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The Rule of Law: Its Origins and Meanings

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The rule of law is a concept that describes the supreme authority of the law over governmental action and individual behaviour. It corresponds to a situation where both the government and individuals are bound by the law and comply with it. It is the antithesis of tyrannical or arbitrary rule.

The rule of law is the product of historical developments over centuries and is linked to the rise of the liberal democratic form of government in the West. The rule of law is the subject of competing theories.[1] For some, the concept has a purely formal meaning. Under this concept of the rule of law, the state must act in accordance with the laws it has promulgated and these laws must meet a certain number of minimum characteristics. For others, the concept has a wider, more substantive, meaning that incorporates ideals of justice and fairness. Further meanings can also be ascribed to the concept according to various political ideologies.

Although it is generally accepted that the extent to which a government adheres to the rule of law is indicative of the degree of legitimacy of its actions, the divergent use of the term illustrate that the concept is far from having achieved a universally accepted meaning. Indeed, while some declare the concept to have attained the status of a new universally-accepted political ideal following the end of the Cold War[2], others have on

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[1] A concise summary of the competing approaches is provided by Paul Craig, *Formal and Substantive Conceptions of the Rule of Law* (1997):
"Formal conceptions of the rule of law address the manner in which the law was promulgated (was it by a properly authorized person . . .); the clarity of the ensuing norm (was it sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, etc.); and the temporal dimension of the enacted norm (was it prospective . . .). Formal conceptions of the rule of law do not however seek to pass judgment upon the actual content of the law itself. They are not concerned with whether the law was in that sense a good law or a bad law, provided that the formal precepts of the rule of law were themselves met. Those who espouse substantive conceptions of the rule of law seek to go beyond this. They accept that the rule of law has the formal attributes mentioned above, but they wish to take the doctrine further. Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not."

[2] See for example, Tamanaha, Brian Z. *On the Rule of Law: History, Politics and Theory* (2004):
"Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. … Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature, requiring only that laws de set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses the "social, economic, educational, and cultural conditions under which man's legitimate aspirations and dignity may be realized". Dissidents point out that authoritarian governments that claim to abide by the rule of law routinely understand this phrase in oppressive terms. As Chinese law professor Li Shuguang put it: "Chinese leaders want rule by law not rule of law' … The difference … is that under rule of law, the law is pre-eminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for government that suppresses in a legalistic fashion". In view of this rampant divergence of understandings, the rule of law is analogous to the notion of the "good", in the sense that everyone is for it, but have contrasting convictions about what it is."

the contrary gone as far as to assert that the term has been misused and abused to such an extent that it has become a meaningless phrase, devoid of any true meaning.

Historical Evolution of the Rule of Law

The rule of law has evolved over centuries and is inextricably linked to historical developments that have led to the gradual emergence of liberal democracies and their underlying modes of governance and legal systems.

The role that law plays in society was the subject of philosophical discussions in Greek and Roman antiquity. In one of his last dialogues, *The Laws* (circa 360 B.C.), Plato is credited with positing the idea that the government should be subservient to the law[3]. The idea was further refined by his student Aristotle in his work *The Politics* (circa 350 B.C.) in which he contrasted the rule of law, reason, with the rule of man, passion, to explain why the government should be bound by law as means to prevent arbitrary rule and the abuse of power[4]. Both philosophers agreed that laws must be promulgated for the common good[5]. These Greek works had a notable influence on Roman legal thought, most notably on Cicero, who emphasised in *De Legibus* (circa 54-51 B.C.) that the law must be for the good of the community as a whole, thereby subjecting law to ideals of justice[6]. The fall of the Roman Republic at the hands of emperors gave way to autocratic rule. During the reign of Emperor Justinian I, Roman law was codified. The resulting

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[3] "[W]e must not entrust the government in your state to any one because he is rich, or because he possesses any other advantage, such as strength, or stature, or again birth: but he who is most obedient to the laws of the state, he shall win the palm…. [N]or are laws right which are passed for the good of particular classes and not for the good of the whole state. States which have such laws are not polities but parties, and their notions of justice are simply unmeaning. ... And when I call the rulers servants or ministers of the law, I give them this name not for the sake of novelty, but because I certainly believe that upon such service or ministry depends the well- or ill-being of the state. For that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer."

[4] "Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; … That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. … And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law… Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire."

[5] In *Politics*, Aristotle wrote:

"[L]aws, when good, should be supreme; and that the magistrate or magistrates should regulate those matters only on which the laws are unable to speak with precision owing to the difficulty of any general principle embracing all particulars. But what are good laws has not yet been clearly explained; the old difficulty remains. The goodness or badness, justice or injustice, of laws varies of necessity with the constitutions of states. This, however, is clear, that the laws must be adapted to the constitutions. But if so, true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws."

[6] "For men prove by some such arguments as the following, that every law which deserves the name of a law, ought to be morally good and laudable. It is clear, say they, that laws were originally made for the security of the people, for the preservation of states, for the peace and happiness of society; and that they who first framed enactments of that kind, persuaded the people that they would write and publish such laws only as should conduce to the general morality and happiness, if they would receive and obey them. And then such regulations, being thus settled and sanctioned, they justly entitled Laws. From which we may reasonably conclude, that those who made unjustifiable and pernicious enactments for the people, acted in a manner contrary to their own promises and professions, and established anything rather than laws, properly so called, since it is evident that the very signification of the word "law" comprehends the whole essence and energy of justice and equity."

