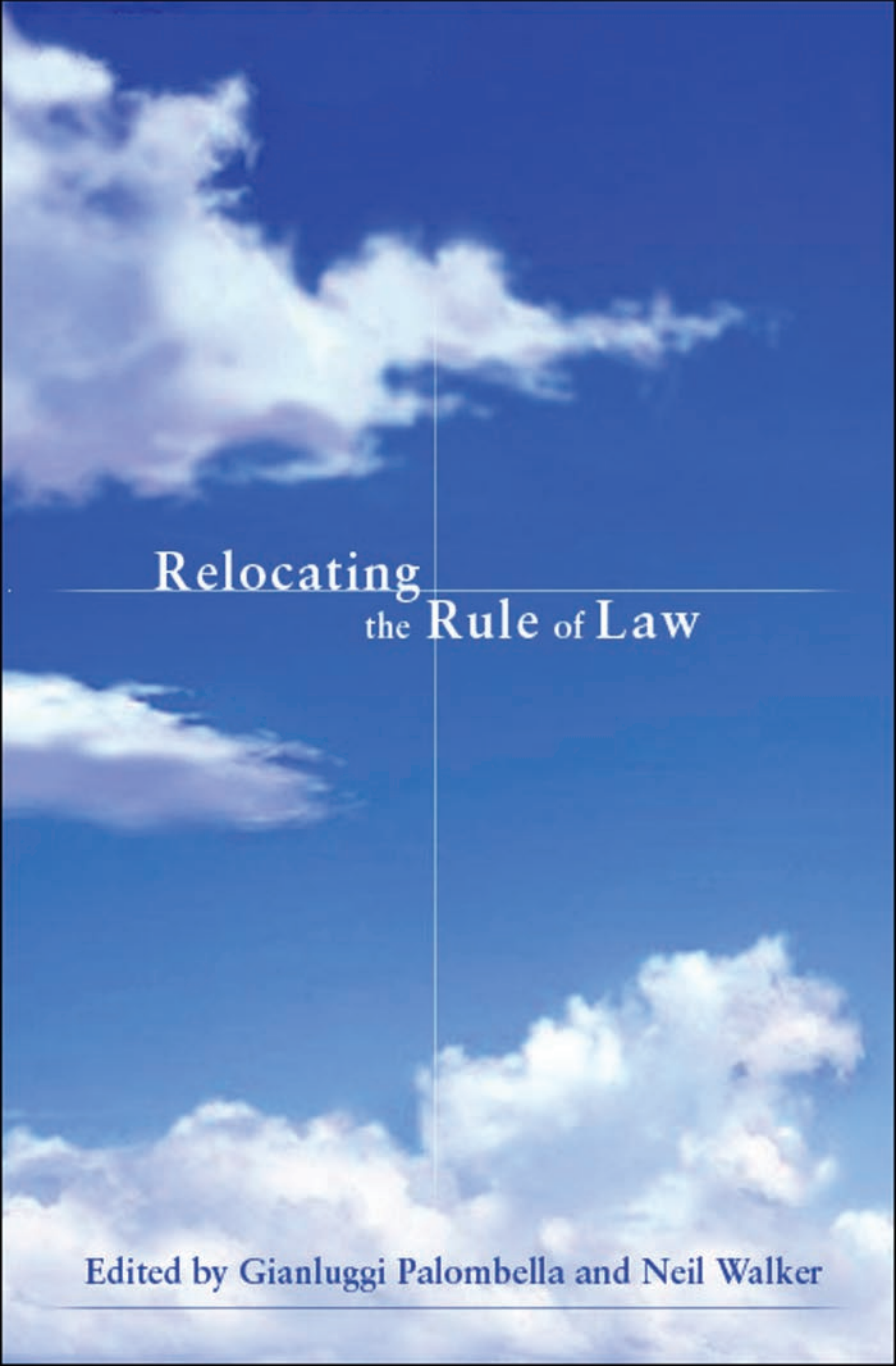
Relocating
the Rule of Law
Edited by Gianluggi Palombella and Neil Walker

RELOCATING THE RULE OF LAW

In this set of interdisciplinary essays leading scholars discuss the future of the Rule of Law, a concept whose meaning and import has become ever more topical and elusive. Historically the term denoted the idea of 'government limited by law'. It has also come to be equated, more broadly, with certain goods suggested by the idea of legality as such, including the preservation of human dignity and other individual and social benefits predicated upon or conducive to a rule-based social order. But in both its narrow and broader senses the Rule of Law remains a much contested concept. These essays seek to capture the main areas and levels of controversy by 'relocating' the Rule of Law not just at the philosophical level, but also in its main contemporary arenas of application—both national, and increasingly, supranational and international.

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Edited by
Gianluigi Palombella
and
Neil Walker

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The origins of this book lie in a seminar held at the European University Institute, in Florence, in June 2007. Our aim was to build a bridge between old and new applications of the ideas associated with the rule of law. Increasingly, debates about supranational community and international society place the rule of law at or near their centre. At the same time, the rule of law, considered both as a general philosophical idea intimately linked to the legitimacy of law-in-general and as an organising principle for the nation state in its ever more diverse forms, remains a matter of intense debate. Our motivating concern was to discover whether we could identify a common thread running through these very different contexts of discussion and contention.

To the extent that we have succeeded we owe a great deal to a great many persons. First and foremost, we must thank the contributors themselves. They came to the seminar with well-developed papers, but still ready to partake in a fertile exchange of ideas, the fruits of which are evident in the final volume. The seminar discussion was greatly enhanced by a thoughtful series of initial commentaries by Wojciech Sadurski, Christian Joerges, Christine Bell, Mark Toufayan, Costanza Margiotta and Christine Chwaszcza, and by a stand-alone contribution by Klaus Günther. To each we owe considerable thanks, and also to the wider group of seminar participants for their intensely engaged discussion over two days of proceedings.

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As we conclude the editorial process, neither editor is any longer fortunate enough to be based at the Institute in Florence. This volume, however, will stand as a souvenir of a time and a place of great intellectual companionship and new and enduring friendship.

Gianluigi Palombella (Parma) and Neil Walker (Edinburgh)
May 2008

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Introduction

What, if anything, can we claim as a defining feature of law today in the face of its palpable diversity? For some, the answer to the most basic question we can pose about both the distinctiveness and the integrity of the legal domain is content-based. They seek to discover in the deep structure of any and all legal systems one and the same general index of the 'right' or even of the 'good'; certain common background principles that survive and perhaps transcend a world of difference. For others the answer is one of form. It is about a unity of legal method, a common paradigm of reasoning within and in accordance with the law that prevails regardless of content and jurisdiction. For others still, including many for whom a content-based answer may be too ambitious and a purely form-based answer too modest, the secret of law's distinctiveness—such as it is—is to be found in its function. That is to say, what is special to law has to do with the general role it plays in human affairs and its situation in the wider social and political order of things.

It is primarily within this third category of answers that our discussion of the rule of law finds its place. Whatever its best interpretation, the rule of law necessarily involves a claim in principle about the centrality of law to the enterprise of living together—about law's title to rule, so to speak. What is more, such a claim always has both a practical and a normative dimension. It seeks to inform us of the ways in which and the characteristics through which it is plausible to think of law as something that rules over other things—as an institution which regulates the other forces that shape our common life. It also seeks to provide a justification for such a claim to ascendancy. What is more, the normative dimension is reflected in the frequent use of the rule of law formula in legal documents, where it is offered as a principled feature of institutional practice. The principle in question typically remains only vaguely specified—irreducible to any precise formal or content-based requirement. Yet it is nevertheless broadly understood to speak—or at least to attempt to speak—to some vital political ideal secreted in law's day-to-day functioning.

These practical and normative puzzles associated with the rule of law are, of course, of ancient vintage and have always resisted easy solution. Yet the title of the present volume alerts us to the fact that, if anything, answers are becoming even more difficult to find today, and that they are unlikely to materialise except through disentangling the rule of law in concrete contemporary context from abstract or anachronistic preconceptions about the nature and concept of law itself. While appeal to the rule

of law, or its various linguistic equivalents, retains a very broad resonance in the twenty-first-century world, its meaning and import become ever more obscure and contested. A reappraisal of the rule of law as an ideal capable of confronting rapid shifts in the understanding, uses and privileged sites of law therefore becomes an urgent priority. More specifically, the exercise of 'relocating' the rule of law suggests at least three different but related types of movement, and three searches and three challenges in response to such movement.

In the first place, the renewal of a basic intellectual challenge is evident in the large number of recent works that have taken the elusiveness of the rule of law ideal as their starting-point and have sought to rediscover and to reconceptualise its elementary structure. Perhaps, of course, the idea of the rule of law never was any more than wishful thinking (or, even less charitably, self-interested or manipulative thinking). Alternatively, even if the rule of law did enjoy a Golden Age sometime and somewhere, perhaps that time and place has gone. Perhaps the conditions of intellectual consensus and of social and political balance that made the rule of law a plausible and justifiable mission for law-in-general simply no longer hold. Whichever is the case, whether the difficulty is eternal or conjunctural, the need for critical re-examination is at present widely endorsed.

One important aspect of social and political change that has certainly contributed to a shift in perceptions, and that provides us with a second and more concrete challenge, is the changing configuration of the state—the key institutional locus of the rule of law in the modern age. If, as many have argued, the rule of law is best suited to a certain type of liberal democratic state of the contemporary West, what happens when it is invoked in other state forms; for example, in the context of post-colonial or Central European post-communist rule? If anything, the rule of law enjoys an even stronger rhetorical currency in these new contexts than it does in its traditional habitat, but does this not simply expose it in these new contexts as a hollow ideology rather than as an authentically rooted cultural category?

And as a third challenge, we must contemplate even more profound and even more topical relocation. In an age of new global connections, what happens when we 'search out' the rule of law in a supranational and international context? In the case of the supranational European Union, the rule of law has always occupied a central place in its legitimating ideologies. But, beneath the surface, again large questions remain as to the role and limits of specifically law-centred rule in this most developed instance of regional integration—its continuities and innovations, its success and its failures, and its uncertain future prospects in a pioneering (internal) constitutional or (external) promotional register. Finally, in the broader global or international domain the rule of law arguably provides an even more vital and increasingly sharp point of contestation between

various brands of legal cosmopolitans and world constitutionalists on the one hand and those of a more 'realist' or 'intergovernmentalist' persuasion on the other. A key question here is whether, how and to what extent the power-limiting and rule-based virtues of political and social order that the rule of law has traditionally endorsed for states in their internal ordering can be transferred to the transnational domain. In other words, to what extent, if at all, can the supposed universal virtues of the rule of law find 'universal' institutional form in our increasingly densely prescribed global legal and political arrangements?

These three linked challenges correspond to the three parts of the present volume. In Part One two contributors are invited to relocate the rule of law as a general intellectual construct. Brian Tamanaha seeks to do so by providing a minimal or 'thin' definition; one that carefully distinguishes between functions, benefits and basic elements. It is an important part of Tamanaha's argument that we can still reach an overlapping consensus over the meaning of the rule of law provided we stick to the basic functional virtues of restraining government power and co-ordinating behaviour among persons and do not stray into the territory of endorsing substantive political values. Gianluigi Palombella takes a rather different approach to the question of specification. For him, the troika of functions, benefits (predictability, non-arbitrariness and so on) and institutional elements (independent judiciary, robust legal profession and so on) that provide Tamanaha's focus are important but not fundamental. Rather, they pertain to the rule of law ideal insofar as they can be recognised as consequences and as traces of a deeper sensibility within a specifically legal way of thinking. That sensibility has to do with maintaining a proper balance between two dimensions of the law that stand in eternal tension. In institutional terms, we can think of these dimensions as *jurisdictio* and *gubernaculum*, while in philosophical terms they translate into the distinction between the (universally power-constraining) right and the (locally power-facilitating) good. The rule of law 'rules' to the extent that it is vigilant in protecting the virtue of both and acknowledging the irreducibility of either one to the other. In this way the rule of law is reconceptualised and 'relocated' as a venerable ideal whose normative import is not necessarily state-centred, but apt to serve as a regulative standard even in the transnational realm.

Part Two of the volume comprises three chapters that look at 'the state of the rule of law state', and the first of these, by Martin Krygier, remains closely engaged with the fundamental definitional issues that animate Part One. Krygier criticises what he sees as the dominant 'anatomical' approach to the rule of law for its undue concentration on the institutional dimension, and suggests instead the reduction of arbitrariness (on the part of the powerful), and of the fear and confusion that attend arbitrariness, as providing its core value and purpose. The point of Krygier's

message is not only to endorse a more direct value-based approach but also, crucially, to help explain why the rule of law has been so difficult to nurture in contexts of political transition from non-democratic regimes in Central and Eastern Europe and elsewhere. If the virtue of the rule of law cannot be reduced to its institutional manifestations, Krygier warns us, then merely putting in place the relevant institutional forms and mechanisms will not guarantee the necessary deep cultural support. A similar if more concrete message is conveyed by Renata Uitz in her study of the invocation of the rule of law by new Constitutional Courts after the fall of Soviet communism. For her, the danger is not so much lack of cultural entrenchment in the broader society as the temptation of the judicial elites to use the rule of law as a purely rhetorical device to help legitimise decisions reached on other more pragmatic and opportunistic grounds. Her conclusion is a sobering one; far from providing sure guidance on how to resolve enduringly difficult questions about the reconciliation of some of the more defensible solidaristic virtues of the communist period with the more individual-centred virtues of liberal democracy, the rule of law threatens to become an empty and debased currency 20 years after the revolutions that bore its name.

The middle Part of the volume closes on a more positive note with David Beatty's passionate defence of proportionality as the most basic anchor of the state's commitment to the rule of law. For Beatty, state (and indeed international) constitutional jurisprudence is increasingly distinguished by its propensity to frame issues in terms of a balancing between different core social values. It is this preparedness to get involved in key choices between 'thick' conceptions of the good—albeit armed with a methodology that does not seek to and does not have to take sides—that provides law's most fundamental virtue in an age of deep pluralism. However, as his discussion of the law's approach to the increasingly fraught question of the acceptability of religiously symbolic forms of dress in public places makes clear, for all his own conviction that proportionality can provide the answers, Beatty remains keenly aware that courts across Europe and America are far from consistent in their application of this principle even in an area which provides such an exacting and high-profile test of judicial legitimacy and even-handedness.

Part Three of the volume brings us finally to the rule of law's new supranational and global frontiers. Two chapters on the European Union are followed by two more on the broader global picture. In the first of the European contributions, Neil Walker seeks to expose a paradoxical truth about the supranational rule of law: namely, that it is all the more heavily relied upon in conditions where it is most vulnerable because the very cultural and political forms of community bonding that normally sustain it (and whose absence it is asked to compensate for) are themselves weak. He concludes that this irony of excessive reliance need not

be fatal to the supranational rule of law provided that the basic regulatory virtues that it seeks to promote are sufficiently reconnected to an ideal of self-government on an extended continental scale. In their examination of the increasingly important external dimension of the EU rule of law, Rachel Kleinfeld and Kalypso Nicolaïdis discover a tension of equivalent strength; between the need to avoid the charge of neo-colonial interference on the one hand and the imperative to use the EU's 'soft' diplomatic and economic power in a way that encourages just institutions and government arrangements on the other. They conclude that this tension, and the geopolitical fault-lines that underpin it, can never be fully resolved, but that with sufficient self-reflection and attention to consistency between internal and external practice they may at least be managed in a productive manner.

