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The Rule of Law

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The importance of the rule of law is universally acknowledged. It is regularly invoked by politicians and commentators, not just in America but around the world, even in countries not known for their devotion to civil rights. Hardly a day passes without mention of the rule of law in the news media. But rarely is the concept defined, and when an attempt is made to give it specific content, the definition is often contested as too limited or too broad. In the Anglo-American legal tradition, the rule of law developed over time, its roots usually traced to Magna Carta in 1215, when rebellious English barons, "sword in hand," forced the king to promise to proceed only "*per legem terrae*," according to the law of the land.[1] Over the ensuing centuries, this promise was occasionally lost sight of, but in repeated political and constitutional crises it was forcefully restated and elaborated. The modern struggle to establish the rule of law began in the sixteenth and seventeenth centuries in England and continued as thirteen of Britain's American colonies demanded their independence. The struggle is not over yet, and probably never will be.

The rule of law is not a purely legal concept but has broad cultural resonance. An early debate about its meaning, with eerie echoes in the highest political circles, can be heard in William Shakespeare's bitter comedy

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[1] *The Federalist* No. 84 (Alexander Hamilton), at 534 (ed. Benjamin Fletcher Wright, 1966); Magna Carta c. 39 (1215); William Blackstone, *Commentaries on the Laws of England* I:123 (1765-69) ("sword in hand").

Measure for Measure, which premiered in 1604 with King James I in the audience. Angelo, the deputy who ruled Vienna during the absence of its Duke, enforced the duchy's harsh law against fornication, sentencing the concupiscent Claudio to death. In response to an impassioned plea by Claudio's sister, Angelo denied personal responsibility: "It is the law, not I, condemns your brother."[2] When acting as a judge, Angelo explained, he was merely "the voice of the recorded law."[3] Twenty years later, Sir Edward Coke, once a royal judge, now an outspoken critic of royal absolutism, rallied the House of Commons in defense of the writ of habeas corpus: "It is a maxim, *The common law hath admeasured the King's prerogative*. . . . It is against law that men should be committed and no cause shown. . . . [I]t is not I, Edward Coke, that speaks it but the records that speak it."[4] Not the judge, but the law.

This was not the first time that Coke had defended the common law against the King, often invoking a reinvigorated version of Magna Carta. Only a few years after the premiere of *Measure for Measure*, he had dared to instruct his monarch that "[c]auses which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain cognizance of it. . . ."[5] Speaking for the law and not for oneself does not come naturally; it is a skill that must be learned. Furthermore, Coke declared – at the risk of being charged with treason – the King is not above the law but "*sub Deo et lege*," under God and the law.[6] No one is above the law.

Law's autonomy and universality are essential elements of the rule of law. Specific legal arrangements that implement and often accompany these elements vary with time and place, making a comprehensive statement of the requirements of the rule of law difficult, but these twin ideals are always

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[2] *Measure for Measure* 2.2.80.

[3] 2.4.61-62.

[4] Quoted in Catherine Drinker Bowen, *The Lion and the Throne: The Life and Times of Sir Edward Coke* 484 (1956) (referring to *Darnell's Case*, 3 How. St. Tr. 1 (K.B. 1627), popularly known as the Five Knights Case).

[5] *Prohibitions del Roy,* 12 Co. 63, 65, 77 Eng. Rep. 1342, 1343 (1607).

[6] Id. (paraphrasing 2 Bracton, *On the Laws and Customs of England* 33 (Samuel E. Thorne trans. 1968)).

at its core. Law is radically distinct from the personality of the judge, who decides cases by reference not to personal preference but to specific types of authority, using a distinctive style of legal reasoning. And law applies equally to all, high and low, the governors as well as the governed.