Corpus Juris Civilis (529 to 534 A.D) constituted a set back for the rule of law insofar as it provided that the emperor was above the law and not subject to it, thereby sanctioning the rule of man.

Although these philosophical works discussed various modes of government and the role played by the law in those systems, it is in Medieval Europe that the rule of law truly began to take shape, a period that was marked by the fragmentation of Europe following the disintegration of the Roman empire and the struggle for power between church authorities and monarchs. Popes and kings vied for control and authority over both religious and secular affairs. Conflict arose as a result of monarchs seeking to reserve to themselves the power to appoint religious leaders within their realms. The Catholic church retaliated in kind by claiming the authority of the Roman Pontiff over all emperors and princes on the theological basis that the religious realm took precedence over the physical, most notably through the issue of the *Dictatus Papae* (1073) by Pope Gregory VII[7]. While initially resisted, over the course of time, the coronation of monarchs came to incorporate the taking of an oath affirming the church's supreme authority and a commitment to uphold the law.

The disappearance of Greek and Roman texts and the loss of codified legal texts, meant that law in the Middle Ages in former Roman possessions reverted to customary law in unwritten form, though in time many rulers oversaw the codification of their customs. Customs enjoyed legitimacy by virtue of being reflective of norms and traditions accepted by the community. In the Germanic lands that had not been conquered by the Romans, the customary law also applied to the monarch who came to be seen as the guardian of the law. This legal principle came to influence much of central and western Europe.

In England, the principle that the king was bound by the law was a prominent feature of the *Magna Carta* signed by King John in 1215. It was the product of a revolt by the nobility against the king following his attempts to extract more resources from them to fund war in France. The agreement sought to place constraints on the king's powers and protect the nobles' privileges. Although King John repudiated the document soon after it was signed, the *Magna Carta* came to be confirmed and modified by successive monarchs and parliaments on numerous occasions. Amongst its many provisions, the *Magna Carta* declared that no person should be deprived of their liberty or property "except by the lawful judgement of his equals or by the law of the land"[8]. This historically significant document is seen by many not only as protecting individuals from the arbitrary will of the monarch, but also as the source of the fundamental right to a fair trial (the right to "due process of law" in US legal terminology). It is also seen as the source of constitutionalism, the legal organisation of the fundamental relationship between a government and the people it oversees.

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[7] "12. That it may be permitted to him [the Roman Pontiff] to depose emperors."

[8] "No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgement of his equals or by the law of the land. To no one will we sell, to no one deny or delay right or justice."

Later on in the Medieval period, the rediscovery of classical texts including those of Aristotle meant they became available again to European scholars. The Catholic priest Thomas Aquinas developed a theory of natural law in *Summa Theologicae* (1265 to 1274) in which he affirmed Aristotle's views that law is based on human reason and must be promulgated for the common good[9]. Although Aquinas acknowledged that the sovereign was exempt from the law because no other person was competent to pass sentence on him, he reasoned that it was proper for kings to submit to the law because whatever law a sovereign makes he should also respect it himself.

As a result of these developments, one of the Medieval era's major contributions to legal theory was to displace the idea that the monarch was above the law that had been inherited from Roman law by giving way to the convention that the sovereign was bound by law and marking a return to the position advocated by classical philosophers.

As a legal concept, the convention did not go unchallenged. The doctrine of the "Divine Right of Kings", according to which kings were appointed directly by God, was elaborated by French jurist Jean Bodin in the sixteenth century in response to the Wars of Religion occasioned by the Protestant Reformation and the split away from the Catholic Church. However, the convention that monarchs were bound by the law survived these challenges because, not only was it often in the monarch's interests to abide by the law, it had also become a firmly entrenched principle that was jealously protected by the legal profession.

There could be dire consequences for monarchs who sought to circumvent established legal conventions, most notably in the case of King Charles I of England, who sought to raise taxes without Parliamentary approval and frequently ordered the arbitrary detention and execution of dissenters. These actions, coupled with his opposition to religious reforms advocated by the Puritans who enjoyed strong support in Parliament, propelled England into civil war from 1642 to 1651 pitting Royalists against Parliamentarians. Parliament eventually emerged victorious and King Charles I was tried for treason and executed in 1649.

Demographic changes also played a part in shaping these legal developments. Through the centuries, towns grew, populations increased and commerce began to thrive. The artisan and merchant classes, the bourgeoisie, had no part to play in land-based feudal systems and sought greater leeway to engage in their crafts and trades and accumulate wealth. Over time, the source of wealth gradually shifted from the holding of land to trade in goods and services. The bourgeoisie sought protection of their interests against oppressive feudal lords and monarchs and forged alliances with those who could provide

[9] "The sovereign is said to be exempt from the law, as to its coercive power; since, properly speaking, no man is coerced by himself, and law has not coercive power save from the authority of the sovereign. Thus then is the sovereign said to be exempt from the law, because none is competent to pass sentence on him, if he acts against the law.... But as to the directive force of law, the sovereign is subject to the law by his own will, according to the statement ... that whatever law a man makes for another, he should keep himself ... Hence, in the judgment of God, the sovereign is not exempt from the law, as to its directive force; but he should fulfil it to his own free-will and not of constraint. Again the sovereign is above the law, in so far as, when it is expedient, he can change the law, and dispense in it according to time and place."

it. The bourgeoisie sought greater political influence and legal recognition of their interests, such as the freedom to contract, the provisions of means to enforce contracts and the protection of property rights.