In the first of the two concluding chapters on the global dimension of the rule of law, Friedrich Kratochwil takes a rather less sanguine approach to the prospects of its migration. For him, the universal ambitions of a transnationally mobile rule of law are apt to founder on the fact that law is always a culturally and politically specific container of meanings. If we deracinate the rule of law we risk being left with a new moral dogmatism or technocracy or naturalism of the powerful, with 'constitutionalism' an especially treacherous medium in this regard. The danger then is not (or not just) that the rule of law be exploited by its exporters in their own narrow interests—a danger of which Kleinfeld and Nicolaïdis are fully cognisant—but that it is simply not capable of exportation without doing violence to the system of cultural understandings and without loss of the framework of popular commitments that made it viable in the host territory. Stéphane Beaulac's handling of this objection in the final chapter is measured and modest. He avoids the strong versions of international society and international constitutionalism that are most susceptible to the Kratochwil critique. Rather, he returns to the 'thin' credentials of legal certainty and predictability with which Tamanaha began our collective discussion and argues that that part of global law that appears in traditional international law guise has been reasonably successful in acknowledging and enacting these credentials. He does not pretend that this resolves all the problems associated with the transnationally relocated rule of law. He does remind us, however, that even at the rule of law's newest frontiers there may still be some merit in working with the old distinction between a 'thin' but broadly acceptable ethic of legality and a 'thicker' but divisive or hegemonic law-coded moralism.

Part 1

The Rule of Law: An Elusive Concept?

1

A Concise Guide to the Rule of Law

BRIAN Z TAMANAHA

Discussions among theorists about the 'rule of law' are riven by disagreements over what it means, its elements or requirements, its benefits or limitations, whether it is a universal good and other complex questions.[1] These debates are essential, but they can be confusing to non-specialists who seek to obtain a basic understanding of this important concept. The present chapter will provide an overview of core aspects of the rule of law. It is by no means exhaustive on the subject and does not resolve any of the hard questions; it does not address any philosophical or theoretical disputes about the rule of law. Rather, it is a pragmatic guide to the basic issues, oriented to the circumstances and concerns of societies that are working to develop the rule of law. The topics covered are (in order): definition, functions, benefits and elements. Several key points will be made about each subject, followed by a few additional comments on limitations or concerns. After covering these subjects, a brief explanation will be provided for why certain notions often associated with the rule of law have not been included. The overview will then close with a few reasons to be wary of the rule of law. The usefulness of this outline as a guide, it is hoped, will outweigh its over-simplifications and lack of nuance.

I. RULE OF LAW NARROWLY DEFINED

The rule of law, at its core, requires that government officials and citizens be bound by and act consistently with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.

[1] A full exploration of the issues surrounding the rule of law can be found in BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), which is the source for the observations made in this chapter.

This is the 'formal' or 'thin' definition of the rule of law; more substantive or 'thicker' definitions of the rule of law also exist, which include reference to fundamental rights, democracy and/or criteria of justice or right. The narrow definition is utilised here because it represents a common baseline that all of the competing definitions of the rule of law share, although a number of versions go beyond this minimum. As will be indicated, this version is amenable to a broad range of systems and societies.

II. TWO *FUNCTIONS* OF THE RULE OF LAW, WITH PROBLEMS

A. Restraints on Government Officials

One function of the rule of law is to *impose legal restraints on government officials*, in two different ways: (i) by requiring compliance with existing law; and (ii) by imposing legal limits on law-making power.

Fear of the uncontrolled application of coercion by the sovereign or the government is an ancient and contemporary concern. The rule of law responds to this concern by imposing legal constraints on government officials.

The first type of legal restraint is that *government officials must abide by valid positive laws in force at the time of any given action*. This first restraint has two aspects: government actions must have positive legal authorisation (without which the action is improper); and no government action may contravene a legal prohibition or restriction. Although exceptions or flexibility may exist with respect to the first aspect, the second (prohibitive) aspect is strict. If government officials wish to pursue a course of action that violates existing positive laws, the law must be changed in accordance with ordinary legal procedures *before* the course of action can be pursued.

The fundamental problem with this first type of restraint is enforcement. It requires that the government bind and coerce itself. Hobbes considered this a logical and practical impossibility, remarking that 'he that is bound to himself only, is not bound'.[2] The solution to this problem lies in the institutionalised separation of government powers, and by distinguishing between the private person and the government office he or she occupies. Government officials hence do not coerce themselves, but rather members of one institutionalised part of the government (prosecutors, courts) hold another part or another official legally accountable.

The second type of legal restraint *imposes restrictions on the law itself, erecting limitations on the law-making power of the government*. Under this

[2] T Hobbes, *Leviathan*, ed JCA Gaskin (Oxford: Oxford University Press, 1996) 176–7.

second type of restraint, certain prohibited actions cannot be legally allowed, even by a legitimate law-making authority. Legal restrictions of this sort rank above and impose control over ordinary law-making. The most familiar versions of this are: (1) constitutionally imposed limits, (2) transnational or international legal limits, (3) human rights limits and (4) religious or natural law limits. In different ways and senses, these types of law are superior to and impose restraints upon routine law-making.

The first two versions share a quality described above in that the limits they impose can be changed by legal bodies, but they are nonetheless distinct in that alterations usually cannot be made in the ordinary course by the government subject to the limitation. Constitutionally imposed limitations and transnational or international legal requirements are often more difficult to modify than ordinary legislation—as when a higher threshold must be overcome or changes must be made by a different law-making body. Constitutional amendments, for example, may require a supermajority vote while ordinary legislation requires only a majority vote, or must be made by a special body with a constitutional mandate; changes in transnational or international law rules must be made by transnational or international institutions, and thus are beyond the power of the nation state to alter unilaterally. These heightened hurdles enhance the efficacy of the legal limits.

The third and fourth limits, in contrast, are often perceived to be completely beyond the law-making power of state or international law-making bodies. Human rights declarations, while embodied in positive laws, are widely thought to pre-exist or exist apart from the documents that recognise them and would thus survive even if the documents were altered or abolished. Natural law principles and religious principles, similarly, are generally thought to exist independently of any human law-making agency (although religious authorities have a say in the latter). Owing to this quality, they establish limits on state law that no government or law-maker can alter.

Several interrelated problems arise with the second type of legal limitation on government. This type of limitation is frequently controversial because it frustrates the ability of government officials to take actions or achieve objectives. These are the main problems:

(i) In democratic societies, the limitation of the law-making power of the government is criticised for overruling or restricting democratic law-making; in authoritarian states, it hampers the ruling authority from using the law to do as it desires. In both cases, when the motivation is sufficiently compelling, there will be attempts to circumvent or ignore the higher legal limits.
(ii) Very difficult questions will arise over the scope, meaning and application of the said legal limits, often raising disputable questions of interpretation.

(iii) A crucial matter is the designation of the institutions or persons with the final say over interpretation—which are often, but not necessarily, the courts. In theory, the authority to interpret the legal limits should not be vested in the same body as is authorised to pass ordinary laws, for that would potentially vitiate the limitation. When this power is allocated to the courts, and where the clauses being interpreted are open-ended and the decisions have political implications, objections may be raised that the courts are thereby engaged in the judicialisation of politics insofar as their decisions restrict or override political authorities.

(iv) Another crucial issue, parallel to the first type of restraint above, is whether the limits imposed by these decisions can be enforced. This problem arises because law sets limits on the government's law-making power. When these limits are internal to the system—like constitutionally imposed limits—the institutionalised separation described previously can solve the problem. When the limits are external—as with transnational law, human rights, natural law and religious limits—the co-operation of the government which is thereby limited must be secured, either voluntarily or through the threat of a sanction. Human rights norms and religious norms, in particular, come up against the reality that governments can ignore their dictates with relative impunity.

B. Social Ordering

A second function of the rule of law is to maintain order and co-ordinate behaviour and transactions among citizens.

This aspect of the rule of law holds that a framework of legal rules governs social behaviour. People must generally behave in a fashion that does not breach legal rules. Transgressions of legal rules or social disruptions—whether treated as criminal or civil (societies draw different lines)—will provoke a response from legal institutions charged with enforcing legal requirements and resolving disputes in accordance with applicable legal norms.

Satisfaction of this second function does not entail that the entire realm of social behaviour must be governed by state legal rules. That is neither possible nor desirable. Multiple normative orders exist within every society, including customary norms, moral norms, religious norms, family norms, norms of social etiquette, workplace norms, norms of business interaction, and so on. Sometimes the norms from these various orders overlap, but often they are different in orientation, extension, scope, penetration and efficacy. The presence, scope and penetration of state law varies between societies and between regions. Some societies or regions are thickly governed

by law, where serious disputes are resolved by well-developed state legal institutions. In other societies or regions, state law has a marginal or negligible role in social ordering—usually when state law is relatively weak—and disputes are resolved primarily through social institutions. In order to be consistent with the rule of law, the law need not cover everything, but what the law does cover should be largely adhered to by the citizenry.

III. PRIMARY *BENEFITS* FROM THE RULE OF LAW, AND PROBLEMS FLOWING FROM EACH BENEFIT

A. Certainty, Predictability and Security

The rule of law enhances *certainty, predictability, and security* in two contexts: between citizens and the government (vertical), and among citizens (horizontal).

With respect to the government, citizens benefit by knowing in advance the government's likely response to their actions. This is an important aspect of liberty, whereby citizens know the full range of conduct they can engage in without fear of being subjected to government interference or sanction. Any action not prohibited by the law can be undertaken by the citizen without fear. Without this assurance, one always acts at one's peril.

Although such predictability is critical to liberty, it is important to recognise that this benefit in itself does not guarantee to citizens any particular area of free action. The scope of action allowed may be quite narrow or oppressive, yet comply with the rule of law in the 'thin' sense defined at the outset.

With respect to fellow citizens, people are able to interact with one another knowing in advance which rules will be applied to their conduct should a problem or dispute occur. Such predictability furthers their ability to make choices and to interact with others. This includes acting with the appropriate (legally established) degree of care and responsibility when dealing with other people or their property, and when engaging in transactions with strangers or acquaintances.

When evaluating the horizontal and vertical benefits just described, it is important to remember that both assume substantial knowledge and foresight about the law on the part of citizens. The reality, however, may be that citizens are poorly informed about the law or give scarce consideration to it before they act.

B. Restriction of Government Discretion

The rule of law *restricts the discretion* of government officials, reducing wilfulness and arbitrariness.

A common worry of citizens is that government officials may be unduly influenced in their government actions by inappropriate considerations—by prejudice, whims, arbitrariness, passion, ill will or a foul disposition, or by any of the many factors that distort human decision-making and actions. The rule of law constrains these factors by insisting that government officials act pursuant to and consistent with applicable legal rules. The law operates in two ways to obtain this benefit. First, government officials are required to consult and conform to the law before and during actions. Second, legal rules provide publicly available requirements and standards that can be used to hold government officials accountable both during and after their actions.

The main negative consequence that comes with this second benefit is that under many circumstances it may be useful or necessary for government officials to exercise discretion or make situation-specific judgements. Legal rules are general prescriptions that cannot anticipate every aspect of every situation in advance, and legal rules can become obsolete as social views and circumstances change. The application of existing rules to unanticipated situations or changed circumstances can have harmful or unfair consequences or lead to socially undesirable outcomes. In such contexts, allowing the decision-maker to use her expertise, wisdom or judgement may produce better results than insisting that she comply with the legal rules. In some circumstances, moreover, strictly following legal rules in a fashion that produces a winner and a loser can exacerbate conflict, while finding a compromise that bypasses the rules might achieve a consensus. In these and other situations, a strict adherence to the rule of law may be detrimental. Underlying this benefit of the rule of law is the fear of potential abuse at the hands of government officials, but every functional polity must accord some degree of trust and discretion to government officials.

C. Peaceful Social Order

A *peaceful social order* is maintained through legal rules.

A peaceful social order is marked by the absence of routine violence, and by the presence of a substantial degree of physical security and reliable expectations about the conduct of others. These are the minimal conditions necessary for a tolerable social existence.

The relationship between social order and legal rules is extremely complex and variable. It is important to bear in mind that the legal rules in the books do not necessarily correspond to, reflect or maintain the social order (nor is it the case that legal officials and institutions always enforce the rules in the books). In virtually all social contexts, moreover, social norms largely shape and govern daily existence; legal norms may

be largely irrelevant to the bulk of routine social conduct. Legal rules can conflict or clash with prevailing social norms. For these reasons, it must not be assumed that law is the main (or even a major) source of social order.

Furthermore, legal rules and institutions can impose an oppressive social order, as occurs in totalitarian societies. Although such societies are not superficially marked by routine violence, and therefore qualify as 'peaceful' and ordered, the social order can nonetheless be experienced as intolerably restrictive.

Two problematic situations deserve to be mentioned. When law has been transplanted from elsewhere—either by imposition or through voluntary borrowing—social and legal norms may clash, reflecting different social, cultural and moral world views. A clash may also occur when a society consists of distinct groups (cultural, ethnic or religious), while the law represents only one. In both situations, the norms and values of the law will not match the norms and values of many of the citizens. In a few contexts (often post-colonial), the language of the law is different from the common vernacular of groups within society, which heightens the clash, and gives the law an alien and obscure feel. In many of these situations the law has a weak role in preserving social order.

D. Economic Benefits

Economic development is facilitated by certainty, predictability and security, for two basic reasons.

As indicated at the outset, the rule of law enhances certainty, predictability and security. In addition to enhancing liberty, it is widely believed that market-based economic systems benefit from these qualities in two different respects, the first related to contracts and the second to property. First, economic actors can better predict in advance the anticipated costs and benefits of prospective transactions, which enables them to make more efficient decisions. One can enter into a contract with some assurances of the consequences that will follow if the other party fails to live up to the terms of the contract. This encourages the creation of contracts with strangers or parties at a distance, which expands the range and frequency of commercial interactions, thus increasing the size of the economic pie.

Second, the protection of property (and persons) conferred by legal rules offers an assurance that the fruits of one's labour will be protected from expropriation by others. This security frees individuals, thus enabling them to allocate the bulk of their efforts to additional productive activity, and to enjoying its benefits, rather than spending time and effort on protecting existing gains.

These economic benefits conferred by the rule of law have been identified in connection with capitalism on local and global levels. One must examine both the law and the relationship between the law and the system of economic exchange in a given situation in order to determine whether and to what extent these claims are borne out. When law and legal institutions are obscure, inefficient, costly or unreliable, commercial transactions and economic development might be inhibited by the legal system, and economic actors may prefer to resort to other institutions in situations of dispute (like private arbitration), thereby avoiding the legal system entirely. In certain contexts, moreover, other mechanisms, such as norms of reciprocity or long-term social or business relationships, can effectively provide predictability and security in transactions, thus rendering the law secondary or superfluous.

E. The Fundamental Justice of Equality of Application of the Law

The equality of application of law, an aspect of the rule of law, is a component of fundamental justice. It is widely considered unfair and unjust when the identity or status of a person affects how legal officials apply or interpret the law. No one should be unduly favoured or ill treated by legal officials. This requirement does not prohibit laws from drawing distinctions between people or groups, as occurs with laws that treat men and women differently, or those that impose graduated tax rates; it only requires that the law be applied in accordance with its terms no matter whom it is being applied to (president or citizen, celebrity or common person, rich or poor).

This essential aspect of justice, known as formal equality, can also have negative consequences, especially in situations with substantial social inequalities. Applying laws equally to everyone according to their provisions may have one-sided effects or serve to perpetuate an unjust social order. A law that forbids rich and poor alike from sleeping on a park bench, for example, may be applied equally to all, but it will have consequences mainly for the poor.

IV. BASIC *ELEMENTS* IN ESTABLISHING THE RULE OF LAW, AND RELATED PROBLEMS

A. Widely Shared Orientation within Society—among Citizens and Government Officials—that the *Law does Rule and should Rule*

In order for the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary,

proper and existing part of their political-legal system. This attitude is not itself a legal rule. It is a shared political ideal that amounts to a cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations and surviving episodes in which the rule of law is flouted by government officials. When this cultural belief is not pervasive, however, the rule of law ends up being either weak or non-existent.