When in 1776 British colonists in North America lost confidence in the royal judges and became convinced that King George III was acting as if he were above the law, they determined to renounce their allegiance and make real Tom Paine's vision: "In America the law is king."[7] The obvious place to begin was with the independence of the judiciary. Prominent among the articles of indictment against King George in the Declaration of Independence was the charge: "He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries."[8] The new states promptly responded by writing into their constitutions guarantees of judicial independence. The North Carolina Constitution of 1776, for example, granted the judges tenure "during good behaviour" – making them removable, not at will, but only for cause – and promised them "adequate salaries," to prevent economic coercion.[9] A dozen years later, the United States Constitution cast the guarantee in classic form: "The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."[10]

Quickly it came to be seen that an independent judiciary would be best anchored in a separate department of government. The Massachusetts Constitution, adopted in 1780, recognized the connection between judicial independence and the supremacy of the law when it declared that the powers of the executive, legislative, and judicial branches must be separate "to the end that it may be a government of laws and not of men."[11] Chief Justice John Marshall invoked the same phrase to justify judicial review of congressional legislation in the landmark case of *Marbury v. Madison* in 1803: "The government of the United States has been emphatically termed a

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[7] Thomas Paine, *Common Sense* 98 (ed. Isaac Kramnick, 1976).

[8] *The Declaration of Independence* para. 12.

[9] N.C. Const. of 1776, §§ 13 & 21.

[10] U.S. Const. art. III, § 1.

[11] Mass. Const., Decl. of Rts., art. XXX.

government of laws, and not of men."[12] The fundamental difficulty, of course, is that law is not a disembodied force that can rule a nation. As the practical statesmen who established the American government recognized, it would necessarily be a government "administered by men over men."[13] The law must find its voice in the mouths of the judges.

More than an independent judiciary is required if the law is truly to be king. Judgments must be enforced, even against the other branches of government. As the unillusioned James Madison explained: "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."[14] Arrangements to diffuse power are built into the constitutional structure, the famous checks and balances that allow one branch of government to restrain another. Congress has the power to impeach and remove officers in the other branches. The President has the power to veto congressional legislation. The Supreme Court has the power to declare government actions unconstitutional and void. While the executive and the legislative branches contend for power, the judiciary defends the law and the constitution.

Power is diffused, not only among separate branches of government, but also between the state and federal governments. Bills of Rights at both levels offer safeguards against government over-reaching – some garnered from the English legal tradition, such as the writ of habeas corpus, earlier defended by Sir Edward Coke; others inspired by colonial experience with official harassment, such as the guarantee of proper procedure; still others added later to redress specific abuses, such as the equal protection clause adopted after the American Civil War. Particular attention is paid to law enforcement which is subject to restraints at every stage, from search and seizure through arrest, detention, prosecution, trial, and final punishment. Ex post facto laws, making acts criminal after the fact, are prohibited. Trial by jury, which had proved itself so potent a defense against tyranny both in England and in the colonies, is guaranteed.

Abuses of criminal law were not the only objects of concern. Economic rights are also protected. States are prohibited from "impairing the obliga-

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[12] 5 U.S. (1 Cranch) 137, 163 (1803).

[13] *The Federalist* No. 51 (James Madison), at 356 (ed. Benjamin Fletcher Wright, 1966).

[14] Id.

tion of contracts."[15] The Fifth Amendment prohibits the taking of private property "for public use without just compensation."[16] And the guarantee of due process, the American expression of Magna Carta's "law of the land," developed in time extensive and unexpected applications as a defense of economic and privacy interests.

Supplementing the constitutional guarantees are judicial practices familiar from English common law, such as stare decisis, the doctrine of precedent, "a foundation stone of the rule of law."[17] Another English tradition was the detailed judicial opinion, explaining a court's decision. In Chief Justice John Marshall's last reported case, he described his lifelong goal in opinion-writing: to convince the parties "that the case has been fully and fairly considered, that due attention has been given to the arguments of counsel, and that the best judgment of the court has been exercised on the case."[18]

A hundred years after American Independence, and long after America had settled on due process as its guarantee against arbitrary rule, influential English legal scholar A.V. Dicey popularized the phrase "the rule of law."[19] Because England lacks a written constitution like the American one with textual restraints on the government, Dicey deployed the concept to mark the proper limits of government power. No one should be punished except for a violation of previously declared law. There should be a unified court system, with no special courts for public officers. And rights are not to be understood as conferred by the constitution but rather as the basis of it.