The Renaissance and its renewed interest in the arts, science and learning; the gradual separation of church and state; and the bourgeoisie's desire for greater protections set the stage for the emergence of liberalism as a political theory during the Enlightenment. Although there are many variations of liberalism, at its core the political theory of liberalism places emphasis on individual liberty and its protection through the conferral of individual rights. The rule of law is a central concept at the heart of liberalism. In this sense it takes the guise of formal legality in which society operates according to structured rules that provide freedom for individuals.

For the English philosopher John Locke, who is considered by many as the "father" of liberalism, liberty means to be free from restraint and violence with law playing a role in preserving and enlarging this freedom. In *Two Treaties of Government* (1690), Locke formulated his idea of the "social contract" under which individuals voluntarily agree to be governed in exchange for the government agreeing to protect their personal freedoms and property[10]. Under this arrangement, the government derives its legitimacy from popular consent and individuals delegate to the government the power to make, execute and enforce laws in the common good[11]. These laws should be enacted in the interests of the majority by a legislature that is separate from the executive and promulgated so that individuals are able to determine the extent of their duties. However, the existence of a separate judiciary was absent from Locke's discussion. From Locke's perspective, the government's primary purpose was the defence of individual rights and particularly the "preservation of property of all the members of that society, as far as is possible".

This theory set the stage for further evolution of the rule of law. In *L'Esprit des Lois* (1748), Montesquieu formulated a theory for the separation of powers as a means to prevent governmental abuse and preserve liberty, which he defined as "the right of doing whatever the laws permit". In his view, "power should be a check to power" and so that the legislative, executive and judicial functions of government should all be held in separate hands[12]. Compared to previous writers, he devoted significant attention to the

[10] "And thus every man, by consenting with others to make one body politic under one government, puts himself under an obligation to every one of that society to submit to the determination of the majority, and to be concluded by it; or else this original compact, whereby he with others incorporates into one society, would signify nothing, and be no compact if he be left free and under no other ties than he was in before in the state of Nature."

[11] "Absolute arbitrary power, or governing without settled standing laws, can neither of them consist with the ends of society and government, which men would not quit the freedom of the state of Nature for, and tie themselves up under, were it not to preserve their lives, liberties, and fortunes, and by stated rules of right and property to secure their peace and quiet. … [W]hatever form the commonwealth is under, the ruling power ought to govern by declared and received laws, and not by extemporary dictates and undetermined resolutions, for then mankind will be in a far worse condition than in the state of Nature …. For all the power the government has, being only for the good of the society, as it ought not to be arbitrary and at pleasure, so it ought to be exercised by established and promulgated laws, that both the people may know their duty, and be safe and secure within the limits of the law, and the rulers, too, kept within their due bounds...."

[12] "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.

central role of the judiciary. In his view, the judiciary should be independent from the other two branches of government, although he advocated that it be composed exclusively of juries rather than a professional corps of judges. For Montesquieu, the time, expense and burden of the judicial process was a price worth paying for liberty.

The theories of Locke and Montesquieu had a profound influence across the Atlantic upon the framers of the US Constitution. In the *Federalist Papers* (1787-1788), Alexander Hamilton, James Madison and John Jay argued for a representative democratic form of government with a multiple layers of divisions incorporating the vertical separation of powers between the federal and state levels and the horizontal separation of legislative, executive and judicial functions at the federal level, with the legislature further divided between upper and lower houses. Further safeguards were provided by giving the courts the power to control the constitutionality of enacted legislation by way of judicial review. This complex constitutional arrangement was intended to ensure that no particular group in society could exert undue influence on the levers of state power and thereby minimize the scope for their abuse[13].

The phrase "rule of law" only entered common parlance in the nineteenth century thanks to the writings of British constitutionalist Albert V. Dicey. His *Introduction to Study of the Laws of the Constitution* (1885) provides the first major explanation of what the rule of law entails in a liberal democracy. According to Dicey, the rule of law consisted of three inter-connected elements[14]. Firstly, the rule of law demands that no person should

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Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.
There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals."

[13] "… In republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit. … First. … In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself. Second. It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure."

