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The Rule of Law in Comparative Perspective

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Chapter 1
An Introduction to the Rule of Law in Comparative Perspective

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The rule of law has a long history in the aspirations of oppressed peoples everywhere.[1] Developing societies seek to establish the rule of law, well-regulated societies seek to preserve it, and most governments claim to maintain it, whatever the nature of their actual practices.[2] This makes the rule of law a nearly universal value, endorsed by the United Nations General Assembly, for example, which has repeatedly identified "human rights, the rule of law and democracy" as "universal and indivisible core values and principles of the United Nations."[3] The Universal Declaration of Human Rights, approved by the Assembly without dissent, recognized that "...it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."[4] These ringing assertions, repeated or paraphrased by the European Convention on Human Rights[5] the American Convention on Human Rights,[6] the African Charter on Human and Peoples Rights[7] and numerous other regional agreements and

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[1] On the history and philosophy of the Rule of Law, *see* Costa, Pietro and Zolo, Danilo, *The Rule of Law: History, Theory and Criticism* (Dordrecht, 2007) and Tamanaha, Brian Z., *On the Rule of Law: History, Politics, Theory* (Cambridge, 2004).

[2] *See*, e.g., *Constitution of Russia* Article 1; Interview with Dmitry Medvedev, President of Russia, *Financial Times*, 24 March, 2008

[3] *See*, e.g., U.N.G.A. /RES/61/39, 18 December, 2006, on "The rule of law at the national and international levels." *Cf.* A/RES/62/70; A/RES/63/128.

[4] *Universal Declaration of Human Rights* (December 10, 1948), Preamble.

[5] *The European Convention on Human Rights* (4 November, 1950), Preamble.

[6] *The American Convention on Human Rights* (22 November, 1969), Articles 8 and 9.

[7] *The African Charter on Human and Peoples Rights* (June 27, 1981), Articles 3, 6, and 7.

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national constitutions,[8] illustrate the necessary moral component always present in appeals to the "rule of law." The "rule of law" in its usual sense implies the fulfillment of justice and the negation of government by and for the benefit of those in charge.[9]

The struggle for freedom usually begins with the demand for written laws, to constrain the discretion of those in authority, then proceeds to the pursuit of just laws, a much more difficult undertaking.[10] The advance of modern constitutionalism on six continents has grown out of the ancient insight that law (in its strictest sense) arises only from the application of reason to human circumstances.[11] The "enactments" or "decrees" of those in power cannot attain legitimacy in the eyes of their subjects without some claim to serve right reason and justice.[12] The advance of law over the past five centuries against arbitrary government has always struggled towards answering the "great question": "What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that the citizens may constantly enjoy the benefit of them, and be sure of their continuance."[13] Put more simply, this became the search to establish an "*imperium legum*"[14] or "the empire of laws and not of men."[15]

The battle of the rule of law against arbitrary government takes place in every human society, when those with power seek to expand their discretion (and control), and their subjects resist.[16] Nor are the advocates of unfettered power without arguments in their favor. The most famous apostle of despotism, Thomas Hobbes, denied any distinction between "right and wrong," "good and evil," "justice and injustice," beyond our separate

[8] For example, the Constitution of the People's Republic of China, Article 5.

[9] *See*, for example, Aristoteles, *Politika* III, 1287a, associating the rule of law with the rule of reason.

[10] The famous story of the *decemviri* and the struggle for the rule of law in Rome was told by Livy in the third book of his *History* (*Ab urbe condita* III. 33ff). For similar developments in Athens, *see* Martin Ostwald, *From Popular Sovereignty to the Sovereignty of Law* (Berkeley, 1986).

[11] *See*, e.g., Marcus Tullius Cicero, *De re publica* III.xxii.33. *Cf.* Aristoteles, *supra* note 9.