Although the phrase is forever associated with Dicey, the rule of law has escaped his specific formulation and become a generic term to refer to a legal system that prevents arbitrariness, guarantees equal treatment, and – in many usages – enforces contracts and protects property. The demand for the rule of law in this sense is now a global phenomenon, not limited to countries sharing the common law tradition and sounded even in non-Western societies. The President of China, for example, has called on judges to "lock power in a cage," and the Chinese Communist Party has

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[15] U.S. Const. art. I, § 10.

[16] U.S. Const. amend. V.

[17] *Michigan v. Bay Mills Indian Community*, 134 S.Ct. 2024, 2036 (2014).

[18] *Mitchel v. United States*, 34 U.S. (9 Pet.) 711, 715 (1835).

[19] A.V. Dicey, *The Law of the Constitution* 179-99 (7th ed. 1908).

reaffirmed the constitution's guarantee of judicial independence: "The people's courts exercise judicial power independently, in accordance with the provisions of law, and not subject to interference by any administrative organ, public organization or individual."[20]

While due process has remained the familiar American expression of the rule of law, in the decades after Dicey his phrase occasionally appeared in United States Supreme Court opinions, including in important cases in which the court was forced to look beyond familiar constitutional texts. A generalized version of the rule of law was invoked in the Insular Cases, concerning the civil rights of residents in America's newly acquired island possessions such as Hawaii and the Philippines. Because the specific constitutional protections in the Bill of Rights did not extend to these unincorporated territories, the justices were forced to distinguish rights that are "fundamental in their nature," such as fair trial, from those that are incidental to the Anglo-American legal tradition, such as indictment by grand jury and trial by a jury of twelve.[21] In 1904 the Supreme Court recognized that there are "certain great principles of government which have been made the basis of our governmental system, which we deem essential to the rule of law and the maintenance of individual freedom."[22] These are guaranteed even to people from a different legal tradition.

The Insular Cases anticipated the later debate over the limitations that the Fourteenth Amendment imposes on the states. Did the Amendment's guarantee of due process include the protections detailed in the Bill of Rights that are applicable to actions by the federal government? In other words, did the Fourteenth Amendment incorporate the Bill of Rights and apply it to the states? At first, the Court tried, as in the Insular Cases, to distinguish rights that are "of the very essence of a scheme of ordered liberty" from those that are not fundamental.[23] In the words of Justice Felix Frankfurter, "As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is 'a constitution we are expounding,' so that it should not be imprisoned in what are merely legal forms even though they have the

[20] *Economist* (16 Aug. 2014) p. 35; P.R.C. Const. art. 126.

[21] *Hawaii v. Mankichi*, 190 U.S. 197, 217 (1903).

[22] *Kepner v. United States*, 195 U.S. 100, 122 (1904).

[23] *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

sanction of the Eighteenth Century."[24] But in the end, the familiar forms asserted themselves and one-by-one were incorporated in the Fourteenth Amendment, until today most of the Bill of Rights is applicable to the states as essential components of due process.

Difficulty in giving content to the rule of law has led to widely varying assessments of its value. On the one hand, the English historian E.P. Thompson hailed it as "an unqualified human good," a defense against "power's all-intrusive claims."[25] On the other, Yale law professor Grant Gilmore remembered the phrase as used in America during the Cold War as one of several "cheerfully meaningless slogans."[26] Recently, promoting the rule of law has become a global industry with international aid agencies touting rule-of-law programs as "a way to reduce poverty, secure human rights, and prevent conflict."[27] But critics have complained that the programs ignore local conditions and overstate what can be achieved.