[14] "That "rule of law," then, which forms a fundamental principle of the constitution, has three meanings, or may be regarded from three different points of view. It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government. Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals; there can be with us nothing really corresponding to the "administrative law" (droit administratif) or the "administrative tribunals"(tribunaux administratifs) of France. The notion which lies at the bottom of the "administrative law" known to foreign countries is, that affairs or disputes in which the government or its servants are concerned are beyond the sphere of the civil Courts and must be dealt with by special and more or less official bodies. This idea is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs. The "rule of law," lastly, may be used as a formula for expressing the fact that with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of

be subject to punishment except for a breach of a pre-established law, and it is the ordinary courts that are the proper venue for determining whether such a breach of law has occurred. The rule of law is therefore incompatible with the "exercise of wide, arbitrary or discretionary powers of constraint" by government officials. Secondly, under the rule of law everyone is equal in the eyes of the law. This implies that government officials should not enjoy special immunities (save for the monarch) and should be held accountable for their actions before the ordinary courts. Thirdly, at least in the United Kingdom where there is no comprehensive written constitution, the rule of law flows from the judicial recognition of individuals' rights. This aspect of the rule of law consists in the array of legal safeguards that protect individuals from arbitrary action taken by government, with the courts empowered to act as the custodians of those safeguards.

Dicey's third component has been the subject of different interpretations. Despite the legal safeguards that may be adopted to provide a comprehensive system of checks and balances on governmental abuse, a state's constitutional framework should not be seen to operate in a cultural or societal void. This helps to explain why the United Kingdom, which has no comprehensive written constitution and where the executive and legislative (and until recently the judiciary) are intertwined, is seen by many as the stronghold of the rule of law. Many believe that this is because ideals of justice and fairness are deeply engrained in British cultural traditions. The British have a deep sense of "fair play" – what constitutes just and fair conduct – and this reveals itself in the way that the public and officials believe and expect that the government should operate within the confines of the law. The rule of law can therefore thrive in the absence of specific legal mechanisms contained in a written constitution. This suggests that for the rule of law to exist there must be a cultural tradition of respect for the law. Indeed, the existence of a strong and independent legal profession plays a significant role in the rule of law. In his seminal work, *Democracy in America* (1835), the French philosopher Alexis de Tocqueville warned against the potential abuses of democracy, what he termed the "tyranny of the majority". For him, the legal profession played a central role in alleviating this risk[15].

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individuals, as defined and enforced by the Courts; that, in short, the principles of private law have with us been by the action of the Courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land."

[15] "In visiting the Americans and in studying their laws we perceive that the authority they have entrusted to members of the legal profession, and the influence which these individuals exercise in the Government, is the most powerful existing security against the excesses of democracy. This effect seems to me to result from a general cause which it is useful to investigate, since it may produce analogous consequences elsewhere. …

The government of democracy is favorable to the political power of lawyers; for when the wealthy, the noble, and the prince are excluded from the government, they are sure to occupy the highest stations, in their own right, as it were, since they are the only men of information and sagacity, beyond the sphere of the people, who can be the object of the popular choice. If, then, they are led by their tastes to combine with the aristocracy and to support the Crown, they are naturally brought into contact with the people by their interests. They like the government of democracy, without participating in its propensities and without imitating its weaknesses; whence they derive a twofold authority, from it and over it. The people in democratic states does not mistrust the members of the legal profession, because it is well known that they are interested in serving the popular cause; and it listens to them without irritation, because it does not attribute to them any sinister designs. The object of lawyers is not, indeed, to overthrow the institutions of democracy, but they constantly endeavour to give it an impulse which diverts it from its real tendency, by means which are foreign to its nature. Lawyers belong to the people by birth and interest, to the aristocracy by habit and by taste, and they may be looked upon as the natural bond and connecting link of the two great classes of society."

Sixty years after Dicey first gave us an explanation of what the rule of law should entail, economist and philosopher Friedrich Hayek echoed many of Dicey's prescriptions in *The Road to Serfdom* (1944). For Hayek, the rule of law requires that laws should be general, equal and certain and lastly the law must provide for recourse to judicial review[16]. Laws must be general in that they must be set out in advance in abstract terms and govern everyone's conduct. Implicit in the need for law to be general is that laws must be adopted by a legislature that is separate from the judiciary. Laws must be equal in that they should apply to everyone equally without providing for arbitrary differences in treatment. However, where differences do occur, these must be the subject of a law that is approved by the majority of those included and those excluded by the law. Laws must be certain so that individuals must be able to foresee in principle the legal consequences of their behaviour and that of the others with whom they interact. Finally, the rule of law requires that judicial review by independent courts must be available in all situations where the government interferes with an individual's person or property.

In countries that follow the civil code tradition, the rule of law was influenced by Austrian legal theorist Hans Kelsen who helped draft the Austrian Constitution of 1920. In his view, the rule of law (*Rechsstaat*) requires a hierarchy of norms within the legal order with the constitution at its apex. All laws are subject to compliance with the constitution and government action is constrained by this legal framework. Kelsen's formulation is also the inspiration for the French legal concept of "*état de droit*".

Following the end of the Second World War, the rule of law as a global ideal was given expression by the adoption of the Universal Declaration of Human Rights in 1948 in which the General Assembly of the United Nations proclaimed that "it is essential if man is not to have recourse as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law".