Cultural beliefs are not subject to human control, so it is no easy matter to inculcate belief in the rule of law when it does not already exist. A specific problem is that in many societies the government is distrusted and state law is feared or avoided. This tends to be the case in societies where the law has a long or recent history of enforcing authoritarian rule, or where legal officials are perceived to be corrupt or inept, or where legal professionals are widely distrusted, or where the content or application of the law is seen to be unfair or is identified with particular interests or the elite. In situations where the legal rules and systems have been transplanted from elsewhere, as indicated earlier, many people will not identify with (or even know) the law, so making it much harder to develop a cultural orientation that the law should rule, although this can change over time. Moreover, when society is made up of distinct cultural, religious or ethnic groups, and the law—either its norms, or the people who monopolise legal positions—is identified with one group but not others, people from the excluded groups may well see the law as a threat, and are unlikely to embrace the notion that the law should rule.

This is an essential element of the rule of law, and it is the hardest to achieve. Above all else, in order for this cultural belief to be viable, people must identify with the law and perceive it as worthy of ruling. General trust in law must be earned, and it takes time to become what is tantamount to a cultural view about law passed on through socialisation.

B. Presence of an Institutionalised, *Independent Judiciary*

An institutionalised, independent judiciary is crucial to both functions of the rule of law: it is an important means for holding government officials to the law (vertical), and for resolving disputes between citizens in accordance with the law (horizontal). Judges individually and as a group must be committed to interpreting and applying the law to everyone (including government officials) according to its terms, fairly and without bias or outside influence.

An independent judiciary is difficult to establish and preserve. At a minimum, it requires the allocation of adequate material resources: functional buildings, competent staff, access to legal resources, reasonable salaries, and job security. Since the courts typically lack direct authority over the police or other enforcement agencies, an essential condition of the independence

of the judiciary is that other government officials respect the independence of the judiciary and comply with court rulings. To return to the first element above, in order for an independent judiciary to exist there must a strong cultural ethic that courts should not be interfered with, and that their legal decisions must be complied with. An independent judiciary also depends upon the existence of a legal profession committed to upholding the law. Judges are recruited from the profession and must be indoctrinated in the values of the rule of law; the profession must also actively support an independent judiciary, and be willing to defend it when threatened.

C. Existence of a *Robust Legal Profession and Legal Tradition* Committed to Upholding the Rule of Law

A well-developed legal profession and legal tradition committed to upholding the law is necessary for several reasons: to develop the body of legal rules in a coherent and accessible fashion that helps achieve predictability and certainty in the law; to provide the legal services required to ensure compliance with the law (in vertical and horizontal terms); to help fill the ranks of government legal positions (including regulators, prosecutors and judges) with the orientation that the law must reign supreme; and to come to the defence of the rule of law when it is under pressure. Without a body of lawyers committed to the law and to the rule of law, there can be no rule of law, for the knowledge, activities and orientations of lawyers as a group are the social bearers of the law—they are the group whose collective activities directly constitute the law. Building a robust legal profession and legal tradition requires a legal education system that transfers legal knowledge and inculcates legal values in those whom it trains. Moreover, the system must attract and reproduce people who are committed to the law and to developing legal knowledge.

A potential problem for this element exists in societies where only people from wealthy classes or selected groups have access to legal education or to positions of authority in the legal system, because this raises the risk that they will develop and utilise the law to advance their own interests at the expense of others, introducing distortions and bias into the law. Citizens will perceive the law as unbalanced, which weighs against the first element above, making it harder to develop a general cultural belief that the law should rule.

D. A Further Problem with these Basic Elements

None of the above three elements is easy to establish when it is absent, but the situation is further complicated because each element in various ways depends upon the others. They are distinct and yet intertwined, and

each relies upon a myriad of supporting economic, political and cultural conditions. These are the social, cultural and institutional underpinnings of the rule of law, and are not entirely subject to human design or control. All of this makes it extraordinarily difficult to put the elements of the rule of law in place, and practically impossible to do so quickly. A lengthy period, perhaps one of generations, is required to build up a general cultural belief that the law does and should rule, to build up an independent judiciary and to build up a legal profession and legal tradition committed to upholding the rule of law. The good news is that, when it comes about, this interconnectedness makes the rule of law resilient.

V. WHAT WAS *NOT MENTIONED* AS A CORE ASPECT OF THE RULE OF LAW

A. Democracy

Democracy is a mechanism for selecting political leaders. Many societies use democratic means to determine who has the authority to make law (voting for legislators) and to create valid laws (voting on proposed laws). Democracy also serves as a legitimating ideal which establishes the obligatory force of law: because the people or their representatives create the law (at least in theory), they thereby consent to and are hence bound by it. Nothing within the thin understanding of the rule of law, however, mandates democratic institutions. Undemocratic systems can satisfy all the conditions set forth in this chapter.

B. Content of the Law

The thin conception of the rule of law does not impose any requirements concerning the content of the law. This openness with respect to content renders the rule of law amenable to all sorts of cultures, societies and political systems. It does not specify the kinds of law a society must have, nor does it indicate any particular limits on the law. It requires only that government officials and citizens be bound by and act in accordance with the law, whatever the law might require. This also means that oppressive or immoral rules can be enacted—for example, imposing slavery, apartheid and religious or caste distinctions—without falling foul of the requirements of the rule of law.

C. Human Rights

The account of the rule of law set out in this chapter does not itself require a regime of human rights. Enforcement of human rights may be an aspect

of the rule of law within a given system, as indicated earlier, but all of the elements discussed above can be established without necessarily protecting human rights.

A large number of scholars who write about the rule of law include one or more of these three aspects as integral to the rule of law. These aspects, however, are not essential to a thin understanding of the rule of law. A narrower approach is taken here because it hews to common ground and applies to the broadest range of systems. Many societies do not embrace liberal values, and a number do not embrace democracy. A state and society may develop the thin version of the rule of law without necessarily adopting the political arrangements or values of liberal democracies.

The rule of law is ultimately about government officials and citizens acting in accordance with legal rules. This is an essential idea with a range of implications, but it cannot solve every problem or be the repository of everything valuable.

VI. REASONS TO BE *WARY* OF THE RULE OF LAW

One reason to be wary of the rule of law follows from the preceding discussion that the rule of law does not in itself require democracy, respect for human rights or any particular content in the law. Developing the rule of law does not ensure that the law or legal system is good or deserves obedience. In situations where the law enforces an authoritarian order, where the law imposes an alien or antagonistic set of values on the population or where the law is used by one group within society to oppress another, the law can be a fearsome weapon. Fidelity to the rule of law in these circumstances serves to enhance legally enforced oppression. It is important to remember that the rule of law is a necessary but not sufficient condition for a fair and just legal system.

A second reason to be wary is that support for the rule of law can shade subtly into (or be wrongly interpreted as) support for the relentless extension of the reach of law into the social, economic and political realms. This spreading insinuation of law—sometimes called the juridification of the life world—does not follow from the rule of law itself. To insist that government officials must act consistently with the law and to say that the population should abide by the law does not suggest that the law must or ought to rule everything. The appropriate reach of the law can only be determined following an examination of the circumstances of each social arena. As the earlier discussion indicated, in various situations the extension or application of legal rules can be detrimental to social relations, and even to the law itself (by fostering rampant disobedience of the law). Specifically, when legal norms or institutions clash with lived social

norms or institutions, it is prudent to be cautious in relation to the subjects and functions the law undertakes.

A third reason to be wary of the rule of law is the risk that it may evolve into the rule of judges (or lawyers). An increasing assertiveness by judges in handing down decisions that infringe upon political authorities, especially when interpreting broad clauses like human rights provisions, has been noted in many systems. When this occurs, the judiciary may become the target of political attacks and efforts at political influence, thereby resulting in the politicisation of judicial appointments and judging. The judicialisation of politics hence leads directly to the politicisation of the judiciary, which in turn reduces the autonomy of the judiciary and diminishes the rule of law. A delicate balance is required in which judges strive to abide by the law and render decisions with an awareness of the proper (limited) role of the courts in a broader polity.

The final reason to be wary of the rule of law—or more accurately, wary of *talk* about the rule of law—is that many abuses of the law have been committed by states and government officials who claim to embrace and abide by the rule of law. The rule of law is a powerful legitimating ideal. As such, it provides cover for cynical political leaders who pay lip service to the rule of law while violating it. This behaviour tarnishes the rule of law ideal, as people come to view talk about the rule of law in a cynical light. The only solution to this problem is vigilantly to hold government officials to account for their behaviour in accordance with legal standards, and to not be fooled by false posturing.

2

The Rule of Law and its Core

GIANLUIGI PALOMBELLA

I. PREMISE

The rule of law can be viewed in terms of certain core historical meanings and yet nonetheless be conceived of beyond its contingent features and context. In developing this as the anchoring proposition of the present chapter, let me start with an overview of the wider European scene, recalling the main characters of the *Rechtsstaat* and its continental equivalents. Following this, some features characterising the rule of law as a distinctive historical-institutional concept shall be discussed. The goals of this elaboration are plain and relatively modest. From this reconstruction the rule of law appears to bear a general normative meaning, yet one that cannot be articulated apart from the historical and institutional roots out of which it has evolved.

This background context may be further conceptualised as a theoretical scheme in relation to which we can ask whether the rule of law can be extended as a normative ideal to our present time. The rule of law can be thus relocated in the forefront of present social transformations, availing itself of both institutional sense and philosophical depth.

Against this backdrop, the rule of law is shown to be born and conceived of both as an *ideal* and as the name for a peculiar *relationship*. Contrary to the *Rechtsstaat* (or the *Stato di diritto)*, understood as a peculiar form of the state, the rule of law as an *ideal* presupposed that law be only partially at the disposal or 'will of men', of the King, or of the sovereign power. Accordingly, as a *relationship*, the rule of law provided a link between two essential Western law domains, harking back to the medieval tradition evoked through the *jurisdictio–gubernaculum* couplet—that is, justice and sovereignty. On a philosophical plane, this same relationship appears to be mirrored as a balance within political institutions, social practices and sources of law, whether protecting 'the right' or producing 'the good'. In the final sections of this chapter, it will be argued that reference to both these registers, that is, to the rule of law as this double *relationship*—between both *jurisdictio* and *gubernaculum*

(institutional) and the right and the good (philosophical)—prevents us from reducing the concept to a particular institutional setting, and so draining it of its possible potential.

Accordingly, as a normative concept, the capacity of the rule of law might extend itself over legal domains even beyond the state. It postulates neither a unique peculiar form *of* the state nor some a priori substantive conception of it, although on contextual grounds, some forms can be expected to be better suited to satisfying its requirements. From this angle, it follows that although many current definitions of the rule of law give consideration to relevant and facilitative characteristics of 'law in general', in a sense they seem to miss the point. The normative meaning of the rule of law cannot be made equivalent to the rule of (what should count as) 'good law', to a rule-based idea of 'certainty' in itself, or to an alleged list of 'neutral' requirements of the law. Ultimately, the concept of the rule of law can be clarified even without any final assessment of the moral content or form of law.

II. THE CONTINENTAL EUROPEAN RELOCATION OF THE STATE

In the context of some common goals it might be appropriate simply to resort to the 'rule of law' as a kind of thin 'universal'. Yet it is a peculiarly Western concept. To begin with, a closer scrutiny of some parallel institutional concepts commonly equated with it can improve our understanding of the rule of law itself by allowing differences to emerge, and can provide a more comprehensive perspective that is better suited to encompassing the variety of the Western legal world.

Although the expression 'rule of law' should be referred to (in its true capacity) as a unitary concept, the simple elevation of some historical settings and institutional connotations to a conceptual—universal—necessity would be unfair. Diversity of experiences is relevant and acknowledgement of this is a premise for reconstructing a possible unitary normative meaning. Indeed, it is of some importance that continental Europe cannot furnish a coterminous expression for the 'rule of law', notwithstanding the rich variety of so-called 'equivalents' such as the *Rechtsstaat*, *l'état de droit*, *l'Estado de derecho*, *lo Stato di diritto*, and so forth.

On the historical plane, the general idea of a 'law-bound' state emerges most clearly through the institutional model of the *Rechtsstaat*. The contrasting notion had been that of the *Polizeistaat*, or l'*état de police*, that is, the concrete background against which the *Rechtsstaat* developed its distinctive identity. In the French context, Carré de Malberg noticed that while *l'état de police* was entitled to apply any discretionary decision to the life of citizens in order to define their well-being, *l'état de droit* entailed

its subjects only submitting themselves to the law, and thus by extension to rules[1]: this goal was accomplished either by stipulating rights reserved to individuals or by providing in advance for means and modes to be followed by the state itself in order to pursue its objectives.

The general concept elaborated by German public law doctrine[2] refers to certain key features, such as the public tasks of the state, the abstention from interference with personal spheres (as regards the guarantee of happiness or religious salvation), and the protection of public order (against internal or external threats), as well as pursuing some welfare objectives.[3] In a way, the starting-point lies beyond that of enlightened absolutism (and state paternalism) and can be well encapsulated by the move from the law of power to the power of the law. The German theorist whose definition was most closely followed in other countries, such as Italy, was FJ Stahl,[4] who emphasised the need for the state to operate precisely and subject to fixed mechanisms and pre-defined rules, thereby limiting its own power through the law.

In spite of this however, the state does not lose its own metaphysical *personality*, the image of a volitional entity with its own voice and its own objectives, and does not fade into a neutral, juridical structure.[5] In this transformation, the state itself is not de-centred but rather relocated, moving from the *Polizeistaat* to the *Rechtsstaat* without losing its persistent centrality.

The passage to the *Rechtsstaat* means that *law is the structure and medium of the state, not an external limitation to it*; the days of the discretionary pervasiveness of the *Polizeistaat* are over, thanks to a qualitative shift towards the *rationality* and *strict legality* of administrative action: the *supremacy* of which over ordinary citizens was granted despite the recognition of rights and the autonomy of individuals. While the guarantees given to individuals are part of the reshaping of the state, such guarantees defer to the persistent authority of state legislation. Liberty is not presupposed by the law but is considered as a product of the law. The distinctive mode

[1] R Carré de Malberg, *Contribution à la theorie general de l'Etat* (Paris: Sirey, 1920), Vol I, pp 488–9.

[2] The expression itself was made famous by L von Mohl, *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates*, Vols I–III (Tübingen: Mohr, 1832–4). See also EW Boeckenfoerde, 'Entstehung und Wandel des Rechtsstaatsbegriffs', in his *Recht, Staat, Freiheit* (Frankfurt am Main: Suhrkamp, 1991) p 144.

[3] Boeckenfoerde, n 2 above, pp 145*ff*.

[4] FJ Stahl, *Philosophie des Rechts*, Vol II, *Rechts und Staatslehre auf der Grundlage christlicher Weltanschauung* (1878); (reprint Hildesheim: Olms, 1963) pp 137*ff*.

[5] The reduction, made in the twentieth century in Hans Kelsen's theory, of the state to the law—to the network of a legal order's rules (see H Kelsen, *Pure Theory of Law*, trs Max Knight (Berkeley, CA: University of California Press, 1967) especially chs 6 and 7)—was in fact the reversal of the earlier reduction of law to the state (though hidden in law-bound state language).

of the *Rechtsstaat* lies in the connection between authority vested in the conservative aristocratic state, and protection of the new civil liberties: the latter being understood as a service offered through the state.[6]

The idea of *Rechtsstaat* in its overall European meaning includes in its institutional organisation both the *separation of powers* and the so-called *principle of legality*, which requires that no authority can exist which is not created and conferred by legislation. The concrete result is the rule of the *state over society*. What Georg Jellinek said about 'public subjective rights' being a *self-obligation* of the sovereign, that is, of the state,[7] means that the state is ready to recognise individuals as being entitled to rights and equality *before the law*, but that the sovereignty of the state is still the dominant source of what should count as law. The development of the state in the nineteenth and twentieth centuries as an administrative power was decisive in shaping the contours of the *Rechtsstaat* in Otto Mayer's definition,[8] as a state in which the administrative power is created by *legislation*, conceived of as a product of the (of course, largely elitist) parliaments.

