith in the eighteenth century, is that he 'stands at all times in need of the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons' (Smith 1981, Vol. 1, p. 26). The rule of law can provide crucial information and security, 'a basis for legitimate expectations' (Rawls 1971, p. 238), without which the 'co-operation and assistance of great multitudes' will necessarily be a more chancy affair. It enables fellow citizens to know a good deal about each other, though many of them are strangers, to coordinate their actions, and to feel some security and predictability in their dealings with them. For though it does not make everything predictable, it ties down much that would otherwise be up for grabs. It establishes fixed and knowable points in the landscape, on the basis of which the strangers who routinely interact in modern societies can do so with some security, autonomy, and ability to choose.

To the extent that a legal system approximates the ideal of rule of law, citizens have, or can obtain, in advance, clear understanding of their and others' legal obligations, and they can reasonably have faith that

the law will constrain other citizens and officials of state in ways that they can predict. Rules of the road are an example; everyone has to obey them, and everyone suffers from confusion, or a good deal worse, if they do not apply to all, are retrospective, secret, incomprehensible, contradictory, require the impossible, or are corruptly administered. If laws do not suffer from these defects, citizens share intersubjective cues as to the rights and responsibilities of people they might know little else about. These are invaluable cues (and clues) to have.

3. *Justice*

On the account so far, and according to many writers, the rule of law might provide certain basic conditions for a society to exist free of certain fears and informed of certain things, but it has little to do with the moral quality of what goes on there. According to one prominent interpretation, there is no special connection between the rule of law and higher values such as justice. The former merely sets out principles of legal efficacy, such as those one might address to a knife-maker: 'make it sharp'; or to a poisoner: 'make it kill quickly and quietly' (see Hart 1965, p. 1286). What it is used for is a quite separate question. Moreover, proponents of this view point out that the rule of law is perfectly compatible with iniquity in the content of laws. The Republic of South Africa, prior to 1989, is a common example in this connection. On the other hand, it is common for there to be a 'general and drastic deterioration in legality' (Fuller 1969, p. 40) when despots do their worst, and there is no surprise in that. There is nothing in the logic of despotism that inclines it to respect the rule of law, and there are many costs in doing so for which there is no despotic rationale. So at the very least one might claim a strong empirical inconsistency between horrific government acts and the rule of law.

Many writers might concede this, but still agree with Joseph Raz that 'the rule of law is a purely negative value. It is merely designed to minimize the harms to freedom and dignity which the law may cause in its pursuit of its goals however laudable these may be' (Raz 1979, p. 228). However, as we have seen, the rule of law has a horizontal function—in facilitating interaction and cooperation among citizens—which is as important as its vertical one—in relation to governments. To the extent that it performs the former role, it goes well beyond the merely negative virtue that Raz allows it.

By contrast to this negative conception, another tradition has it that the rule of law is altogether more, and more morally charged, than mere formal or procedural regularity. For Ronald Dworkin, the rule of law 'is the ideal of rule by an accurate public conception of individual rights' (Dworkin 1985,

pp. 11–12). That will often involve formal regularity, but not only, and not always. For Philip Selznick, the constraints emphasized in the formal conception are precious and need to be respected for what they secure. Yet the weight given to formality in the rule of law might generate vices of its own—particularly that of blindness to particularity—that subvert the doing of justice that the rule of law might otherwise be thought to support.

Even apart from the high price of exaggerated ‘legalism,’ legal systems are not always or only threatened by unrestrained power. There are other sources of arbitrariness in social life, and among them can be a refusal to take account of particulars to which rules are being applied. Moreover, in well established legal systems, with strong rule-of-law institutions, traditions, and legal expectations, there might well be room to vindicate larger values carried within the principles, traditions and purposes of law, in the service of a ‘higher instrumentalism’ which is not limited to, but need not necessarily subvert, a legal order whose injunctions overall are clear, predictable, and obeyed.

According to this view, formal regularity should not be the limit of one’s ambitions for the rule of law. Rather, it should be supplemented by a

thicker, more positive vision [that] speaks to more than abuse of power. It responds to values that can be realized, not merely protected, within a legal process. These include respect for the dignity, integrity, and moral equality of persons and groups. Thus understood, the rule of law enlarges horizons even as it conveys a message of restraint (Selznick 1999, p. 26).

The move from negative to positive conception, on Selznick’s view, is not merely a matter of normative expansion. It has a sociological basis and plausibility, for

we cannot really separate the negative and positive aspects of the rule of law. Indeed it would be highly unsociological to try to do so, for we would then miss the moral and institutional dynamics which create demands for justice, and which induce rulers to accept accountability (1999 p. 25).