The Rule of Law Today

The rule of law is a phrase that we hear with increasing regularity from diverse quarters. We hear it in the pronouncements of world leaders, such as President Barack Obama recalling that adherence to "the rule of law serves as the foundation for a safe, free, and just society". We hear it in the statements of diplomats commenting on key international events, such as United Nations Secretary General Ban Ki Moon emphasising the central role which the rule of law should play in Libya following the overthrow of Muammar Gaddafi. We hear it from dissidents who denounce their repressive government's abuses, such as pro-democracy activist Aung San Suu Kiy commenting on the importance of upholding the rule of law and calling on the authorities in Myanmar to release political prisoners. We may even hear it from unlikely quarters, such as Chinese President Hu Jintao who declared following his appointment that the People's Republic of China "must build a system based on the rule of law and should not pin our hopes on any particular leader". Perhaps most surprisingly, we even hear it from the likes of Robert Mugabe,

[16] "Stripped of all technicalities [the rule of law] means that government in all its actions is bound by rules fixed and announced beforehand - rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge"

Zimbabwe's autocratic President, who has asserted that "[o]nly a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law". It is clear from these examples that the concept can be the subject of disparate even contradictory usage. One of the reasons is that the rule of law today remains the subject of competing theories. Moreover, these do not always coincide with popular perceptions of what the rule of law consists in.

Competing Theories of the Rule of Law

For some, the concept has a purely formal meaning, in which the rule of law requires the state to act in accordance with the laws it has promulgated and these laws must meet a certain number of minimum characteristics. However, for others, the concept has a wider, more substantive, meaning that incorporate ideals of justice and fairness and respect for fundamental rights.

Under formalistic theories – termed by some as the "thin rule of law" or "rule by law" – the government must operate within the confines of the law, whatever those laws might be. Contemporary formalistic theories tend to share the liberal view of the rule of law as being equivalent to formal legality. From this perspective, the rule of law is therefore not concerned with the content of the laws, but rather the optimal functioning of the legal system with a view to providing individuals with a certain degree of predictability as regards the legal consequences of their actions. Formal theories of the rule of law tends to be the most widely accepted and are embraced by international development agencies, because they are capable of universal appeal regardless of whether certain countries recognise fundamental rights or democratic values.

In *The Morality That Makes Law Possible* (1964), Lon Fuller explained that, in order to act as a proper guide to behaviour, the law must be characterised by the existence of a system of rules that meets a certain number of characteristics[17]. Although Fuller acknowledged that the occasional and partial absence of any of these criteria was unavoidable because a balance has to be achieved between legal certainty and society's ability to change laws, he also stressed that the complete absence of one or more criteria would result in complete failure of the law. Although these criteria were not directed at providing a definition of the rule of law but rather a definition of law itself, Fuller's list of characteristics has been incorporated one way or another in contemporary definitions of the rule of law.

[17] "Rex's bungling career as legislator and judge illustrates that the attempt to create and maintain a system of legal rules may miscarry in at least eight ways; there are in this enterprise, if you will, eight distinct routes to disaster. The first and most obvious lies in a failure to achieve rules at all, so that every issue must be decided on an ad hoc basis. The other routes are: (2) a failure to publicize, or at least to make available to the affected party, the rules he is expected to observe; (3) the abuse of retroactive legislation, which not only cannot itself guide action, but undercuts the integrity of rules prospective in effect, since it puts them under the threat of retrospective change; (4) a failure to make rules understandable; (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party; (7) introducing such frequent changes in the rules that the subject cannot orient his action by them; and, finally, (8) a failure of congruence between the rules as announced and their actual administration."

Formalistic theories have been developed by several leading contemporary legal scholars[18]. One classic definition has been formulated by Professor Joseph Raz in his essay on *The Rule of Law and its Virtue* in *The Authority of Law* (1979). For Raz, the rule of law consists in a number of principles and went on to enumerate the most important: (i) all laws should be prospective, adequately publicised and contain clear, unambiguous rules; (ii) secondly, all laws should be relatively stable and not be changed too often; (iii) the making of the laws themselves should be guided by public, stable, clear, and general rules; (iv) the independence of the judiciary must be guaranteed to ensure that the courts correctly apply the law; (v) the principles of natural justice must be observed, so that court hearings are both fair and open and decisions taken without bias; (vi) the courts should have the power of judicial review over both legislation and administrative action to ensure their compliance with the law; (vii) the courts should be easily accessible and minimise long delays and excessive costs; and finally, (viii) the discretion of the law enforcement agencies should not be allowed to circumvent the law.

Like Fuller, Raz recognises that the rule of law requires compliance with these principles to a certain degree, but that total compliance with the rule of law should not be the ultimate aim of society: rather the rule of law should serve as a means to achieve other social goals[19]. However, he disagreed with Fuller that the rule of law is necessarily a moral good. Instead, he takes the view that the rule of law is a morally neutral concept, which although it is necessary to achieve good ends, can also be put at the service of immoral ends[20], citing by way of example the existence of the rule of law in the United States when slavery was still legal. For Raz, the abuse of power is wider than the rule of law. As a result, violations of the rule of law will necessarily amount to violations of human dignity, but violations of human dignity do not necessarily consist in violations of the rule of law. Formalists consider that the rule of law is not concerned about the content of laws: for them, it is immaterial whether the rule of law works for the common

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[18] A further formalistic definition has been formulated by John Finnis in *Natural Law and Natural Rights* (1980): "The name commonly given to the state of affairs in which a legal system is legally in good shape is 'the Rule of Law'…. A legal system exemplifies the Rule of Law to the extent (it is a matter of degree in respect of each item of the list) that (i) its rules are prospective, not retroactive, and (ii) are not in any other way impossible to comply with; that (iii) its rules are promulgated, (iv) clear, and (v) coherent with one another; that (vi) its rules are sufficiently stable to allow people to be guided by their knowledge of the content of the rules; that (vii) the making of decrees and orders applicable to relatively limited situations is guided by rules that are promulgated, clear, stable and relatively general; and that (viii) those people who have authority to make, administer, and apply the rules in an official capacity (a) are accountable for their compliance with rules to their performance and (b) do actually administer the law consistently and in accordance with its tenor."