In consequence, the priority of legislation may formally protect some rights of individuals, but it also subordinates them; and under the separation of powers the independence of the judiciary is called upon rigidly to respect the legislative will. *Dura lex sed lex.* This does not show simply a limitation of power—a condition of being 'bound by the law'. It is a different concept. Law is the specific voice of the state and expresses its own will: law is not the constraint but rather the 'form' of the state's will.

In fact, legal codification, a long process stretching from the seventeenth to the twentieth centuries, meant that the common law of the land was replaced by the certainty of legislation. Codification overcame privileges, particularities, uncertainty and arbitrariness engendered by the frustrating multi-layered and multi-sourced law of the still fragmented European territories. It notably referred the law to a universal addressee (the individual *sans phrase*),[9] moving beyond feudal privileges, and imposed its rationality, unity, and above all, its alleged completeness—another cardinal concept peculiar to the continental mindset, according to which positive legislated law both incarnates a holist rationality and pre-regulates or foresees every future case.[10] Since legislation was the highest and exclusive source of the law, it had to be conceptually comprehensive, showing no gaps whatsoever. Moreover, there was no place for any

[6] See L Krieger, *The German Idea of Freedom* (Boston: Beacon Press, 1957) p 14.

[7] G Jellinek, *System der subjektiven öffentlichen Rechts,* 2nd edn (Tübingen: Mohr, 1919).

[8] O Mayer, *Deutsche Verwaltungsrecht*, vol I (Leipzig: Duncker & Humblot, 1895) pp 64*ff*.

[9] G Tarello, *Storia della cultura giuridica moderna. Assolutismo e Codificazione del diritto* (Bologna: Il Mulino, 1976).

[10] Cf N Bobbio, *Teoria generale del diritto* (Torino: Giappichelli, 1993) pp 241–3.

superior institution, or for any superior check on the law. The growing irrelevance of the common law, roman law, customary law and natural law—gradually superseded by the need for unity, clarity and certainty of law—combined with the secularised nature of power to allow not only an ultimate sovereignty of the state, but also its self-reference, that is to say, a sense of the state and its positive laws as being founded just on itself.

Legality therefore provides for legitimacy, it aims to embody legitimacy within itself, as Schmitt also reminded us.[11] But as soon became clear, sheer legality meant nothing in the eyes of those who could decide on the 'state of exception'. The 'form' of legislation was not such a limit, and did not provide for a self-standing constraint on the open-ended nature of political 'decision',[12] but rather for its legalisation.

Of course, this state of affairs might appear, unsurprisingly, to be just as obvious a feature of legal positivism, with its decisive division between the validity of rules in positive law and requirements of morality, justice and natural law. But the point to be stressed here is rather different: there is nothing behind, or before, legislation, *das Gesetz*, *la loi*, *la legge*. The weakness of the *Rechtsstaat* was not the alleged poverty of legal positivism, but, more basically, the lack of a plurality of equally relevant protagonists and actors on the (institutional) scene.

III. RIGHTS VERSUS LEGISLATION

There is no doubt that during the phase of the codification of the law, states' political attitudes also caused their authoritative ideas to become more liberal, incorporating especially civil liberties along with contract and property rights. The 'sacred' centrality accorded to contractual autonomy and private property in the Napoleonic Code, for example, is evidence of their ultimate value, which was as high as that assigned to the new political institutions. However, the development cannot be read as a mere record of the emergence of economic liberties. The subversive force of charters of rights, such as the 1789 Declaration of the Rights of Man and of the Citizen, marked a watershed in French law, and the end of the *Ancien Régime.* Immediately afterwards, once the Tables of the Law had been established, France's great lawyers and reformers endeavoured to protect positive legislated law from instability, change and the claims

[11] C Schmitt, *Legality and Legitimacy*, trs J Seitzer (Westport: Greenwood Press, 2002 (1932)).

[12] C Schmitt, 'The Problem of Sovereignty as the Problem of the Legal Form and of the Decision', in *Political Theology. Four Chapters on the Concept of Sovereignty*, trs G Schwab (Cambridge, MA: MIT Press, 1985 (1934)) p 30.

of natural law.[13] The same pattern was generally followed throughout the rest of Europe, from Spain to Italy, and eventually to Germany in the *Buergerliches Gesetzbuch* of 1900, thus granting a unitary (logically) ordered corpus of rules universally valid (as to subjects and territories).

The main French concern became that of having an unadulterated 'democratic' inspiration for the institutions (rooted in Sièyés and Rousseau), rather than to allow a new opening to natural rights through interpretative liberty, or to grant rights a force equal to the sovereign will (that is, *legislation*). Its political justification offers *la loi* itself the powerful character of sovereignty, through the National Assembly and the legitimising myth of the French nation. Considering the French model of state in the early twentieth century, Carré de Malberg[14] was conscious that the parliamentary monopoly over state sovereignty was a potential danger to French liberties—all the more so given the traditional French hostility to *le gouvernement des juges*, and since the French Parliament had assumed that its popular roots justified its peculiar nature both as *pouvoir constituent* and *pouvoir constitué*. *La loi* is meant to express the final and supreme regulation which has no peer: neither the King, nor the *raison d'état*, nor the appeal to natural law, can override it. From our perspective, it can be said that the German equivalent was *die Herrschaft des Gesetzes*: in a different context, *das Gesetz* is the ultimate source of the law, beyond the contrasting dualism of the King and representatives.

The law-based state that came about in Europe, despite major differences in the various nations, was based neither on the rule of law, nor on the practice of modern constitutionalism, as it developed in the 1787 US Constitution. Instead of the flag of rights, the general prevailing idea was that there is almost nothing which can be real unless it is in legislation. The liberal state, of course, protected the late eighteenth-century 'bourgeois' freedoms; and the Napoleonic Code was so high and solemn an instrument for private law as to be called the 'Constitution of the Bourgeois'. But the tussle between rights and public power could only be 'decided' by legislation; accordingly, the view of the self-limitation of the state developed, outside of which nothing autonomous could be recognised, not even 'rights'.[15] The latter cannot be intended as demonstrating any external limits against the omnipotence of legislation.

The persisting 'legalistic' stamp of rights here can only reflect a substantially residual idea of freedom (as that to which the law is deemed

[13] As then was taught by the hegemonic school of exegesis, the *caenaculum* of the high priests of the Napoleonic Code, whose real objective was no longer to proclaim the priority of open-ended natural rights, but the untouchable status of the Code itself, both in relation to natural law and discretionary interpretation.

[14] Carré de Malberg, n 1 above, pp 140*ff*.

[15] Jellinek, n 7 above.

to be indifferent). As Von Gerber wrote in the middle of the nineteenth century, while the concept (and reality) of the rule of law had already spread itself even as far as the United States and its constitutional setting, rights depend on the state leaving 'free, outside its circle and influence, that part of the human being that cannot be subjected to the coercive action of the general will in accordance with the ideas of popular German life'.[16] Thus it is true that rights did not consist of any 'substance', but only of a form (the legal form of the legislative reservation).[17] This is ultimately the conception according to which 'the "law" is what the state determines it to be' and 'individual rights are, and must be, defined by the state and, as a consequence, are necessarily dependent on the state. In this vision of reality the state itself, along with its various arms and agencies, is subject to no rules beyond its internal limits' and there is 'no meaningful constitution in this construction'.[18]

In the history of the European continent the collective ground of community and the implicit idea of the common weal were the prevailing good that took priority over ideas of justice. Continental Europe recognised the 'intrinsic' value of *institutional certainty*, through the state. Therefore the only *possible* form of protection for individual rights was not the courts or some common law or natural law catalogue, but the priority of legislation.

The declaration of independence of rights from state legislation was written down and accorded recognition only when contemporary constitutions were written, that is, in the twentieth century. It was the constitution, and not legislation, which created this autonomy—a state of affairs long awaited in continental Europe. Constitutional rules and principles granted fundamental rights as high a rank as parliamentary legislation and the democratic principle. Through an effective constitution individual rights came to be placed *on the same plane* as the public weal of the institutions (*salus publica suprema lex*). Prior to this, it would have been impossible in Europe to follow the logic embedded in the rule of law.

IV. THE DISTINCTIVENESS OF THE RULE OF LAW

The rule of law in Dicey's influential definition incorporates a self-reference of law (*droit*) that is missing in the *Rechtsstaat*, which vests its faith in state

[16] CF von Gerber, *Über öffentliche Rechte* (Tübingen: Mohr, 1913 (1852)) pp 64–5.

[17] See G Zagrebelsky, *Il diritto mite* (Torino: Einaudi, 1992) p 59. This same antiquated conception is laid at the door of all the 'legal positivisms' contemporary to us by theorists who, like the economist James Buchanan, aspire to a society ruled by some limited procedural rules: *cf* J Buchanan, *Freedom in Constitutional Contract. Perspectives of a Political Economist* (College Station: Texas, A & M University Press, 1977) p 290.

[18] This appropriate definition was coined by Buchanan: its only defect (see previous note) is that it does not refer to German legal writing in the late nineteenth and early twentieth centuries, but erroneously to 'legal positivism' pure and simple (*ibid*).

supremacy. The rule of law imports a peculiar idea of limitation of the material power of men, a limitation which is, of course, apparent not only in the subordination of every citizen (with no exception for officials) to the judicial power of the ordinary courts, but also in Dicey's statement that 'with us … the rules that in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of the individuals, as defined and enforced by the Courts.'[19]

Reading Dicey, the rule of law appears to consist of a history of institutional conventions, custom and social practice where law is interconnected with a particular system of power. But even if the supremacy of the English Parliament is beyond doubt, its inclusion in a wider framework of understanding of authority has a broader resonance. The principles inherited[20] in the line which unites Henry de Bracton (through the duality of *gubernaculum* and *jurisdictio*) with Edward Coke (in Bonham's case[21]), the US Federalist Papers and ultimately the US founding of judicial review are—despite their differences—evidence of a general unitary logic.

There is a plurality of sources which go together to make up the intrinsic diversity of the law of the land. That plurality allows for rights to be retained and emerge with an autonomous aspect. This invites three closer considerations. To begin with, the law also includes parliamentary sovereignty, that is, the unlimited authority of legislation, the assumption that as a matter of abstract law legislation can even infringe rights[22]: this was the motivation for the 'grotesque expression' (as cited by Dicey from De Lolme) that the English Parliament 'can do everything but make a woman a man, and a man a woman'.[23] However, sovereignty is complex, shared between the Crown, the Lords and the Commons, and the law has a wider scope: as a matter of fact, it includes a main second pillar, the common law and the courts, which are in fact the ultimate interpreters of the legal system as a whole. The complexity of legal achievement in the diverse denominations of common law, precedents, customary law, conventions and rights, is entirely relevant to the rule of law. Indeed, they are founding elements of the rule of law, so much so that Dicey recognised in the rule of law certain quintessentially English features: that no man can be punished for what is not forbidden by the law, that legal rights are determined by the ordinary courts and that 'each man's individual rights are far less the result of our constitution than the basis on which that constitution is founded'.[24]

[19] AV Dicey, *Introduction to the Study of the Law of the Constitution*, ed ECS Wade, 8th edn (London: Macmillan, 1915) p 121.

[20] See more generally N Matteucci, *Lo Stato moderno* (Bologna: Il Mulino, 1993) pp 157–8.

[21] 8 Co Rep 114 (Court of Common Pleas [1610]).

[22] This comes from Blackstone's *Commentaries*, which in turn report Edward Coke's most famous words about the unlimited legislative authority of Parliament: Dicey, n 19 above, pp 4–5.

[23] *Ibid*, p 5.

[24] *Ibid*, p lv.

This last point invites a second principal remark. These common law roots locate certain qualified rights at the foundation of the constitution, and not on the level of the *consequences* of the constitution. But this endows the constitution and the rule of law with the *historical* content of liberties: as part of *positive law,* not abstract claims from natural law (or, say, organic) doctrines. It cannot be made equivalent either to some appeal to nature or to the fundamental and obscure soul of the *Volk*.

Third, the experience of a law which incorporates the foundational individual rights of the English is also testament to the conventional and historical character of law that has matured through prudential judicial assessment. This feature stands at odds with the self-reference of the formalist idea of legality, the final positivistic turn of the *Rechtsstaat*, the emptiness of which was easily laid bare when Mussolini or Hitler purported to take power 'legally' and under the authority of the posited law.

The institutional premises are substantively different. The rule of law prevented violations of substantive liberties and provided procedural guarantees (such as habeas corpus and due process[25]), and its organisation of powers proved to be safe. It does not simply correspond to the law in general, but to the law in a specific setting, that is to structures, practices, ideas, in their institutional concretisations. We can reduce law to an instrument, perhaps, but we cannot depict the rule of law, with its specific institutional historical content, as being reducible to empty means.

Moreover, if we were to look at the rule of law as a form re-presenting the state, we would be making a big mistake. Looking through an institutional (not just legal theory) lens, Giovanni Sartori has noted that 'the Rule of Law does not postulate the State, but an autonomous law, external to the State: the common law, the case law, in sum the judge made and jurists' law. Therefore, there is a "rule of law" without the State; and more exactly it does not require the State to monopolise the production of law.'[26] In fact, as we know, *Rechtsstaat* engendered *Staatsrecht*, as the unifying source of the law, and the mode of this unification was caused on one side by the centrality of the state, and on the other side by the artificial character of general and abstract norms, refined through the scientific construction which made the codification possible.[27] However, while the

[25] Article 39 of the Magna Carta (1215) reads: 'Nullus liber homo capiatur vel imprisonetur, aut desseisetur de libero tenemento vel libertatibus, vel liberis consuetudinibus suis, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae.' ('No free man shall be captured, and/or imprisoned, or deprived of his freehold, and/or of his liberties, or of his free customs, or be outlawed, or exiled, or in any way destroyed, nor will we proceed against him by force or proceed against him by arms, but by the lawful judgment of his peers, and or by the law of the land.')

[26] G Sartori, 'Nota sul rapporto tra Stato di diritto e Stato di giustizia' (1964) I–II *Rivista internazionale di filosofia del diritto* 310–16.

[27] The capacity of the *Staatsrecht* to be the reason for popular obedience to the *Rechtsstaat*, the modern state, as Weber observed, boils down to the known coincidence between

reality of a *Stato di diritto* is the self-subordination of the state by its own law, in the case of the rule of law the state is subordinated to a law which is not its own product.[28]

Here, it seems that the meaning of the rule of law depends on an enduring continuity with its own past. It would be very hard to accept its alleged coincidence with the exclusive substance of any single contemporary ideology.[29] When we refer to the rule of law, after all, we take account of many resilient ancient and modern factors, which have in part already been mentioned here.

A further note, however, should be dedicated to the glorious victory of the seventeenth-century English Parliament against absolutism, the restoration of the rights and privileges of the English people against the King's claims. Here, the parallel becomes even more instructive. While the *Rechtsstaat* or *l'état de droit* defeated the ultimate absolute power of the King *because* it was the King's, the Rule of Law defeated it because it was *absolute*.[30] The root is normally traced back to the thirteenth-century medieval rule of law:

> There appeared a noticeable reluctance to permit alterations in common law, and we soon hear of cases in which writs brought by the King were quashed by his own judges … To this extent at least, the rule of law was extended to limit prerogative action and to prevent the King from making further changes in the substantive rights and procedures of his subjects … But this was not all. The remarkable feature of the development was that the rights and remedies of the common law came to be identified with the rule of law itself.[31]

Also interesting on this point is Charles H McIlwain's elaboration on the pairing of *jurisdictio* and *gubernaculum*:

> For in jurisdictio, as contrasted with gubernaculum, there are bounds to the king's discretion established by a law that is positive and coercive, and a royal act beyond these bounds is *ultra vires*. It is in jurisdictio, therefore, and not in 'government' that we find the most striking proof that in medieval England the Roman maxim of absolutism was never in force theoretically or actually.[32]

legitimacy and legality, the faith that scientific law really could ensure certainty through the alleged neutrality beyond the conflict of values.