The rule of law begins with rule *by* law, itself a not inconsiderable benefit. A rule-based society is certainly preferable to a lawless one. Sir William Blackstone spoke for many when he described anarchy as "a worse state than tyranny itself, as any government is better than none at all."[28] Fidelity to properly adopted and widely known rules protects citizens from arbitrary decision-making; it is also economically efficient. At the very beginning of the Industrial Revolution, Lord Mansfield recognized that "[i]n all mercantile transactions, the great object should be certainty and therefore, it is of more consequence that a rule should be certain, than whether the rule is established one way or the other."[29] Without the security provided by an independent judiciary enforcing contracts and protecting property, investors are less likely to risk their capital, which explains why authoritarian rulers of developing countries often lay claim to this limited version of the rule of law.

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[24] *Adamson v. People of State of California*, 332 U.S. 46, 66 (1947) (Frankfurter, J., concurring) (internal quotation from *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819)).

[25] E.P. Thompson, *Whigs & Hunters: The Origin of the Black Act* 266 (1975).

[26] Grant Gilmore, *The Ages of American Law* 106 (1977).

[27] G. John Ikenberry, Recent Books, *Foreign Affairs* vol. 93: no. 6 (Nov./Dec. 2014), p. 185.

[28] Blackstone, *Commentaries on the Laws of England* I:123.

[29] *Vallejo v. Wheeler*, 1 Cowp. 143, 153, 98 Eng. Rep. 1012, 1017 (K.B. 1774).

But the rule of law is meant to be more than merely utilitarian – a safeguard for the rights of free people, not only for the operations of the free market. By codifying and reinforcing unequal power relationships, particular laws may themselves violate the ideal which the rule of law expresses. It is cautionary to reflect that the rule of law co-existed for centuries with the institution of slavery. In what today seems a perversion, Chief Justice Roger Taney even held in the *Dred Scott* case that due process protected a slave owner's property rights.[30] To advance beyond rule *by* law to the rule of law, as Professor Harold Berman pointed out, "justice-based-on-law" must give way to "law-based-on-justice, with mercy playing an important role in exceptional cases."[31] For this reason, many commentators insist that to realize the ideal of the rule of law it must be accompanied by robust respect for individual rights and fair political processes.

Where the rule of law allows for effective enforcement, as with the American guarantee of due process, it can protect the individual from oppression by the majority. The American Revolution may have deposed the king in favor of the law, but the law that should have restrained the king now restrains the sovereign people, who occasionally chafe at its restraints just as monarchs once did. More subtly, long-continued experience with the rule of law fosters a legal mentality in both the governors and the governed, causing grievances to be expressed in legal terms and channeling both action and reaction into legal forms.

But even nations long committed to the rule of law admit exceptions to the ideal. During times of war or national emergency the normal protections of law are often abandoned. Internment, detention without trial, denial of legal representation, wiretapping, rule by decree – all appear in times of duress in the best regulated states. Although the Constitution expressly guarantees "the Privilege of the Writ of Habeas Corpus," it also concedes that the writ can be suspended "when in Cases of Rebellion or Invasion the public Safety may require it."[32] *Inter arma silent leges* (When arms speak, the laws are silent) is a maxim as old as the Romans.[33]

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[30] *Scott v. Sanford*, 60 U.S. 393, 450 (1857).

[31] Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* 530 (1983).

[32] U.S. Const. art. I, § 9.

[33] Cf. Cicero, *pro Milone* 4.11-12.

Law's universality, the claim that law applies equally to all, high and low – regularly repeated ever since Magna Carta – is also never fully realized. States can close their courts to suits against themselves by asserting the extra-constitutional doctrine of sovereign immunity. In a famous dictum Justice Oliver Wendell Holmes implicitly recognized that the doctrine is at odds with the rule of law: "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends."[34] Without a remedy there is no right.

The rule of law is often equated with formal legal equality. In his celebrated dissent in *Plessy v. Ferguson*, the case that upheld racial segregation, Justice John Marshall Harlan I argued that "[o]ur constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law."[35] But equal laws applied to an unequal society inevitably produce unequal results. "The rich as well as the poor are forbidden to sleep under the bridges of Paris,"[36] but no one who could afford an alternative would choose to billet there. Not only can undeviating adherence to equality under the law prevent unequal laws that promote substantive equality, but the procedural demands of due process also offer decided advantages to the wealthy, the educated, and the well-counseled, who can be sure to secure all the protections afforded by law.