[19] "It is also to be insisted that the rule of law is just one of the virtues which a legal system may possess and by which it is to be judged. It is not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and racial persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies …. It will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law."

[20] "Of course, conformity to the rule of law also enables the law to serve bad purposes. That does not show that it is not a virtue, just as the fact that a sharp knife can be used to harm does not show that being sharp is not a good-making characteristic for knives. At most it shows that from the point of view of the present consideration it is not a moral good. Being sharp is an inherent good-making characteristic of knives. A good knife is, among other things, a sharp knife. Similarly, conformity to the rule of law is an inherent value of laws, indeed it is their most important inherent value. It is of the essence of law to guide behaviour through rules and courts in charge of their application. Therefore, the rule of law is the specific excellence of the law."

good. Like Hayek, Raz considers that the rule of law in its formalistic guise is nonetheless a useful concept because it enables individuals to plan their behaviour by knowing in advance what the legal consequences of their actions will be.

As Raz himself acknowledged, observance of the thin rule of law does not guarantee that a government will refrain from enacting repressive and discriminatory laws. From this perspective, the enactment of the Nuremburg laws in Nazi-era Germany or apartheid laws in South Africa would appear to have been enacted in accordance with the rule of law, which most would agree is an abhorrent proposition. Some critics argue that Raz's narrow take on the rule of law fails to have proper regard to its historical evolution which has mostly been concerned with the imposition of limits on sovereigns as a means to restrict abuse and arbitrary rule. As a result some observers also suggest that formal theories of the rule of law should also encompass equality before the law (as Dicey and Hayek advocated), meaning that the law applies equally to everyone irrespective of status or race. Such an approach would help to ensure that government officials cannot extract themselves from the obligations imposed by law.

In opposition to formal theorists, proponents of the substantive rule of law – also called "thick" rule of law – consider that the rule of law should also encompass ideals of justice and fairness. Ronald Dworkin is one of the leading protagonists of the substantive rule of law, which he calls "rights conception" of the rule of law, as opposed to the "rule-book" conception advocated by formal theorists. In his view, the rule of law requires not only compliance with formal legality but also requires laws to recognise moral and political rights and permit individuals to enforce those rights through the courts or some other mechanisms[21]. One of the problems with such an approach is that the nature of "moral rights" tends to be nebulous and can polarise opinions, an example being diverse public attitudes to same-sex unions or the death penalty.

Other substantive theorists, such as Professors Richard Bellamy and T R S Allan, go even further suggesting that democracy is an inherent part of the rule of law. However, this approach minimises the uses to which the rule of law can be put as a legal concept. It is also criticised as conflating two inter-related but nonetheless distinct concepts: the rule of law and democracy. While it is true that the rule of law is an essential component of democracy because it provides safeguards on governmental excesses, democracy is not a prerequisite for the rule of law.

Substantive approaches to the rule of law are followed by some international organisations including the United Nations, whose definition of the rule of law includes a reference to compliance with international human rights standards.

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[21] Ronald Dworkin, *Political Judges and the Rule of Law* in *Proceedings of the British Academy* (1978):
"I shall call the second conception of the rule of law the "rights" conception. It is in several ways more ambitious than the rule book conception. It assumes that citizens have moral rights and duties with respect to one another, and political rights against the state as a whole. It insists that these moral and political rights be recognized in positive law, so that they may be enforced *upon the demand of individual citizens* through courts or other judicial institutions of the familiar type, so far as this is practicable. The rule of law on this conception is the ideal of rule by an accurate public conception of individual rights. It does not distinguish, as the rule book conception does, between the rule of law and substantive justice; on the contrary it requires, as a part of the ideal of law, that the rules in the rule book capture and enforce moral right."

UN Secretary-General's *Report on the rule of law and transitional justice in conflict and post-conflict societies S/2004/616* (2004)

> *The "rule of law" is a concept at the very heart of the Organization's mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. 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.*

In addition, efforts have been made recently to develop measures of the rule of law. One ambitious project is the World Justice Project which has developed a Rule of Law Index that aims to measure the adherence of countries to the rule of law. The index is based on measures relating to the degree of compliance with the following principles (i) the degree to which government and their officials are accountable under the law; (ii) the laws are clear, publicised, stable and fair, and protect fundamental rights; (iii) the process for the enactment, administration and enforcement of laws are accessible, fair and efficient; and (iv) access to justice is provided by competent, ethical and independent lawyers and judges who are sufficient in number, have adequate resources and are representative of the society they serve.