[28] Sartori, n 26 above, p 311.

[29] Like the liberal ideology, in a line which is later on elaborated in the 'rule of law' conception (but truly the rule of the 'good law' (Joseph Raz, 'The Rule of Law and its Virtue', in his *The Authority of Law: Essays on Law. and Morality* (Oxford: Clarendon Press, 1979) p 227); proposed by Hayek in *The Road to Serfdom* (London: Routledge, 1944) ch 6).

[30] K Kluxen, *Geschichte und Problematik des Parlamentarismus* (Frankfurt am Main: Suhrkamp Verlag, 1983) pp 50*ff*; and Zagrebelsky, n 17 above, p 26. See also the reconstruction by Zagrebelsky at pp 24–9.

[31] GL Haskins, 'Executive Justice and the Rule of Law: Some Reflections on Thirteenth-century England' (1995) 30(4) *Speculum* 529–38 at 535–6.

[32] CH McIlwain, *Constitutionalism: Ancient and Modern* (Ithaca, CA: Cornell University Press, 1940) p 85.

As far as these insights are correct, the rule of law appears to be built on a diversity of sources of law, and can reflect a clear tension within the justice–government coupling. In particular, justice tends to refer to the law of the courts and the common law, and does not present itself as an appeal to some ideal of rational or natural justice through its posited normative authority and force.

V. *JURISDICTIO* AND *GUBERNACULUM*

The decline in the image of unity and supremacy of the state and the twentieth-century transformations of the *Rechtsstaat* into the *constitutional* state, among other significant historical developments, have brought to the fore the question of the modern-day meaning of a trans-institutional idea of the rule of law—one which should, of course, not be hostage to an overstated divide between civil law and common law countries. My present claim draws on the consequences of our inherited concepts. As long as the rule of law is a concept with institutional, historical and normative meaning, it says *more* than it might appear to. It does designate a particular cultural reference to law, but also a normative sense which might be extended elsewhere. Our responsibility is to identify which theoretical meanings can best interpret the ancient concept within our present-day horizons. The *jurisdictio–gubernaculum* pairing appears both to sum up appropriately the institutional-historical *rationale* and to promise a potential openness, due to its reference to the rule of law as a peculiarly balanced relation.

'The aspect of jurisdictio which is most important', according to McIlwain's description, 'is the negative one—the fact that in jurisdictio, unlike gubernaculum, the law is something more than a mere directive force'.[33] This aspect of the law is therefore different from the expression of power or will. Nonetheless, it is not the evocation of morality. McIlwain is quite aware of the dividing line between law and morality:

> The famous thirty-ninth chapter of Magna Charta contains merely the classical statement of a principle that was always insisted upon and usually enforced as a rule of positive coercive law, and not, as the Austinians would say, as a mere maxim of positive morality—the fundamental principle that the king must not take the definition of rights into his own hands, but must proceed against none by force for any alleged violation of them until a case has been made out against such a one by 'due process of law'.[34]

[33] It goes on: "It is not merely the vis directiva of St Thomas, or the moral inhibition implied in the Digna vox. Those ought to guide the will of a king and, if he is a good king, they will. But the king may legitimately disregard them, for they are only self-imposed; and, if he refuses to be so guided, he is within his undoubted legal rights in so doing. This is true, however, only within the sphere of government (gubernaculum). It is never true in the sphere of jurisdictio, although the king is the sole fountain of justice.'

[34] *Ibid*, p 86.

Enhancing the *jurisdictio* side as 'part of the law' has thus a decisive importance. It means that it is an integral part of the rule of law in an institutional setting in which, as noted above, the sovereign does not exhaust the law. The rule of law depends on a distinction. On the one hand, there is that part of the law rooted in the particular jurisdiction, protecting its positive idea of justice and giving liberties their due; it is the part formed through judicial decisions, the common law and conventions; On the other hand, the *gubernaculum*—the will of the sovereign—embraces instrumental aims and government policies. As a matter of fact, on one side we find, so to speak, the concrete achievements of minimal requirements of coexistence, respecting the individuality of human beings; on the other side the sphere of 'the good' (including the common good), evolving through time. The ultimate power of a polity could avail itself of the law only in part: that which is under its sovereign prerogative.

The fundamental law of the land appears, then, to be a complex and collective construct. What is deemed justice is itself artificial, law made by many hands, through the wisdom of decades or centuries. *Jurisdictio* refers to law: but, in this domain, men have the duty to say and declare it (*jus dicere*), rather than to choose or decide. There is, then, some part of the law which remains at the disposal of the sovereign; but the other aspect of law is not at his disposal, and to that other aspect the sovereign is thus bound to defer.[35]

As McIlwain wrote:

> In the Middle Ages, as always, there was, of course, the salutary threat of revolution against an oppressive government; but it is a contradiction in terms to call such a check a constitutional or legal one. Within the frame of what we might call the constitution, government proper, as distinguished from jurisdictio, was 'limited' by no coercive control, but only by the existence beyond it of rights definable by law and not by will.[36]

The absence of sanctioning through legally coercive devices does not, however, necessarily coincide with and does not essentially mean *not counting as law*, or being *outside of it*. It is well known to jurists who consider the essential features of, say, constitutional law or international law.

Much of this inchoate justice has been clarified as having been present in the medieval tradition, from which the Enlightenment's experience, especially through the codification of law, was inspired. As the declarations of Enlightenment revolutionaries from the eighteenth century show, justice is considered to protect certain properties of the individual,

[35] This aspect was highlighted years ago also by Habermas, speaking of non-disposability (*Unverfügbarkeit*): see 'Law and Morality', in *Tanner Lectures on Human Values*, vol VIII (Salt Lake City, UT: University of Utah Press, 1988) pp 217–79.

[36] McIlwain, n 32 above, p 90.

progressively deemed to be truths of reason.[37] Of course, regardless of whether it is deposited in the tradition of the English institutions and laws, or in natural reason, those 'properties' of human beings are still considered not to be dependent on parliaments or on democracy.

If this were to be denied, it would alter the balance between conditions of inter-subjective justice, liberties and sovereign prerogatives. As a general notion, then, when some rights, or some relations of justice which are *conceptually unrelated* to the choice of any sovereign (whether the King in Parliament, or the people, or the Nation, and so on), come to fall 'legally' under the purview of the sovereign, a whole part of the law has virtually faded and has been pushed out, with the effect that its normative claim is left out as belonging at best in pure morality. In this case—and we should take the following as a *caveat*—there is no longer a division between *gubernaculum* and *jurisdictio*. That *caveat* is what I understand as being at the heart of the rule of law.

I am not suggesting that there is somewhere a substantive conception of justice, which can be defended on the basis of rational natural law arguments, as for example is done in masterly fashion in the outstanding work of John Finnis.[38] Instead, the meaning of the rule of law, especially in comparison with the experience of the *Rechtsstaat*, does not simply incorporate certain prerequisites—whether procedural or substantive—into the definition of law, but rather fidelity to an idea of a *relation*. It implies respect for and protection of the opposition—to use freely these solemn terms—between two sides of the law, that is, between *gubernaculum* and *jurisdictio*, with all their historical evolutions and equivalents.

That very relation in fact eventually disappeared in the modern history of continental Europe, with the institutional subordination of rights and justice under the will of the sovereign, with any competing law being eliminated or sidelined. For example, the structure of the *Stato di diritto* was typically a legal reason to debase the claims of some to a possible institutional protection and *locus standi*: if the law exhausts itself in the monopoly of legislative sources, and if the latter does not mention a right, then neither harm nor offence can 'legally' occur. And if no harm or offence can be alleged, the lack of *locus standi* prevents any challenges to the law from being heard.

Of course, it is possible to present the same problem from the viewpoint of the link between the morality of certain rights and positive law. But the issue at stake here is not whether the validity of law may be made dependent on moral arguments, or whether there are any necessary connections between moral standards and legal rules or principles. The

[37] An overview is supplied by BZ Tamanaha, *On the Rule of Law. History, Politics, Theory,* (Cambridge: Cambridge University Press, 2004).

[38] J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

important point does not concern the emptiness of legal positivism or its indifference to the substantive content of the valid law and its moral value. Rather, it concerns the very possibility of the rule of law: whether one can conceive of a different law other than that produced by the sovereign, thus allowing for a broader understanding of social normativity. This in turn concerns the practicability of principles of 'justice' in Western legal systems, whether stated in the founding and revolutionary charts of modernity—in national constitutional documents, or the statutes of contemporary supranational organisations—predominantly in the sphere of the protection of rights. The autonomy of the *jurisdictio* side of the law and its connection to rights and wider common values has today been broadly positivised in national constitutions as well as in international charters and conventions.

Yet this side of the law and its corresponding institutional and social practice clearly remains a prerequisite for the rule of law to exist as a relationship of the kind argued here (that is, *jurisdictio–gubernaculum*). Focusing on that general relationship means that we can denote the rule of law as it is, as well as being capable of normative extension beyond its territorial manifestation in each particular instantiation.

VI. THE RIGHT AND THE GOOD

The relationship mentioned above between sovereignty and—as we might call it—the realm of rights, considered as a matter of law, suggests its affinity with the corresponding philosophical opposites of ethics and justice. The rule of law, in a sense, entails relying on the conceptual capacities of both the 'right' and the 'good'.

In fact, when the law destroys this relationship and its vitality, it falls into the trap of the full moralisation—or 'ethicisation'—of the legal system, which is a characteristic feature of totalitarian regimes. Writing in the middle of twentieth century, an eminent constitutional historian saw in his times 'a constant threat to all the rights of personality we hold dearest—such rights as freedom of thought and expression and immunity for accused persons, from arbitrary detention and from cruel and abusive treatment'.[39] He defined those circumstances, saying that 'never has *jurisdictio* been in greater jeopardy from *gubernaculum*'. His institutional history leads him to conclude that: 'If *jurisdictio* is essential to liberty, and jurisdiction is a thing of the law, it is the law that must be

[39] McIlwain, n 32 above, p 139. In a highly contemporary language he notes that 'in some parts of the world apparently all such safeguards of individual right and personality have been thrown down entirely and no one is safe from prosecution *ex officio mero*, secret, arbitrary, and irresponsible. "Reasons of state" have been urged in the past for just such enormities, but probably never on such a scale as at this moment' (p 140).

maintained against arbitrary will.'[40] Again, *jurisdictio* is associated with the preservation of the law rather than with the preservation of a sort of external morality. But nonetheless, it incorporates the side of positive law whose contents refer to 'the right' rather than to 'the good' as a sovereign political choice. Where the rule of law is absent, justice, or 'the right', has no shield, and provides no filter against the contingency or absoluteness of ethics, that is, against the 'tyranny of values',[41] which can be, and often have been, totalitarian.

As a question of moral and political philosophy, this opposition was actually mirrored in an important part of John Rawls' work, first in *Theory of Justice* and subsequently in *Political Liberalism*.[42] As he wrote, the 'principles of right, and so of justice, put limits on which satisfactions have value; they impose restrictions on what are reasonable conceptions of one's good'. Principles of justice 'specify the boundaries that men's systems of ends must respect … Interests requiring the violation of justice have no value.'[43] This also holds true of political action pursuing ethical values of the majoritarian groups or interests. In Rawls' construction, justice takes precedence and helps to shape the admissible prospects of action towards the good.

This general view is in fact linked, as Rawls knows, to the *Critique of Practical Reason*, where Kant clearly argues that our concept of the 'good' should *not* determine what is just and 'make possible the moral law', but 'it is on the contrary the moral law that first determines and makes possible the concept of the good'.[44] Moral legislation requires the universal recognition of human beings as coexisting, under innate equal liberty. It concerns justice, not the good, nor happiness:

> No one can coerce me to be happy in his way (as he thinks of the welfare of other human beings); instead, each may seek his happiness in the way that seems good to him, provided he does not infringe upon that freedom of others to strive for a like end which can coexist with the freedom of everyone in accordance with a possible universal law (i.e. does not infringe upon this right of another).[45]

[40] *Ibid*, p 140.

[41] C Schmitt, *The Tyranny of Values,* trs Simona Draghici (Washington, DC: Plutarch Press, 1996 (1959)).

[42] *Theory of Justice* (Cambridge, MA: Harvard University Press, 1971); *Political Liberalism.* (New York: Columbia University Press, 1993).

[43] Rawls, *Theory of Justice*, n 42 above, p 31. This statement falls within the 'particular meaning' of the priority of justice, as distinguished later on by Rawls from the 'general meaning' in his *Political Liberalism* (n 42 above, p 209). For Rawls, 'the general meaning' refers to the priority of the right as a political conception 'so that we need not rely on comprehensive conceptions of the good but only on ideas tailored to fit within the political conception' (*ibid*).

[44] I Kant, 'Critique of Practical Reason', in his *Practical Philosophy*, trs and ed MJ Gregor (Cambridge: Cambridge University Press, 1996) p 191.

[45] I Kant, 'On the Common Saying: "That may be correct in theory, but it is of no use in practice"' (1793), in his *Practical Philosophy*, n 44 above, p 291.

These very conditions of coexistence can be coerced through the law. But, with Kant, the task of law remains that of removing obstacles to liberty:[46] the guarantee of the 'negative' external freedom of the private sphere, a guarantee which precedes and does not even imply any confusion with ethics. So a precept's moral and rational validity does not depend upon its conformity with any particular ethics or any view of goodness and happiness. With Kant therefore, rational legislation 'is not mingled with anything ethical'.[47]

The protection of the spheres of freedom (and of possession) of each person is a question of justice. This is also evident in Kant's claim that men would be failing justice if they did not create a civil state in which 'mine and yours' can be preserved: in the absence of a civil state, nobody

> is bound to refrain from encroaching on what another possesses if the other gives him no equal assurance that he will observe the same restraint toward him … Given the intention to be and remain in this state of externally lawless freedom, men do *one another* no wrong at all when they feud among themselves … But in general they do wrong in the highest degree by willing to be and to remain in a condition that is not rightful, that is, in which no one is assured of what is his against violence.[48]

From this passage of extraordinary importance, it appears that law and justice are *conceptually* required in order to avoid the condition in which the abuse of personal liberty is unobjectionable. At the same time, it is true that justice in law here is *separated* from ethics: whatever value of life or social construction dominates, it has to accommodate itself within the co-ordinates of this minimal justice to human beings. This conceptual distinction depends on a transcendental *ideal* of law, which sees law as the condition of co-existence through liberty, before any ethical objective can be actually pursued through the means of existing law. There is, therefore, a necessary distinction, and a necessary connection, between justice on the one hand and ethical and political choices on the other. And one of the main risks that law (under the rule of law ideal) can run is the loss of the institutional settings, social guarantees and practices which defend this relationship in different legal orders and societies.

In the same way, (negative) liberty is a typical legal condition for moral agency, and for autonomy to develop the capacity to pursue the 'good' in the different scales of substantive values.[49] The point is that, for Kant,

[46] According to Kant, the law's possibility of coercion should be understood 'as a hindering of a hindrance to freedom' (I Kant, 'The Metaphysics of Morals' (1797), in his *Practical Philosophy*, n 44 above, p 389, 'Introduction to the Doctrine of Right'.

[47] *Ibid*.

[48] I Kant, 'The Metaphysic of Morals' (1797), in *Practical Philosophy*, n 44 above, p 452 'The Universal Doctrine of Right. Part I'.

[49] Among the most widespread controversies of recent decades, the debate between *liberals* and *communitarians* illustrates every aspect of the issue of the debate between the just

in other words, one cannot attain the 'good' in any form if the question impinges on the life of other worthy subjects to the detriment of the 'right'. This says nothing against the importance of the 'good', but of course locates it within a vital tension.