[12] This insight was famously expressed by Marcus Tullius Cicero, *De legibus* 1.vii.23: "inter quos etiam ratio, inter eosdem etiam recta ratio communis est: quae cum sit lex" on the importance of this famous insight, *see* M.N.S. Sellers, "The Influence of Marcus Tullius Cicero on Modern Legal and Political Ideas," to appear in *Ciceroniana, Colloquium Tullianum Anni MMVIII* (2009).

[13] John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787) at I.128.

[14] *See*, e.g., Titus Livius, *Ab urbe condita*, 2.I.I.

[15] *See* e.g. James Harrington, *The Commonwealth of Oceana* (1656), ed. J.G.A. Pocock (Cambridge, 1992), p. 20.

[16] *See* the other chapters of this volume for examples in a variety of cultures and continents.

and conflicting desires.[17] Hobbes had seen in the horrors of England's civil war the indiscriminate misery of anarchy, "which is the greatest evil that can happen in this life."[18] From this it follows (his followers believe) that we need an absolute and uncontested sovereign power to rule us and that "whatsoever [the sovereign] doth, it can be no injury to any of his subjects; nor ought he be by any of them accused of Injustice."[19] Hobbes insisted that "This great Authority [is] Indivisible, and inseparably annexed to the sovereignty."[20] Anarchy, insecurity, and the inevitable conflicts of private desires justify the absolute power of government, according to this theory, and new definitions of "law," "justice," "right," and "wrong," determined through the arbitrary commands of sovereign power.[21]

European theorists such as Thomas Hobbes developed a "positivist" conception of law and sovereignty that has considerable appeal for those with "*de facto*" political power over subject populations.[22] If "law" can be reduced to the simple commands of those in power, then the "*Rechtsstaat*" becomes an instrument of oppression[23] and law becomes a weapon, like a knife, to be wielded for good or ill by whomsoever holds it in her hands.[24] The conflict between this "*de facto*" theory of law, as the instrument of power, and the "*de jure*" conception of law, as the product of reason and justice, has been the driving force of legal modernity, and the development of constitutional government throughout the world.[25] The Venetian Donato Gianotti[26] observed in a passage repeated by the Englishman James Harrington a century later,[27] and again by the American John Adams, at the time of his own Revolution,[28] that they all belonged to the timeless party of justice, fighting over the centuries to establish government under law ("*de*

[17] Thomas Hobbes, *Leviathan* (London, 1651), at I.vi.24; I.xiii.63.

[18] Ibid. at II. xxx.175.

[19] Ibid. at II.xviii.90.

[20] Ibid. at II.xxvi.93.

[21] Ibid. at II.xxvi.137.

[22] For the formula "auctoritas, non veritas, facit legem" *see* the Latin translation of Hobbes in *Thomas Hobbes, Opera* ed. W. Molesworth (1837–1845) at III.26.202.

[23] *See*, e.g., Carl Friedrich Gerber, *Grundzüge eines Systems des deutschen Staatsrechts* (Leipzig, 1865).

[24] Joseph Raz, Authority, Law and Morality, 68 *The Monist* 285 (1985) at 299. Law exists to "allow those in authority to express a view on how people should behave."

[25] *See* M.N.S. Sellers, *Republican Legal Theory: The History, Constitution and Purposes of Law in a Free State* (Basingstoke, 2004).

[26] Donato Gianotti, *Libro della Republica de' Viniziani* (1540) in F. Diaz (ed.) *Opere politiche* (Milan, 1974).

[27] James Harrington, *The Commonwealth of Oceana* (1656), ed. J.G.A. Pocock (Cambridge, 1992), p. 6.