Today, specialized bodies of law have developed to protect various classes perceived to be at a disadvantage in the marketplace: tenants against landlords, consumers against producers, employees against employers. Groups victimized by past (and present) discrimination may benefit from affirmative action programs, giving them preferential treatment. Yet, unequal laws intended to rectify social inequality have been challenged as violations of the rule of law. Indeed, the conservative economist F.A. Hayek roundly declared that "formal equality before the law is in conflict, and in fact incompatible, with any activity of the government deliberately aiming at material or substantive equality of different people, and . . . any policy

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[34] *Kawananakoa v. Polyblank,* 205 U.S. 349, 353 (1907).

[35] *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[36] Anatole France, *Le Lys Rouge* c. 7 (1894).

aiming directly at a substantive ideal of distributive justice must lead to the destruction of the Rule of Law."[37]

Law's autonomy, ideally protecting individuals from arbitrary decisions, may also lead to unacceptable rigidity. All societies committed to the rule of law have struggled to provide some latitude for discretion. The historic court of equity offered substantial justice when the remedy at law was inadequate. But judges exercising equitable jurisdiction have long insisted that their discretion is not unbounded. As one of the English founders of modern equity put it, echoing Sir Edward Coke's praise of the law's artificial reason: "if conscience be not dispensed by the rules of science, it were better for the subject there were no Chancery at all than that men's estates should depend upon the pleasure of a Court which took upon itself to be purely arbitrary."[38] As long ago remarked, the measure of justice in the court of equity should not, like the length of the Chancellor's foot, vary from judge to judge.[39]

Discretion in limited circumstances has been admitted even in law enforcement. The prosecutor has discretion whether to file charges or not. The jury has the power to nullify a statute in individual cases by refusing to convict. And the executive may pardon a convicted criminal or commute a convict's sentence. Indeed, the dramatic dilemma in Shakespeare's *Measure for Measure* is finally resolved by the Duke's pardon of all the law-breakers, while leaving the law unaltered. Even civil disobedience finds support in the rule of law. Although the law necessarily speaks through the judges, not everything that comes out of their mouths is law. The law is king, supreme over all its subjects, and protesters appeal directly to the throne.

Although due process has been given substantial content by two centuries of judicial decisions, it is ultimately no more readily defined than the rule of law. As explained by Justice John Marshall Harlan II: "Due process has not been reduced to any formula; its content cannot be determined by reference to any code. . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and

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[37] F.A. Hayek, *The Road to Serfdom* 87-88 (1944).

[38] Sir Heneage Finch, Lord Nottingham, Ch. 1675-82, quoted in *Biographical Dictionary of the Common Law* 176 (ed. A.W.B. Simpson, 1984).

[39] John Selden, *Table Talk* (1689), quoted in *Sources of English Legal and Constitutional History* 223-224 (eds. M.B. Evans & R.I. Jack, 1984).

purposeless restraints. . . ."[40] Any final definition of due process, as of the rule of law, risks confining it in such a way as to prevent its use in future emergencies.

If it is to endure, the rule of law must strike deep roots in the society at large. The public must develop a legal consciousness, not with the detail of a professional jurist, but with at least a general understanding and acceptance of the role assigned to the judiciary. Of course, respect for the law does not guarantee perfect adherence to its norms. Like all ideologies, it can tolerate individual lapses, sometimes even serious and prolonged lapses. But repeated and widespread failure can lead to the cynicism that causes its ultimate collapse. The rule of law can exist only if supported by a deep social consensus that respects proper procedure, that values equal treatment and fundamental fairness, and that fears the corrupting influence of power unrestrained by law.

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[40] *Poe v. Ullman*, 367 U.S. 497, 542-43 (1961) (Harlan, J., dissenting).