World Justice Project - Rule of Law Index 2011	
Factor 1 Limited Government Power	***Factor 4 Fundamental Rights***
Norway (1/66)	Sweden (1/66)
New Zealand (2/66)	Norway (2/66)
Sweden (3/66)	Netherlands (3/66)
Australia (4/66)	New Zealand (4/66)
Netherlands (5/66)	Germany (6/66)
Germany (6/66)	Australia (9/66)
Canada (7/66)	United Kingdom (13/66)
United Kingdom (9/66)	Canada (14/66)
Hong Kong SAR (14/66)	France (15/66)
France (15/66)	Chile (18/66)
United States (16/66)	United States (19/66)
Chile (17/66)	Italy (20/66)
Italy (29/66)	Hong Kong SAR (21/66)
China (37/66)	Ukraine (44/66)
Iran (58/66)	Kenya (52/66)
Pakistan (61/66)	Venezuela (53/66)
Kenya (61/66)	Cambodia (62/66)

Ethiopia (63/65)	Pakistan (63/66)
Ukraine (64/66)	China (64/66)
Cambodia (65/66)	Ethiopia (65/66)
Venezuela (66/66)	Iran (66/66)
source: worldjusticeproject.org	

The Rule of Law and International Development

Following the end of the Cold War, many countries abandoned their former communist forms of government and embraced liberal democracy and capitalism. In the transitional period, many of those countries sought to reform their legal systems and international development agencies began funding projects to build "the rule of law" in those countries. The 1990s also saw, the imposition of rule of law benchmarks by development banks as a condition to the provision of financial assistance. The establishment of rule of law is considered by donors as necessary to ensure sustainable economic development, encourage investment and trade, and ensure that countries emerging from conflict can transition to democracy.

As a result, the rule of law has become a significant component of international development with billions of dollars spent in the last twenty years or so on reforming legal systems. Donor agencies, including the European Commission, the United States Agency for International Development, the Japan International Cooperation Agency, as well as the World Bank, all fund rule of law projects in diverse locations around the globe, whether it be China, Ecuador, Liberia or the Papua New Guinea. Technical assistance is often provided to donor recipients by specialised non-government organisations including Avocats sans Frontières, the American Bar Association Rule of Law Initiative and the International Legal Assistance Consortium, but private companies are also used on larger projects.

Such initiatives are not without criticism[22]. In line with other international development activities, many commentators denounce the lack of empirical evidence as to the effects and impact of such programmes, a lack of proper coordination between donors, as well as the unsustainable nature of many programmes. More damning is the charge that rule of

[22] See for example, Thomas Carothers, *Promoting the Rule of Law Abroad: The Problem of Knowledge* (2003): "Although the current rule-of-law promotion field is still expanding as it approaches the end of its second decade, it still faces a lack of knowledge at many levels of conception, operation, and evaluation. There is a surprising amount of uncertainty, for example, about the twin rationales of rule-of-law promotion—that promoting the rule of law will contribute to economic development and democratization. There is also uncertainty about what the essence of the rule of law actually is—whether it primarily resides in certain institutional configurations or in more diff use normative structures. Rule-of-law promoters are also short of knowledge about how the rule of law develops in societies and how such development can be stimulated beyond simplistic efforts to copy institutional forms. And the question of what kinds of larger societal effects will result from specific changes in rule-of-law institutions is also still open. Although aid institutions engaged in rule-of-law assistance do attempt some "lessons learned" exercises, many of the lessons produced are superficial and even those are often not really learned. Several substantial obstacles to greater knowledge accumulation in this field persist, including the complexity of the task of promoting the rule of law, the particularity of legal systems, the unwillingness of aid organizations to invest sufficient resources in evaluations, and the tendency of both academics and lawyers not to pursue systematic empirical research on rule-of-law aid programs. Whether rule-of-law aid is on the path to becoming a well-grounded field of international assistance remains uncertain."

law assistance programmes have led to very limited long-term improvements on the ground, that programmes are too narrow in focus because they only address judicial or legal institutions without at the same time addressing the police or prisons, that they lack clearly articulated objectives that are directly linked to improving the various constitutive elements of the rule of law and that, in some instances, such efforts have been counter-productive. Aspects of these criticisms can be attributed to the absence of a universally accepted definition of what amounts to the rule of law. In any event, most observers agree that much more needs to be done to develop a more consistent approach to rule of law assistance and take meaningful steps to measure the impact of rule of law programmes.

Criticisms of the Rule of Law

It is undeniable that the rule of law forms an integral part of the liberal form of democratic government worldwide. It goes without saying that "freedom under the rule of law" is an oft-repeated mantra of Western liberal democracies. In this sense, adherence for the rule of law therefore appears to carry with it a number of connotations of a social and political nature. Seen in this light, the rule of law is not necessarily a politically neutral concept.