[28] John Adams, *A Defence of the Constitutions of Government of the United States of America* (London, 1787) at I.126.

jure"), in the public interest, against arbitrary ("*de facto*") government, maintained in the interest of those in charge.[29]

This, then, is the central definition and purpose of the rule of law: the effort to discover what combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance.[30] This formula bears repetition because it captures the rule of law in its fullest sense, as the application of reason to reality in order to maintain a just and stable legal order. The rule of law implies constitutionalism, and all states or societies that struggle towards the rule of law are also working towards constitutional government, to control power with reason, or (more prosaically) make "ambition ... counteract ambition,"[31] with the constant aim to "divide and arrange the offices in such a manner as that each may be a check upon the other—that the private interest of every individual may be a sentinel over the public rights."[32]

A proper understanding of the rule of law—maintaining the famous "empire of laws and not of men"[33]—begins with the perception that "in establishing a government which is to be administered by men over men" the greatest difficulty "lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." Even in the worst of times, partisans of the rule of law have hoped to establish "liberty" through the instrument of a "well-ordered constitution" so that justice could prevail (idealists hoped) "even among highwaymen," by "setting one rogue to watch another," so that "the knaves themselves may in time, be made honest men by the struggle."[34] Many of these necessary legal and political controls were as well-known (as John Adams expressed it) "at the time of the neighing of the horse of Darius" as they are today.[35] The basic guarantors of the rule of law include representative government, a divided legislature, an elected executive, and above all, an independent judiciary serving for extremely long and non-renewable terms in office.[36]

To recognize the necessary connection between the rule of law as an ideal and well-constructed constitutional government does not and should not be taken to imply that all states can or should maintain the same

[29] For an early example of this distinction, *see* Cornelius Tacitus, *ab excessu divi August annalium libri* at I.2.

[30] *See supra* note 12.

[31] "Publius" [James Madison] *The Federalist* LI, February 6, 1788.

[32] Ibid.

[33] *Supra* notes 13 and 14.

[34] John Adams, *Defense of the Constitutions of Government of the United States of America* vol. III (London, 1788) at 505 (Letter VII, December 26, 1787).

[35] Ibid., Preface, at I.ii.

[36] Ibid.

constitutional structures in practice. The social, historical, geographical and other circumstances in different societies will always differ, limiting what is appropriate, prudent and possible in practice. Certain practices will never be justified, however, and certain standards and basic institutions will be shared by every society that aspires to attain "the government of laws and not of men." The chapters gathered in this volume consider how best to establish and extend the rule of law in a variety of circumstances, ranging from highly developed but now ethnically diverse European societies, to societies emerging from conflict or revolution, to highly tradition-bound but institutionally weak regimes of self-help and customary law and justice.

This brief introduction to a collection of deeper and more detailed discussions of particular societies and situations cannot and should not presume to offer a complete theory of the rule of law, but it can help to establish a basic outline of the common elements necessary to any rule-of-law society, reviewing some of the exceptions and compromises that may be needed to establish the rule of law, and identifying a few of the limits that even the most principled and self-aware proponents of the rule of law should not allow themselves to cross, even to advance their struggle against arbitrary government and oppression. Those seeking to establish the "impartial execution" and "faithful interpretation" of "good and equal laws" must always remember the limits of their own judgment. To be well-intentioned is not in itself a guarantee of infallibility. All rulers make mistakes and these mistakes, more often than not, closely track their own class, sectional or personal self-interest.

The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor. The great breakthrough in securing the rule of law in most societies occurs when judges attain tenure *quam diu se bene gesserint* (or during good behavior) rather than *durante bene placito* (at the whim of those in authority). This transition took place in England with the "Glorious Revolution" of 1688, confirmed by the Act of Settlement in 1701, which also prevented the executive from diminishing judicial salaries, once they had been established by law.[37] The Act of Settlement was a turning point in the progress of the rule of law, which made Britain the envy of other European nations.[38] Wherever judges do not enjoy secure tenure in their offices, their rulings are subject to improper influence and coercion.[39]

[37] *Statutes of the Realm* VII, 636f.; 12–13 William III, c.2.

[38] *See*, e.g., Voltaire [François-Marie Arouet], *Lettres Philosphiques* (1734), *Lettre* 8, *Lettre* 9.