From different premises, St Thomas Aquinas argued that if the principal goal of a captain were that of preserving his ship, he would have to keep it anchored in port forever: but the ship must sail, and this is the ultimate goal which the captain must also have.[50] *Mutatis mutandis*, justice is not all there is about society and human beings, and it would not be sufficient on its own. Society must sail. It pursues the common good. Should we follow only this second directive, we might need a shared, unitary, communitarian view of an objective good, any prospect of which we know has been lost through the modern secularisation of thought and of law.

Among Max Weber's contributions to the sociology of our contemporary law, it is maintained that after the decline of the sacred foundation of values, the formalisation of law emerged as the only way of legitimising power (that is, the state) on the basis of the regularity, certainty and rationality of its law.[51] This formal property of law—its rational core—means that general rules are applied by unbiased and impartial methods. By excluding mere procedural arbitrariness, it makes obedience possible. In the heterogeneous realm of substantive ideas of the good, the ethics of values nurtures conflicts, and is too strong—as Habermas has noted—to be an instrument for legitimation that can cope with the Weberian 'pluralism of idols'. In a sense, the law serves instead as the formal instrument which guarantees both policy choices to the sovereign as well as a 'universal' frame of reference. This service is offered by the law through the delimitation of its domain against external imperatives: therefore, the validity of a legal rule is a question to be answered on a formal and

and the good, so offering many useful and persuasive arguments. For example, among the protagonists of this debate, Michael Sandel has argued that although a certain conception of the moral subject is the presupposition of the primacy of justice, a moral theory must give an explanation of the good as well as of the right, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982)).

[50] S Tommaso d'Aquino, *La Somma Teologica*, I–II, q 2, to 5, (ed); Italian translation and commentary by the Italian Dominicans, Latin text of the Edizione Leonina (Bologna, 1985), vol. VIII, p 72: 'it is impossible that the ultimate end of a thing be the conservation of the same, when it is already ordained to an end distinct from itself. A pilot, for example, cannot consider the conservation of the ship entrusted to him as the ultimate end: because the ship is already ordained for a more distant end, that is for navigation.' (In the original: 'impossibile est quod illius rei quae ordinatur ad aliud sicut ad finem, ultimus finis sit eiusdem conservatio in esse. Unde gubernator non intendit, sicut ultimum finem, conservationem navis sibi commissae; eo quod navis ad aliud ordinatur sicut ad finem, scilicet ad navigandum.')

[51] M Weber, *Economy and Society*, vol II, ed G Roth and C Wittich (Berkeley, CA: University of California Press, 1978). Weber complains against the deformalisation of law at pp 882*ff*, and p 886. See also J Habermas, *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1992), trs W Rehg, (Cambridge: Polity, 1996) pp 124*ff*.

procedural basis, irrespective of the merit of its substantive content. Even so, however, as Habermas has further noted, the normativity of a universalised service of law, freed from arbitrariness, should have for those whom it affects a moral importance.[52]

We can better understand this comment only on the basis of Habermas's belief that there is more to the law than just sovereign rule. His arguments are based on a deep contrast between morality and ethics, assuming that the rules of social respect and co-existence fall within morality, while ethics refers to goals valued individually or through collective deliberation. Morality refers to justice in a sense that calls for justification of our claims on the basis of the principle of universalisation.[53] While Weber gave up his engagement in the confrontation among values as lacking any possible common frame of reference, Habermas promotes the 'system' of basic rights of individuals as providing for the procedural guarantees which structure the deliberative exercise of popular sovereignty. This is based on his thesis of the co-originality of both the system of rights and popular sovereignty.[54] The first is the condition for the second to be channelled only to those choices which can be made respecting those rights of each and all, and which will produce free discourse and fair participation. Accordingly, private autonomy and public autonomy are seen as reinforcing each other. In a sense, the role for the distinction between the 'right' and the 'good' is less that of supplying one substantive popular choice through procedural fairness than of providing for the universal grammar of justice, that is for the terms of its justification.

In Rawls' model, a conception of justice is also called upon as a condition for allowing only some conceptions of the good, that is those which can overlap on the institutional requisites for liberal 'political' justice.[55] Of course, Habermasian categories imply that the required contents of rights are to be elaborated inside the law, in accordance with the procedural

[52] Habermas, n 51 above.

[53] Which of course re-elaborates the Kantian categorical imperative—'act only in accordance with that maxim through which you can at the same time will that it becomes a universal law': I Kant, 'Groundwork of the Metaphysics of Morals', in *Practical Philosophy*, n 44 above, p 73. It is possible to see how Habermas draws upon this in many of his works, in particular applying it to the 'D' principle that governs his discourse ethics ('Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses': J Habermas, *Between Facts and Norms*, n 51 above. p 107). In any case, the moral point of view is related to universality: a norm can be considered to be right by all possibly affected persons who use rational arguments and exchange them in conditions free of constraint: the universality of this moral point of view is in this sense independent both of individual preferences and of individual substantial ethics. It therefore distinguishes between the moral point of view and the ethical one of an Aristotelian, contextual type.

[54] Habermas, n 51 above, especially pp 82–131.

[55] See Rawls, *Political Liberalism*, n 42 above.

constrains of deliberative democracy.[56] Yet for all their major differences, both Rawls and Habermas premise their arguments on the conceptual distinction between the right and the good.[57]

It can fairly be said, in summary, that the tension between these two poles can be protected through institutional devices as well as by the law when it pursues the ideal of the rule of law—demanding the non-disposability of justice (*jurisdictio*) by the rule of the sovereign.

VII. DEFINITION THROUGH REQUIREMENTS

When dealing with the rule of law, legal theory concentrates typically on the features which law generally needs in order to rule.[58] The issue as to which characters are constitutive of the rule of law has been widely discussed from a range of perspectives, and the question is no stranger to controversy. Nonetheless, general attention has been devoted to the eight requirements listed by Lon Fuller,[59] and to the influential contribution of Joseph Raz. For Raz, non-retroactivity (that is, prospectivity), publicity and clarity, stability and generality of rules are required, together with institutional settings which guarantee judicial independence, compliance with the principles of natural justice (open and fair hearing, absence of bias); access to courts and their review powers; and limitations on the discretion of prosecution authorities.[60] All these main prerequisites derive from the essential objective of the law, which is that of *guiding behaviour*.[61] This common rationale lies at the core of both the separation of powers and their subordination to law. Since they are regarded as efficient means of achieving this objective, these requisites are morally neutral, as in the positivist scheme. Accordingly, in the latter, legal validity does not depend on moral sources but only on social sources: the 'sources thesis' rules out the possibility of a norm's moral character being a reason for its legality.[62]

[56] Habermas, n 51 above, especially pp 302–28. For some criticism as to the risk of mere circularity see G Palombella, 'From Human Rights to Fundamental Rights. On the consequences of a conceptual distinction' (2007) 93 *Archiv für Rechts- und Sozialphilosophie* 396–426.

[57] Kant, Habermas and Rawls do not refer to an identical model of the social system. However, both Rawls and Habermas are concerned with the modern liberal democratic state.

[58] J Waldron, *The Concept and the Rule of Law*, available at: www.law.nyu.edu/clppt/program2006/readings (as of 25 May 2007). Instead of starting from the concept of law, so to define accordingly the features inherent in the 'rule of law', Waldron suggests starting from the latter as controlling, accordingly, the concept of law.

[59] Generality, clarity, promulgation, stability, consistency between rules and behaviours, non-retroactivity, non-contradictory rules, nor requiring the impossible: L Fuller, *The Morality of Law*, 2nd edn (New Haven, CT: Yale University Press, 1969) ch 2.

[60] J Raz, 'The Rule of Law and its Virtue', in his *The Authority of Law: Essays on Law. and Morality* (Oxford: Clarendon Press, 1979) pp 214–18.

[61] *Ibid*, p 214.

[62] *Cf* J Raz, *The Authority of Law*, n 60 above, pp 47*ff*. See also his *Ethics in the Public Domain*, (Oxford: Oxford University Press, 1996) pp 210*ff*, especially pp 230*ff*.

It follows that a perspective of *neutrality* accepts that it is possible for rights and human dignity to be infringed, even when those requirements of the rule of law are satisfied. This means, first, that law can infringe human dignity, which is historically proven, but more importantly, as a further consequence, that this can be done despite the rule of law.

As far as the question as to whether the law can violate basic rights and be unjust is concerned, the main alternative mindset to the positivist scheme of Raz and others is the natural law doctrine, which elevates morality to the ultimate criterion of legal validity, thus regarding unjust law as non-law. The validity of unjust law is indeed questioned from more than one perspective. Even positivism has opened itself up to moral standards, as with the theses of 'inclusive legal positivism'.[63] Ronald Dworkin's theory of adjudication and his moral reading of the law[64] have also been highly influential. And the line which goes from Gustav Radbruch's 'extreme injustice' argument to the 'special case thesis', which 'states that legal discourse is a special case of general practical discourse'[65]—most recently made by Alexy—is also highly relevant. However, this controversy will not be fully addressed here. The important instant point is less the requirements of the concept of law than the normative meaning of the rule of law as an ideal evolved and developed within our Western legal civilisation.

Returning now to the rule of law in its Razian variant, one may question whether this kind of definition (*via* requirements) does really provide a pure and neutral depiction of the rule of law. It is known, as well, that in his philosophy of law, Raz maintains the authority of law on the basis of a 'service' conception of law: its ability to issue valid reasons for action, that is to guide behaviour, is connected with the 'dependence' conception which refers those reasons back to the expectations and reasons of individuals.[66] This connection, consisting in the reference to those subject to it,

[63] Among others, see J Coleman, 'Constraints on the Criteria of Legality' (2000) 6 *Legal Theory* 175: 'whether or not morality is a condition of legality in a particular legal system depends on a social or conventional rule, namely, the rule of recognition ... If the rule of recognition incorporates no moral principles, however, then no such principles figure in the criteria of legality'. And WJ Waluchow, 'Herculean Positivism' (1985) 5 *Oxford Journal of Legal Studies* 187–210, arguing that 'if moral principles can be incorporated explicitly in a legal system's rule of recognition, then the validity of a norm X cannot be solely a function of its source, but also of its content, seeing that it must be considered in relation to its potential violation by a principle of justice. Although both the norm X and the "moral" principle depend on having a "pedigree", it remains, however, that *more* than X's pedigree is relevant in determining its legal validity' (p 194).

[64] R Dworkin, *Freedom's Law. The Moral Reading of the American Constitution* (Cambridge, MA: Harvard University Press, 1996).

[65] R Alexy, 'The Special Case Thesis' (1999) 12(4) *Ratio Juris* 374–84. As such it 'raises a claim to correctness' although 'special', because it is not 'concerned with what is absolutely correct, but with what is correct within the framework and on the basis of a validly prevailing legal order' (p 375).

[66] Each legal norm capable of exercising authority is expected to take previously existing reasons into account, that is, not to be issued regardless of merit (dependence thesis): J Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) p 47.

shows why the authority of law is not just its force or power of coercion, but rather the expression of an internal claim to legitimacy.[67] Finally, Raz's mention of 'natural justice' as a basic requirement of the rule of law should intuitively also incorporate premises such as those banning arbitrary killing, brutality, violence, torture, genocide, slavery, as well as unjustified discrimination: all converge in weakening the positivistic closure of the rule of law 'neutrality'.

Such a definition of the rule of law is based on the presupposition that the law serves as a means for guiding behaviour, but even this assumption might appear to be controversial. Raz is correct, however, in properly stressing the difference between a conceptual definition of the rule of law, and any definitions which pick up on political preferences over the *contents* of the law and translate them into *conceptual requirements* of the rule of law. The rule of law is indeed to be distinguished from the rule of the 'good' law.[68] For Raz this is true because the rule of law is a concept which embraces technical requirements, and its virtue is efficiency[69] in the light of its role as a 'behavioural guide', regardless of the good or bad goals for which it may from time to time serve as a means. It is therefore inconsistent to ask here for the rule of law *conceptually* to match our idea of the 'good law'.

Developing this proposition, the rule of law does not conceptually embody one of the heterogeneous purposes and ends that law should always pursue, irrespective of whether it is founded on, say, liberal or welfare state principles. It is highly questionable whether the rule of law, as understood by Hayek, that is as a formal, rule-based system, should be necessarily connected not only with liberty, but also with capitalism, and that by extension it cannot be compatible with the welfare state.[70] The question as to whether we should have a society based on Nozick's individualism or Rawlsian social fairness is not an issue for the rule of law. The ethical goodness of *law* certainly relates to its external *ends*: the good law is at root a matter of choice which depends on the prevailing values for any given person(s) in any given society.

But the proposition of the independence of the rule of law from law's ethical goodness should be accepted for a further reason, one which approaches the issue from a top-down rather than a bottom-up perspective. The rule of law cannot just be made to collapse into the prevailing ethical-political choices which belong within the domain of sovereign

[67] See Raz, 'Authority, Law, and Morality', in his *Ethics in the Public Domain*, n 62 above.
[68] Raz, 'The Rule of Law and its Virtue', n 60 above, p 227.
[69] *Ibid*, p 226.
[70] Hayek, *The Road to Serfdom*, n 29 above, and also his *The Constitution of Liberty* (London: Routledge, 1960). Raz's comments are in 'The Rule of Law and its Virtue', n 60 above, pp 227–8; see also W Scheuerman, 'The Rule of Law and the Welfare State. Toward a New Synthesis' (1994) 22 *Politics and Society* 195–213; 'Globalization and the Fate of Law', in D Dyzenhaus (ed) *Recrafting the Rule of Law* (Oxford and Portland, OR: Hart Publishing, 1999).

will, that is the prevailing ruling power. This conclusion can be reached on the basis of the argument proposed above, which shows how the tension between justice and sovereign deliberation, *jurisdictio* and *gubernaculum*, offers a fundamental and stable meaning of the rule of law. The conflation of the rule of law with the rule of the good law would involve a concealment of that meaning.

But this new argument has brought us beyond Joseph Raz's justification. The rule of law is not the rule of (this or that) good law but at the same time, we should add, it is neither simply a technical concept: instrumentally open to, and compatible with, all uses and aims. We would do better to focus again on its roots and its ideal.

As already noted, our continental European statist past has made us more sensitive to some features of the rule of law. It is not just a question of abiding by the rules, giving formalism and regularity their due,[71] once a law has been passed. Despite the service to certainty and the limits placed on arbitrariness, or even fidelity to texts in the application of the law, it would still not be clear what the ideal of the rule of law was there for. Its ordinary meaning, originally conceived against the background of absolutism, suggests that there is a law which can be called upon either to contrast with or to prevail over sheer will. As we have seen, this brought some further implications: first, a duality in the composition of the law, that is the idea that there are two sides to the law (on the one hand the 'inherited' law of the land and on the other the sovereign will); second, that all possible institutional settings which do not run against this general dualism are acceptable, and can prevent the legitimate existing sovereign from monopolising law through its absolute and overriding will.

If the rule of law is an ideal with which existent law is asked to comply, then it is not just the law. So it is possible that the law in fact does not mirror or live up to the rule of law. As a normative concept, rooted in our Western culture and civilisation, it has been and can be at odds with valid rules. Validity in a legal system can, of course, be made to depend upon structural (procedural) and substantive criteria which faithfully protect the rule of law, as (more or less) occurs in our constitutional states. Yet there have indeed been opposite cases, an eventuality that, of course, remains conceptually possible and may occur again in the future.

I have not dealt here with the question as to whether law which does not adequately comply with the rule of law is also invalid law for that very reason. Nor have I addressed the issue as to whether an unjust law is not a fully valid law.[72] Of course, both of these claims have been made,

[71] For example see F Schauer, *Formalism* (1988) 97 *Yale Law Journal* 509.

[72] See R Alexy, *The Argument from Injustice: A Reply to Legal Positivism*, trs BL Paulson and SL Paulson (Oxford: Oxford University Press, 2004), elaborating on Radbruch's extreme injustice thesis.

but this issue would end up reducing the discussion of the rule of law to the controversial legal theory issue of the inclusion of morality among the necessary requisites of law (and not of the rule of law). Instead of dealing with this question, the rule of law as defined here asks for there to be a definite relationship between two parts or sides of the law, one encapsulating the tradition of current justice and the other the power of the sovereign to deliberate freely.