One objection which the first, agnostic, interpretation has to the second, justice-impregnated one is that it threatens to do away with the specificity and usefulness of the concept:

[i]f the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph (Raz 1979, p. 211).

Yet there is a space between a purely procedural account of the rule of law, whose only connection—if

any—with virtue is external, and one that wipes out the distinction between the rule of law and the rule of good law. Legal orders typically embody and generate certain values, both in their animating principles and in the complaints they provoke when their practices flout the values that give them legitimacy. These include values such as due process or natural justice and, in particular legal traditions, much more. The rule of law might well be argued to be incomplete to the extent that such values are not honored. Attempts to vindicate such values, often implicit in legal principles and traditions if not in rules, might be considered a service to the rule of law, even if it goes beyond purely procedural fairness and notwithstanding that it might fall short of justice more globally conceived.

4. *Tensions and Challenges within the Rule-of-law Ideal*

Like most important ideals, the rule of law contains internal tensions and can lead to conflict with commitment to other social ideals, because the ideals themselves are under strain, or because different interpretations of the same ideal, or attempts to realize different ideals, have different institutional logics. Thus, whether one thinks it an assault on the rule of law, or a vindication of a particular vision of it, the law generated by an active welfare state sits ill with some of the procedural conditions mentioned earlier. The simplest ways to deal with such tensions is to hold fast to one interpretation of one ideal and reject whatever might compromise it in another (Hayek 1973–79, Walker 1988). Another is to minimize the conflict and pretend that no price is being paid. More complex, but perhaps more realistic, is to acknowledge that the rule of law is not consistent with every value that one holds dear, and that, consequently, compromises in one or other direction might be unavoidable. We ask many things of law, as we do of life, and not all of them are consistent with each other. The rule of law is a mighty source of good in large modern polities, but not the only source, nor one which is automatically better the more you have of it. If power in a polity is unconstrained, the negative conception of the rule of law speaks to precious virtues, the absence of which can be vicious. But if power is already substantially constrained by law, the rule of law might tolerate, even on occasion require, that some space be made for wisdom, judgment, particularity, and substantive justice.

All the more is this the case, if one amplifies the lawyer’s and philosopher’s understanding, of what law does and how it does it, with what might be gleaned from other social sciences. Sociology of law does not suggest any linear connection between the rigidity and precision of laws and their real-world

reliability (see Bardach and Kagan 1982). Social causation is too complex, and the mediation and supplementation of formal by informal institutions, norms, and social practices too pervasive, for such a connection to be plausible, or for the extrapolations of legal dogmatics to carry much explanatory or predictive weight.

Yet those who sought the protection of the rule of law against abuse of power and social disorganization were onto something precious. Our experience of despotism, and of rule-less chaos, gives us good reason to take their exhortations very seriously indeed. Our experience, however, of incompetence, legalism, and arbitrary manipulation of hard-edged rules, even by non-despots, gives us reason to be suspicious of too narrow an understanding of the rule of law, or, if that understanding appeals, not to exaggerate its proper reach.

See also: Equality and Inequality: Legal Aspects; Equality of Opportunity; Equality: Philosophical Aspects; Governments; Hobbes, Thomas (1588–1679); Justice and Law; Law and Democracy; Rechtsstaat (Rule of Law: German Perspective)

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Rules in the Legal Process

The ancient Romans had two words for law: *lex*, the specific rules written in statute books, and *ius*, enduring principles of justice. Contemporary 'legal positivists' view *lex*, the legal rules made by legislatures, courts, and administrative agencies, as the essence of law, and those legal rules are the focus of this article. Yet the idea that law also includes a body of principles, in some sense superior to the rules written by the current political regime, persists in many modern languages, in legal theory (Dworkin 1967, Fuller 1964), in popular consciousness (Ewick and Silbey 1998), and in the recurrent political effort to entrench 'higher law' principles in written constitutions.

To distinguish rules from principles, legal scholars emphasize the specificity and binding quality of legal rules. Thus, Lawrence Friedman (1975, p. 26) defines a legal rule as 'a proposition of law couched in general terms,' consisting of a statement of facts and a statement of the legal consequences which follow from those facts, for example, 'Any person who drives a motor vehicle through a red light is guilty of a violation and shall be fined \$50.' Social scientists, on the other hand, focus on the distinction between legal rules and customary rules or social norms. Thus Max Weber

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