[39] *See*, e.g., Alexis de Tocquerille, *De la démocratie en Amérique* (Paris, 1835, 1840), volume I, part 2, Chapter 8, for how even the elections of judges by the people poses a threat to the rule of law.

Judges secure in their salaries and tenure in office, who believe the law to be just, will do their best to uphold law's empire, not least because their own status and prestige depends upon the legal system's standing in society. This confirms the second great basis of the rule of law, which is that laws themselves should seek justice. Not only must judges apply the laws fairly, but the process of legislation must also attempt to advance justice, for its products properly to attain the status of "law." This is a complicated point. The concepts of law and fidelity to law imply a claim to justice.[40] The rule of law assumes a theory of law that separates law from the volition of those who serve it. Thus pursuit of the rule of law also requires the maintenance of legislative procedures that will generate legislation for the public good, and not to promote the private interests of those with power.

This link between the rule of law and a "common good" theory of justice is profound and essential. The "empire of laws and not of men" seeks a world of "equal" laws that serve all those subject to their control.[41] This absence of partiality is what sets government "*de jure*" apart from government "*de facto*" (to use the old terminology) and distinguishes "the empire of laws" from "the government of men."[42] But the question remains how to find "good and equal laws."[43] "Representative government" and "checks and balances" in the legislature (and the separation of both from the actual administration of justice) seem necessary precursors to "good and equal laws,"[44] but here we begin to reach the limits of the "essential" or "necessary" rule of law.[45]

John Stuart Mill advanced a theory of liberty and government, still extremely popular among statesmen, according to which some societies may not yet be sufficiently developed in their institutions and culture to support even such simple requirements of just government as the separation of powers between the executive and legislative powers, checks and balances in the legislature and administration of justice, or representative institutions in any branch of the government.[46] In circumstances such as

[40] *See* M.N.S. Sellers, "The Value and Purpose of Law" 33 *Baltimore Law Journal* 145 (2004).

[41] *See* the citations to John Adams and Voltaire above. *Cf.* John Rawls, *The Law of Peoples with, The Idea of Public Reason Revisited* (Cambridge, MA, 1999), p. 71.

[42] *See supra* notes 25–28.

[43] To use John Adams' felicitous description. *Supra* note 12.

[44] *See* ibid. at I.1.

[45] For the concept of "necessary" law, *see* Emerich de Vattel, *Le Droit des Gens ou Principes de la Loi Naturelle Appliqués à la conduit et aux affaires des Nations et des Souverains* (London, 1758) at Preface pp. xx–xxi. His "voluntary" law is also "necessary," in the more natural sense of the terminology. *Cf.* Christian Wolff, *Jus gentium methodo scientifica pertractatum* (1764).

[46] John Stuart Mill, *On Liberty* (London, 1859) referred to "backward states of society in which the race itself may be considered as in its nonage."

these perhaps "a ruler full of the spirit of improvement" may be "warranted in the use of any expedients that will attain an end perhaps otherwise unattainable."[47] But there are offensive implications in making the judgment that certain peoples or nations are not yet capable of being trusted with political freedom and equality.[48] Despotism in the common interest, even when pursued with a view to developing the higher faculties of those subject to its rule, is still despotism, and susceptible to all the vices of tyranny.[49]

The dependence of the rule of law upon the institutions of representative government arises from the observation that government *by* any subgroup within the larger society will inevitably become government *for* the interests of that subgroup, above the others.[50] And even were the natural effects of self-interest somehow avoided, the laws of a benevolent despot would suffer from a very incomplete knowledge of the actual needs and circumstances of the citizens that all laws must actually serve, to be worthy of the name.[51] So the concept of the rule of law implies an attempt to establish just laws, which in turn implies representative government, in order to achieve the degree of general knowledge and commitment to the common good necessary for impartial laws and government.[52] The rule of law entails the impartial pursuit of justice, which requires an equal concern for the welfare of all members of society.