For instance, some argue that a model of government based on the welfare state is incompatible with the rule of law. In a later edition of *Introduction to Study of the Laws of the Constitution*, Dicey had deplored what he saw as the decline in the rule of law owing in part to the emergence of the welfare state and the adoption of legislation that gave regulatory and adjudicatory powers to administrative entities without recourse to judicial review by the courts. This concern has been shared by liberal commentators over time. Like Dicey, Hayek argued that the welfare state was incompatible with the rule of law. Nonetheless, it could be argued that these concerns have been tempered by the rise of administrative law as a distinct area of law in common law countries, where the ordinary courts have developed an elaborate body of case law that has placed limits on administrative discretion, some of which has been codified into legislation. Dicey criticised as being incompatible with the rule of law the existence in France of separate administrative laws that deal with relations between government and the governed and which did not fall within the jurisdiction of the ordinary courts. However, it is now recognised that the establishment of administrative courts that are distinct from the civil and criminal courts in countries following the civil code tradition has ensured to a large extent that discretionary actions taken by the government do not go unchecked. Moreover, it is undeniable that certain countries that follow the civil law tradition – for example Belgium and Sweden – which pride themselves on having a political system that embraces social welfare, are also widely accepted as adhering to the rule of law.

The rule of law is criticized as serving a convenient justification for the capitalist system of economic governance and the social inequities that may flow from it. Locke's view that the government should serve to secure the property rights of individuals was shared by Adam Smith, the pioneer of political economy. In *Lectures on Jurisprudence* (1763), he declared that "[l]aws and government may be considered … as a combination of the

rich to oppress the poor, and to preserve to themselves the inequality of the goods which would otherwise be soon destroyed by the attacks of the poor". Hayek wrote "[i]t cannot be denied that the Rule of Law produces economic inequality – all that can be claimed for it is that this inequality is not designed to effect particular people in a particular way". Given the unapologetic stance of liberal theorists, it is not wonder that these views have fed the arguments of their ideological opponents. In the communist theory of class struggle elaborated by Karl Marx and supported by Friedrich Engels, the law is one of the means by which the capitalist class maintains their exploitation of the workers' proletariat., Supporters of the rule of law argue that the concept is not inherently ideological in nature and that the rule of law is essentially concerned with ensuring respect for the law, whatever that law may be. Proponents of the substantive rule of law also contend that the rule of law incorporates ideals of fairness and justice that can be used to address economic inequality.

The rule of law also falls victim to accusations of Western cultural imperialism or neo-colonialism. By contrast to the west, law does not necessarily play a prominent role in the organisation of eastern societies. For example, in Confucian theory, a far greater emphasis is placed upon the observance of rites (*li*) or rules of conduct to achieve civilised behaviour and social harmony in society and limits the application of the tools of law (*fa*) and punishment (*xing*) to those who fail to abide by the Code of Rites (*Liji*). In Confucian and the other distinctive cultural traditions of Asia and beyond, the modes of social governance which these traditions advocate often place an emphasis on the community rather than the individual. As a result, some see in the promotion of rule of law a means for the West to impose its values on the rest of the world. However, supporters of the rule of law point out that the majority of countries are members of the United Nations and as such agree to abide by the Universal Declaration of Human Rights which calls for the respect of human rights based on the rule of law. Many developing countries are also signatories to a large array of international and regional treaties and declarations that commit them to upholding standards such as those relating to the functioning of their legal systems and the independence of the judiciary. Finally, and perhaps most importantly, many developing countries have adopted their own constitutions that encapsulate many elements of the rule of law. In recent years, the leaders of many developing countries have made public pronouncements declaring their commitment to upholding the rule of law.

Conclusion and Future Prospects

In its present day meaning, the rule of law is often used as short hand for the existence of good governance in a particular country. In the West and other countries that have adopted a liberal democratic mode of governance, the rule of law is seen as essential for economic and social development and as a necessary prerequisite for the existence of democratic mode of government.

In his work, *On the Rule of Law, History, Politics, Theory* (2004), Brian Tamanaha has asserted that the rule of law "stands in the peculiar state of being the pre-eminent legitimating political ideal in the world today, without particular agreement upon

precisely what it means". He draws the analogy that the rule of law is like the concept of the good: "everyone is for it", but no-one knows precisely knows what it is.

While the concept of the rule of law is the subject of competing theories, the existence of a divergence of views as to its precise meaning does not invalidate the rule of law as a concept in law. Most theorists tend to agree that, at the very minimum it does include a requirement that the government observe a country's laws and the existence of institutions and mechanisms which allow individuals to enforce the laws against officials. In time it is hoped that the rule of law will gain not just universal acceptance as to its desirability, but also further agreement as to its precise meaning.

Anthony Valcke

Suggested Further Reading

Books:

Thomas Carrothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006)

Rachel Kleinfeld, *Advancing the Law Abroad: Next Generation Reform* (2012)

Ian Shapiro (ed.), *The Rule of Law* (1995)

Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004),

Articles:

Rachel Kleinfeld Belton, *Competing Definitions of the Rule of Law: Implications for Practitioners*, Carnegie Paper No. 55 (January 2005)
http://carnegieendowment.org/files/CP55.Belton.FINAL.pdf

Lord Bingham, *The Rule of Law, The Sixth Sir David Williams Lecture*, Centre for Public Law (16 November 2006)
http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php

Brian Z. Tamanaha, *A Concise Guide to the Rule of Law* St. John's Legal Studies Research Paper (2007)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051