Of course, this ideal presupposes the view that the law can embody customary, judge-based, conventional rules which enhance rights and legally protect the normative practices which are not at the disposal of the other side of the law produced by the sovereign. This ideal is not necessarily dependent on a natural law doctrine which denies the law its validity when it does not comply with, say, some particular rights of individuals. It asks that institutions take adequate measures to maintain—and that law embodies—the two different sides mentioned above. It does not necessarily (or logically) exclude the possibility of law being law even when it does not embody these two aspects. Or at least it is not necessary to answer this question for our present purposes. For, in the final analysis, the validity of law, whether based on a moral source or on simply a social source, or indeed on both, is something different from the features which enable us to recognise what the rule of law requires.

VIII. SOME PROSPECTS AND CONCLUSIONS

As an ideal, the rule of law has often been interpreted as securing the certainty of law, and often enough certainty has been essentially based on a static idea of a 'law of rules'.[73] As in some other cases, this kind of blocked and closed definition could cause a draining of the concept and its ultimate exhaustion. There is no doubt that the rigidity of a 'law of rules' can today make this an unsuitable medium for reflecting the ideal of the rule of law, and its formalism can be easily manipulated and abused: its final results might simply abolish the tension between just law and sovereign law, or may even be used as a shield enabling right-holders or public authorities to avail themselves of a power that has been formally assigned but is in fact substantively abusive and unjustified.[74] This does not at all mean that the law of rules should just be neglected, or that certainty must no longer be aspired to. It means rather that the ideal of the rule of law

[73] A Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175; and *A Matter of Interpretation. Federal Courts and the Law* (Princeton, NJ: Princeton University Press, 1996).

[74] See A Sajo (ed), *The Dark Side of Fundamental Rights* (Utrecht: Eleven International Publisher, 2006). And, in the same volume, see also G Palombella, 'The Abuse of Rights and the Rule of Law'.

might also require different incarnations that are better suited to realising its normative rationale against a background of changing social settings. If certainty must be granted on the basis of compliance with strict rules, it would ignore the logic of principles[75] which developed as the sole possible answer of law in polycentric, complex and conflicting societies. Here, law is called upon to make less rigid substantive choices, and to serve within principled (constitutional) frameworks, thus functioning as a factor of equilibrium.[76] This is in fact a good reason to suppose that among the tools that are useful for preserving the logic of the rule of law, it is the logic and practice of 'proportionality'[77] that constitutes the 'ultimate'[78] means, far more than the untenable 'law of rules'.

As far as the possible substantiation of the ideal is concerned, within the constitutional state adequate protection should be available both for the law of rights and for sovereign legislation. More generally, within the constitutional state, the law and the relevant institutions appear to meet the conditions which must be satisfied in order for the *rule of law* to be achieved. Yet this match cannot entail the *conceptual* identification of the rule of law with the constitutional democratic state, nor with one or the other among its political interpretations; for example through the inclusion of shorter or longer lists of rights and other substantive pretensions.[79] The long history of the rule of law has embraced many incarnations, and any final absolute identification with the latest version would fail to grasp the general and non-contingent sense of this normative concept, which developed even before the emergence of the constitutional state and its organisation. Finally, it does not stand for some fixed perennial rules or substantive contents, and cannot be equated with the requirements of 'democracy' or the democratic state. The nature of the political structure of the sovereign is not, strictly speaking, the most important question here.

It is essential to the rule of law, as an institutional concept, that areas of justice and rights exist and that they exist not as a matter of morality but as positivised *in the law* and on legally autonomous grounds. The point is that, from the perspective of that normative ideal, what counts for a

[75] See R Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978) p 48 *passim*. Also, R Alexy, *A Theory of Constitutional Rights* (1986), trs J Rivers (Oxford: Oxford University Press, 2002) pp 47–50 and *passim*.

[76] I dealt with this in G Palombella, *Dopo la certezza. Il diritto in equilibrio tra giustizia e democrazia* (Bari: Dedalo, 2006) (*After Certainty. Law in equilibrium between justice and democracy*).

[77] Among the presentations of it, see R Alexy, *A Theory of Constitutional Rights*, n 75 above.

[78] DM Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

[79] See, eg, Tamanaha, *On the Rule of Law*, n 37 above; P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467–87; TRS Allan, *Constitutional Justice, A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

legal system in general is its own way of preserving the tension between a law of justice and the law of sovereignty (which today for us means democracy).

Alongside the decisions of majorities, we refer to constitutional law and, depending on the particular legal system, the law of equity, judge-made law, common law and even customary law: indeed, the relevance of the latter for international law is well known.[80] In fact, a question of no minor importance is the capacity of this model to be projected onto international law, and beyond the states. In this regard, the fragmentation of legal domains and the trans-state development of law, the rise of legal pluralism and the growing obsolescence of state sovereignty are at the same time countered by attempts to enhance some unitary legal constants. The more legal orders and actors appear to multiply, the more a world 'constitutionalism' appears to be developing. The extension of the normative ideal of the rule of law into the international realm[81] or the global scenario might call for some basic legal principles to be protected against the sheer whim of men—whether economic powers or states or supranational organisations: an issue, however, to be left for another day.[82]

To reiterate a general comment against the grain of much of the literature, the rationale of the concept, or its stable *fil rouge*—that is the capacity of law to prevent the will of the sovereign from completely absorbing available social normativity—hopefully seems to be irreducible to the question of the means necessary to law, or the list of the requirements of the law in order for it to be law (valid, or non-arbitrary, general, and

[80] To take another example, from a different area of law, private law institutions, like torts or contract law, can be assumed to express a *Gestalt* and a scheme of essential ingredients which discloses their link with a certain formal idea of justice, to be protected against legislative policies which might exploit and alter the corrective or commutative justice which is implicit in those institutions of law. For this area, we have important elaborations, eg by E Weinrib, 'Causation and Wrongdoing' (1987) 63 *Chicago–Kent Law Review* 407; 'Understanding Tort Law' (1989) 23 *Valmont University Law Review* 485–526. On formalism, see E Weinrib, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949–1016; and recently, also on the importance of the form (but explaining its neutrality to different ends), R Summers, *Form and Function in a Legal System: A General Study*. (Cambridge, MA: Cambridge University Press, 2006). I have addressed some of these issues in my book *Dopo la certezza*, n 76 above.

[81] For the rule of international law, see G Palombella, 'The Rule of Law, Democracy and International Law. Learning from US Experience' (2007) 20 *Ratio Juris* 456–84.

[82] One of the most relevant enquiries would concern the possibility of a unitary reference through legal pluralism; some active channel of communication or thin connections between plural legalities would perhaps integrate the logic of self-contained systems. Among interpretations of the pluralisms, see Boaventura de Sousa Santos' concept of 'interlegality': 'legal life is constituted by an intersection of different legal orders, that is, by *interlegality*. Interlegality is the phenomenological counterpart of legal pluralism, and a key concept in a post-modern conception of law': Boaventura de Sousa Santos, *Toward a New Common Sense—Law, Science and Politics in the Paradigmatic Transition* (New York and London: Routledge, 1995) p 473.

so on), or to be efficient, or to implement democracy. Regardless of the choices we might make, the ideal of the rule of law requires that the law not be deprived of its potential duality,[83] for should it be reduced simply to the will of the sovereign, it would turn into the brute 'rule of men', irrespective of the particular prerequisites of law which had been satisfied.[84] Nonetheless, many different suggestions, including the requirements proposed by Lon Fuller, and those of Joseph Raz, are to be taken seriously in general terms: this is also because they are held to be necessary for the very existence of law. It is equally essential to note that law itself would totally fade away, denying its own existence, should it turn into crude violence and brutality.[85] If the necessary and sufficient means have to be found, then it is necessary to develop a combination of a logic of means and contextual devices, always bearing in mind the goal of preventing the entire machinery of social normativity from being monopolised and absorbed by an absolute and self-referential ruling power, in one of its up-to-date manifestations.

Indeed, this is itself a consolidated notion within the core of the rule of law. The contrary experience of the *Rechtsstaat* in its failure to ensure that consolidation, and so to govern and stabilise 'legality', proves that the burdens and checks that were necessary in order for the rule of law to be defended were no longer satisfied in the then existing law. Despite their many merits, such as the subordination of power to the universality of legislation, the *Rechtsstaat* and the *Stato di diritto* collapsed, and were replaced by totalitarian orders under a system which was even claimed to represent a kind of law, but which could by no means pretend to embody the 'rule of law'.

[83] As argued above, within the Western tradition of the rule of law, the law protecting justice, rights, positive common beliefs and the achievements of common or customary or conventional or constitutional law on one side, as against the sovereign (whether more democratic or more autocratic) law on the other side.

[84] It must be remembered that Raz does not in fact draw on the fact that the concept of 'the rule of law' was historically used to contrast with 'the rule of men'.

[85] J Waldron, 'Torture and Positive Law: Jurisprudence for the White House' (2005) 105 *Columbia Law Review* 1681. On the inderogability of some basic imperatives of *jus cogens* and their belonging in the rule of (international) law, G Palombella, n 81 above. Basic protections of human dignity are invoked by many as constitutional norms in the international realm: for example, 'civilian inviolability' is referred to as a constitutional principle in international law by A-M Slaughter and W Burke-White, 'An International Constitutional Moment' (2002) 43 *Harvard International Law Journal* 1.

Part 2

The State of the Rule of Law State

3

The Rule of Law: Legality, Teleology, Sociology

MARTIN KRYGIER

Das Vergessen der Absichten is die häufigste Dummheit, die gemacht wird (Nietzsche[1])

The concept of the rule of law is no new coin. It has long been the stuff of legal cliché, but also of extensive conceptual analysis and scholarly debate. The concept has a strong presence in legal theory and in traditions and branches of political theory. It has been central to centuries of political thought about how power might be restrained, without being emasculated. It has been less noticed or analysed by social theorists, however, which is odd. For if the rule of law matters legally and politically, it certainly matters socially. It is typically contrasted with arbitrary exercise of power. Since that is a common cause of social disorientation and, in the worst cases, catastrophe, what might be done to prevent or lessen it is a proper matter of social concern. Moreover, the success of the rule of law as a restraint on power has indispensable social conditions as important as, or more so than, any particular legal specifications one might suggest.

But there are many things that conspire against close sociological exploration of the rule of law. Prominent among them are purists' fears of disciplinary contamination. The rule of law is *so* associated with law and politics that sociologists have tended to keep their distance from this hallowed legal ideal—too normative, too legal, too political, too formal, too disconnected from life; and how is it to be measured? That neglect is unfortunate, for some of the central questions about the rule of law are sociological ones.

[1] Lon Fuller's chapter, 'The concept of law', in his *The Morality of Law* (New Haven, CT: Yale University Press, 1969) begins with this epigram. 'Forgetting purposes is the commonest form of stupidity' is HLA Hart's translation in his review of *The Morality of Law* (1965) 78 *Harvard Law Review* 1291.

Conversely, if sociological innocence about the rule of law is striking, so too are the immaculate conceptions of legal and political theorists, untainted as they have remained by social theory or empirical social research. That is an odd way to work. Presumably if they were confident that by prayer they could eliminate arbitrariness in the exercise of power, they would think more about prayer and less about law. Instead we are sent to particular sorts of legal arrangements which on their own, I have sought to argue, often do not amount to much. So my suggestion is that we would do well to explore a 'social science that does not quite yet exist',[2] the sociology of the rule of law.

I provide nothing like that here, only some reasons to seek it. I have more confidence in the questions I ask and the goals I postulate than in my ability to answer and reach them all successfully. My argument has been developed in a number of pieces and in answer to a number of different questions.[3] This chapter attempts to restate that argument in general terms, to refine it where I have noticed weaknesses in earlier renditions and to raise some new questions which any such sociology needs to answer.

The argument is briefly this. The proper way to approach the rule of law is not to offer, as lawyers typically do, a list of characteristics of laws and legal institutions supposedly necessary, if not sufficient, for the rule of law to exist; let me call that the anatomical approach. Rather, one should begin with teleology and end with sociology. That is, I suggest we start by asking what we might want the rule of law for, by which I mean not external ends that it might serve, such as economic growth or democracy,

[2] I borrow the phrase from Karol Sołtan. He has used it of Philip Selznick, Lon Fuller and Charles Anderson, alleged pioneers of such a science, that of 'civics' (see his 'Selznick and Civics' in RA Kagan, M Krygier and K Winston (eds), *Legality and Community. On the Intellectual Legacy of Philip Selznick* (New York: Rowman & Littlefield, 2002) p 357; or 'eunomics' (see K Soltan. 'A Social Science That Does Not Exist' in WJ Witteveen and W van der Burg (eds), *Rediscovering Fuller. Essays on Implicit Law and Institutional Design* (Amsterdam: Amsterdam University Press, 1999) p 387). Since Selznick and Fuller are arguably also pioneers in the sociology of the rule of law, it is not plagiarism but merely respectful homage to have borrowed the phrase from Sołtan.

[3] Among them: 'Institutional Optimism, Cultural Pessimism and the Rule of Law' in M Krygier and A Czarnota (eds), *The Rule of Law after Communism* (Aldershot: Ashgate, 1999) pp 77–105, 'The Rule of Law' in *International Encyclopedia of the Social and Behavioral Sciences*, eds-in-chief NJ Smelser and PB Bates (Oxford: Elsevier Science, 2001), vol.20, 13403–8; 'Transitional Questions about the Rule of Law: Why, What, and How?' (2001) 28(1) *East Central Europe/L'Europe du Centre-Est* 1–34; 'The Grammar of Colonial Legality: Subjects, Objects and the Rule of Law' in G Brennan and FG Castles (eds), *Australia Reshaped. Essays on 200 Years of Institutional Transformation* (Cambridge: Cambridge University Press, 2002) pp 220–60; 'False Dichotomies, Real Perplexities, and the Rule of Law' in A Sajó (ed), *Human Rights with Modesty. The Problem of Universalism* (Leiden/Boston: Martinus Nijhoff, 2004) pp 251–77; 'Rethinking the Rule of Law after Communism' in A Czarnota, Ma Krygier and W Sadurski (eds), *Rethinking the Rule of Law after Communism* (Budapest: Central European University Press, 2005) pp 265–77; 'The Rule of Law. An Abuser's Guide' in A Sajó (ed), *The Dark Side of Fundamental Rights* (Utrecht: Eleven International Publishing, 2006) pp 129–61.

but something like its *telos*, the point of the enterprise, goals internal to and immanent in the concept. Only then should we move to ask what sorts of things need to happen for us to achieve such a state of affairs, and only then move to ask what we need in order to get it. That third question, the bottom line, as it were, will of course involve legal institutions but it cannot be answered without looking beyond them to the societies in which they function, the ways they function there, and what else happens there which interacts with and affects the sway of law. For the rule of law to exist, still more to flourish and be secure, many things beside the law matter, and since societies differ in many ways, so will those things.

My concern is with questions that need to be put about the rule of law, narrow or broad, thick or thin, and, just as important, the order in which they should be put. My belief[4] is that the movement through these questions takes one from universal human needs (more or less—I would not bet my life on universality; pretty general will do me fine) through some also fairly general conditions, to extremely variable ways in which they might be met in particular societies with particular histories and particular problems at particular times. So a universal, institution-based, answer to what the rule of law is, is implausible. And it will often mislead. Indeed, it might well lead us away from the rule of law. Or maybe not those of us from rule-of-law-rich states, but those who seek or are advised to seek, to emulate us in this regard. For my thinking in these matters has been provoked by the problems of those who lack the rule of law but want it or are being told they need it. I have recently started to suspect that the approach I defend is less appropriate for understanding elements of the rule of law where it is established than it might be for seeking to introduce it where it is not. In both cases, however, the reason is the same: we lack, as a matter of principle rather than epistemological shortcoming, universal legal-institutional prescriptions for the rule of law. The reasons for that, in turn, have to do with social complexity rather than lack of legal ingenuity.