While the rule of law without representative government may be a near impossibility, due to the fallibility of human nature, representative government by itself does not assure the rule of law, and may sometimes impede it. The earliest recorded musings about law and justice already distinguish "tyranny" from the rule of law, and contemplate the dangers of the tyranny of the majority, as well as by smaller factions.[53] The word "democracy" implied a sort of popular despotism for most of its history,[54] and the concept of "representative" government was developed to distinguish elected

[47] Ibid.

[48] And Mill was not shy in spelling these out. Ibid.: "Despotism is a legitimate mode of government in dealing with barbarians."

[49] *See* Philip Pettit, *Republicansim: A Theory of Freedom and Government* (Oxford, 1997).

[50] John Stuart Mill, *Considerations on Representative Government* (London, 1861), Chapter III.

[51] *See* James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (Cambridge, MA, 1996).

[52] *See* M.N.S. Sellers, "Republican Impartiality" 11 *Oxford Journal of Legal Studies* 273 (1991).

[53] *See, e.g.*, Aristoteles, *Politika* IV.2.1 (1289 a 26 ff).

[54] So much so that Kant baldy stated that democracy was "im eigentlichen Verstande des Worts notwendig ein Despotismus." Immanual Kant, *Zum ewigen Frieden* (1795).

deliberative assemblies from more narrowly "democratic" governments.[55] Representative legislatures should be so constructed that they respect the rights of minorities, and will require the checks and balances of divided power to guide them away from populism and oppression.[56]

The checks and balances of constitutional government play a very important role in preserving the rule of law, but here too there must be room for variation. At a minimum, the executive and legislative powers should be separated from one another, internally divided against themselves, and subject to periodic rotation in office. Obvious provisions such as these were well-known by the eighteenth century and to most advocates of "de jure" government long before they had much influence on the actual institutions of power.[57] The "checking" in this context is more important than the complete integrity of the separation. There may be circumstances in which executive powers can have some useful influence on legislation or legislators on the administration of the laws, provided their roles remain limited and always controlled by others, but unchecked power will always tend to undermine the rule of law.

This short review of the primary attributes of the rule of law provides a brief reminder of the principles and institutions towards which nations and their subject peoples struggle, as they seek to create "an empire of laws and not of men." Establishing the rule of law requires constant attention to the "combination of powers in society" that will form the most impartial laws, for the benefit of everyone, without regard to the interests of those in power. These include representative government, a divided legislature, an elected executive, the separation of powers, and an independent and self-confident judiciary, with the power to declare the laws impartially, without any interference (or influence) over actual cases by the executive or legislative powers.

The greatest threats to the rule of law will differ at different times and places, but the underlying principle remains the same: to separate the law from arbitrary power. In many societies, custom and public opinion are the best and only constraints against despotism. More developed polities create written statutes to constrain those in authority. The single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power. "Rule of law" states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent

[55] "Publius" [James Madison], *The Federalist* No. LXIII (March 1, 1788).

[56] This necessity is well expressed by James Madison ("Publius") in *The Federalist* No. 10 (November 22, 1787).

[57] John Adams, in the three volumes of his *A Defence of the Constitutions of Government of the United States of America* (London, 1787–1788) gives numerous examples of the literary and historical antecedents of this way of thinking.

judges. These fundamental preconditions of an impartial legal system can be vastly improved upon and infinitely refined—but they are hard enough to achieve in themselves and do not entirely prevail under any existing polity.[58]

The rule of law may be difficult to attain, but its absence is never hard to perceive. Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. Government will always be needed to protect liberty against aggression and to secure the many social goods that require large-scale collective action, but the rule of law constrains those in power to the purposes that justify their authority. Scholars may sometimes advocate partial departures from the rule of law, or its incomplete realization, or its differing application in different societies, because of transient or unfortunate circumstances, but no one can deny that every departure from the rule of law is a denial of justice. The ultimate goal of every society and every legal system should be equal and impartial justice for all. *Imperia legum potentiora quam hominum esto.*

[58] To give just one example, the United States still retains popular elections of sitting judges in many States of the Union.