In what follows, I start with an outline of the anatomical approach that I oppose, draw on some historical (and one modern) grounds for suspicion of it, and move to teleology and sociology, which I commend. I conclude by considering whether what I recommend is the opposite of what it is best to do in relation to the rule of law. I argue that at times it is, but I find a way not to be embarrassed by that conclusion.

I. ANATOMY

Anatomies of the rule of law typically have two features in common: first, their focus is on legal institutions and the norms and practices directly

[4] Argued in 'False Dichotomies', n 3 above.

associated with them; second, a list of elements of such institutions and practices is presented as adding up to the rule of law. That is not a surprise, since law is plausibly assumed to be central to the rule of law, lawyers are typically taken to be the experts on it, and they provide the lists. Not a surprise, but perhaps a mistake.

A famous example is Albert Venn Dicey's three-point definition of the rule of law, considered by Judith Shklar to be 'the most influential restatement of the Rule of Law since the eighteenth century'[5]:

1. '[N]o man is punishable ... except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.'[6]
2. '[H]ere every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.'[7]
3. '[T]he general principles of the constitution ... are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.'[8]

We will return to Dicey. Here my observation is not that he is wrong about English law, although he might be;[9] nor that he is parochial about the rule of law, although he is.[10] Simply it is to point to what he takes to be the appropriate way to ground and explain 'a trait of national character which is as noticeable as it is hard to portray'.[11]

Not everyone picks on the same features as Dicey. A more abstract account, overlapping but not identical, is developed by Friedrich von Hayek, at least in one of his renditions. On this view, the ideal type of the rule of law (from which modernity has steadily fallen away) depends on abstract, general and certain *laws* rather than particular *commands*, where 'Law in its ideal form might be described as a "once-and-for-all"

[5] J Shklar, 'Political Theory and the Rule of Law' in *Political Theory and Political Thinkers* (Chicago, IL: University of Chicago Press, 1998) p 26.

[6] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (first edition 1885) (London: Macmillan, 1959) p 188.

[7] *Ibid*, p 193.

[8] *Ibid*, pp 195–6.

[9] See I Jennings, *The Law and the Constitution*, 5th edn (London: University of London Press, 1959).

[10] *Cf* Judith Shklar on 'Dicey's unfortunate outburst of Anglo-Saxon parochialism': 'The Rule of Law was thus both trivialised as the peculiar patrimony of one and only one national order, and formalised, by the insistence that only one set of inherited procedures and court practices could sustain it': n 5 above, p 26.

[11] Dicey, n 6 above, p 187.

command that is directed to unknown people and that is abstracted from all particular circumstances of time and place and refers only to such conditions as may occur anywhere and at any time'.[12] Hayek concedes that in reality laws shade all the way down into concrete commands, but the rule of law, he insists, depends on the extent to which the bulk of laws are not commands. Many writers have agreed with him in this stipulation.

Other influential accounts follow the eight elements that Lon Fuller characterised as constituting 'the internal morality of law'. This list has frequently been adopted or adapted to constitute the conditions of the rule of law. Briefly, these conditions are that there must be: (1) general rules; (2) made public; that are (3) non-retroactive; (4) comprehensible; (5) non-contradictory; (6) possible to perform; (7) relatively stable; and (8) administered in ways congruent with the rules as announced.[13] There are many other such accounts of the form required of institutional hardware, but I need not delay with them for I am not concerned with their details. The issue I take is with their character. What they all have in common is: (a) the confident assumption that the central ingredients of the rule of law are legal institutions, and (b) the equally confident assumption that we are in a position to stipulate in general terms what aspects and elements of these institutions produce the results we seek. Many other accounts of the rule of law are even more specific than these, and mention the configuration of institutions, presence or absence of bills of rights, institutional measures to guarantee judicial independence, and so on.

Let me stress, this is not a definitional dispute. I am not saying that this is a semantically mistaken way of proceeding. People can define as they wish and since the rule of law has such aura today, there is no tying it down. Moreover, as we will see, there might be circumstances where it makes sense, better sense than I once believed, to take this path. Nevertheless, I think it is liable to mislead us about important substantive matters, and to do so precisely where the stakes are highest.

Many countries have emerged relatively recently from dictatorships that, whatever else can be said about them, ignored, denied and/or defiled the rule of law. Many citizens of these countries seek, or are urged, to (re)establish it. Here some clarity about the rule of law matters, since the assumption is that there has not (in some places, has never) been much of it there, and so it has to be developed from the ground up. In the post-communist world, for example, a taste for the rule of law was made all the more tantalising (for some) by its absence from local experience,

[12] F von Hayek, *The Constitution of Liberty* (London: Routledge and Kegan Paul, 1960) pp 149–50.

[13] For a good discussion in this spirit, see J Raz, 'The Rule of Law and Its Virtue' in *The Authority of Law* (Oxford: Clarendon Press, 1979) pp 210–29.

and its alleged presence elsewhere—in what were, in the communist and early post-communist period, called 'normal countries'.[14] What was to be done and how was it to be done?

It was common in 1989 to insist that what distinguished these revolutions from any of their forebears was that the former intended 'no more experiments'. Successful models existed in normal countries, and the job was to adopt them. Those locals who wanted the rule of law thought of it a bit like working telephones, or roads without potholes, which they also lacked: they have them, we want them, let's get them. Or, even if local enthusiasm was less strong, there were plenty of foreigners to insist: we have them, you need them, here take them. Timothy Garton Ash faithfully captures this sentiment of the time:

> In politics they are all saying: There is no 'socialist democracy', there is only democracy. And by democracy they mean multi-party, parliamentary democracy as practiced in contemporary Western, Northern, and Southern Europe. They are all saying: There is no 'socialist legality', there is only legality. And by that they mean the rule of law, guaranteed by the constitutionally anchored independence of the judiciary.[15]

This taste for democracy and legality 'without adjectives', as dissidents used to put it, can be readily appreciated. They were rightly allergic to such substance-cancelling qualifiers. But, to the extent that saying 'there is only legality' might suggest that there exists one obvious incarnation of legality which merely needs to be copied by eager imitators, then the taste for legality unqualified is misleading. As Stephen Holmes remarked a few years ago,[16] a production technology is easier to transplant than an interaction technology. I imagine he would agree that is all the more the case when you only have a very vague idea what the relevant technology is, and no one seems to have much of a clue how it works.

In the past 20 years, over a billion dollars has been spent internationally to bring the rule of law to benighted countries thought to need it. Some of the promoters and observers of these efforts have recently begun to issue crestfallen reports.[17] One observation might suffice:

> In legal circles in developing countries and in international development circles, *rule of law* has become almost synonymous with *legal and judicial reform.* Basic

[14] Cf M Krygier, 'Marxism and the Rule of Law. Reflections on the Collapse of Communism' (1990) 15 *Law and Social Inquiry* 633–63 at 637.

[15] TG Ash, 'Eastern Europe: The Year of Truth' *New York Review of Books*, 15 February 1990, p 21.

[16] In a workshop on 'Rethinking the Rule of Law after Communism', European University Institute, Florence, 2003.

[17] See two good collections: E Jensen and TC Heller (eds), *Beyond Common Knowledge. Empirical Approaches to the Rule of Law* (Stanford, CA: Stanford Law and Politics, 2003); and T Carothers (ed), *Promoting the Rule of Law Abroad. In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

> questions about what legal systems across diverse countries actually do, why they do it, and to what effect are either inadequately explored or totally ignored. In developed and developing countries, larger questions about the relationship of the rule of law to human rights, democracy, civil society, economic development, and governance often are reduced to arid doctrinalism in the legal fraternity. And in the practice of the international donor community, the rule of law is reduced to sectors of support, the most prominent of which is the judicial sector.
>
> ... During the last seven years, we have witnessed an explosion of literature related to legal and judicial reform. Yet very little attention has been paid to the widening gap between theory and practice, or to the disconnection between stated project goals and objectives and the actual activities supported.[18]

Common to many of these reports is the complaint that, notwithstanding the vast amounts of money funnelled into legal and judicial reform in the name of the rule of law, corruption still rules, hidden structures of power decide, networks are key, those who win outside the law win inside it, if they ever need to venture inside it. One conclusion you might draw is that even though the rule of law has been installed, it is just not worth the money spent on it. Even when people get it they will not have got much. Thus, roughly following the model of that old and bleak hospital joke: 'the operation was successful; the patient died', Frank Upham laments about:

> [t]he likelihood that Western mischaracterization of the appropriate roles of law will be accepted by developing countries, thus leading to misallocation of domestic effort and attention, and perhaps most important, eventually to deep disillusionment with the potential of law. When the revision of the criminal code does not prevent warlords from creating havoc in Afghanistan and the training of Chinese judges by American law professors does not prevent the detention of political dissidents—or, perversely, enables judges to provide plausible legal reasons for their detention—political leaders on all sides may turn away from law completely and miss the modest role that law can play in political and economic development.[19]

Typically, Upham identifies the rule of law and exaggerated expectations of it, rather than an inadequate understanding of it, as the source of his fears. However, what if the problem is less that the rule of law was installed but failed to do much good, than that what was installed was not the rule of law? That is my view. When legal institutional tinkering fails to prevent havoc, when people who count ignore the law and those who do not merely suffer it, the rule of law is in very poor shape if it exists at all. And commonly that should not have been a surprise. On their own,

[18] Jensen and Heller, n 17 above, pp 1–2.

[19] F Upham, 'The Illusory Promise of the Rule of Law' in A Sajó (ed), *Human Rights with Modesty. The Problem of Universalism* (Leiden/Boston: Martinus Nijhoff, 2004) p 281.

the legal institutional features so often identified with the rule of law are not up to the task. Indeed, they never are, but always need supporting circumstances, social and political structures and cultural supports, which are not always available and are difficult to engineer. Some peoples are lucky to be born into societies where those supports are old and embedded. They should recognise their luck. Others face challenges, which are never merely legal-institutional. And yet, not just disappointed political leaders but also misdirected critics are liable to indict the rule of law, even though it has yet to visit the scene of the crime.[20]

One possibility, then, is that one could have elements of what many take to be the rule of law, but not in fact have the rule of law. Another is that you might have the rule of law without the elements. Let me offer some quickly sketched examples of this second option, from two domains on both of which my expertise is slight and derivative: one is English history, the other American modernity.

II. HISTORY

Within Britain, and inherited by its dependants, the concept of the rule of law is deeply embedded and very old indeed. This has recently been well demonstrated by the American legal historian, John Philip Reid. Thus he quotes Bracton in the thirteenth century declaring of the King:

> Let him, therefore, temper his power by law, which is the bridle of power, that he may live according to the laws, for the law of mankind has decreed that his own laws bind the lawgiver, and elsewhere in the same source, it is a saying worthy of the majesty of a ruler that the prince acknowledges himself bound by the laws. Nothing is more fitting for a sovereign than to live by the laws, nor is there any greater sovereignty than to govern according to law, and he ought properly to yield to the law what the law has bestowed upon him, for the law makes him king.[21]

Perhaps it is this heritage that impressed those 'foreign observers of English manners, such for example as Voltaire, De Lolme, de Tocqueville, or Gneist', of whom Dicey wrote that they have been 'far more struck than have Englishmen themselves with the fact that England is a country governed, as is scarcely any other part of Europe, under the rule of law'.[22] Whatever slippage we allow between self-preening ideology and actual historical practice, there is something in the claim. But if there is,

[20] For another example of this style of argument, see RP Peerenboom, 'Human Rights and Rule of Law: What's the Relationship?' (2005) 36 *Georgia Journal of International Law* 809.

[21] H Bracton, *On the Laws and Customs of England*, vol 2, pp 305–6, quoted in JP Reid, *Rule of Law* (Illinois, IL: University of Northern Illinois Press, 2004) p 11.

[22] Note 6 above, p 184.

it is important to know what that claim amounts to. It is *not* that the sort of institutional arrangements now identified with the rule of law have a long history; that law was, or was even thought to be, certain, prospective, promulgated, general, and so on. Rather, it is that the power even of the King was required to be exercised within bounds set, however vaguely, by existing law. And that was predominantly *common* law.[23] That in turn, as Blackstone put it in the eighteenth century, was an 'ancient collection of unwritten maxims and customs',[24] and: 'The only method of proving that this or that maxim is a rule of the common law, is by shewing that it hath always been the custom to observe it'.[25]

Reid shows that in English tradition until the eighteenth century, law was identified with misty, murky but ages-old custom, traced to a time when 'the memory of man runneth not to the contrary'. He writes, 'the medieval constitutional law out of which today's rule of law developed would not have met the requirements of clarity or precision. There was always an air of indefiniteness, a smoky vagueness surrounding this all-embracing restraining "law" of English constitutionalism. Even its authority as law was shrouded in immeasurability'.[26] On the old view, as Reid puts it, 'what mattered was not its intrinsic qualities but that it was customary practice, not deliberative decision'.[27] The rule of law tamed unruly exercise of power, because even the sovereign was not above it, indeed was not sovereign in Cromwell's or Blackstone's or Austin's sense, but subject to higher law.

The last great defence of that old English conception, Reid argues, conscious of the irony, was the American Revolution against the British Crown. In the eighteenth century, the Americans insisted that no government was above the law, but the English had moved beyond them to regard the lawmaker as legally sovereign, outstripping though (and perhaps thus) losing its about-to-be-former colony. The Americans still defended an older understanding of law and the rule of law: 'In truth, the American Revolution, if understood from the perspective of the development of the concept of rule of law in England and Great Britain should be seen as one of the last—if not the very last—constitutional stands for the old ideal of rule by customary, prescriptive, immutable, fundamental law … the American Revolution was the greatest triumph for the rule of law.'[28]

[23] See M Krygier, 'Common Law' in *Routledge Encyclopedia of Philosophy*, vol 1, gen ed E Craig (London: Routledge, 1998) pp 440–46.
[24] W Blackstone, *Commentaries on the Laws of England, Vol 1* (Chicago, IL: Chicago University Press, 1979) p 17.
[25] *Ibid*, p 68.
[26] Reid, n 21 above, p 16.
[27] *Ibid*, p 13.
[28] *Ibid*, p 75.

It can, then, make sense to speak of the rule of law, and thereby mark a significant distinction between different sorts of polities, without putting some particular institutional recipe at the centre of things. Indeed, it makes sense to talk about the rule of law without saying much about the specifics of legal institutions at all. Take another English example that has intrigued me for a long time: the subject of EP Thompson's famous/notorious conclusion to *Whigs and Hunters.* Readers will recall that although the bulk of this book is a denunciation of many particulars of that law, in his conclusion Thompson reflects that:

> there is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath the law. But the rule of law itself, the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims, seems to me to me an unqualified human good.[29]

Perhaps fortunately, Thompson was not a lawyer, and unlike Dicey and most other lawyers who write about the rule of law, he did not seek to spell out just what legal elements allegedly produced it. In an 'I know it when I see it' way, he insisted upon the 'obvious point' that 'there is a difference between arbitrary power and the rule of law', and the latter was identified by what it was claimed to achieve rather than by any recipe or précis of ingredients. Thompson identified the rule of law by the good it did—'the imposing of effective inhibitions upon power and the defence of the citizen from power's all-intrusive claims'. It was only if and to the extent that law and the rule of law made that sort of difference that it mattered.

And where did he look for evidence of that difference? Well, not to particular legal forms, which he thought were constantly being 'created … and bent' by 'a Whig oligarchy … in order to legitimise its own property and status'.[30] But that oligarchy could not do as it wished; its hands were often tied by the law it sought to exploit. How did Thompson show this? By describing the character of legal institutions and norms? No. Rather, he called to his aid facts such as that:

> What was often at issue was not property, supported by law, against no-property; it was alternative definitions of property-rights … law was a definition of actual agrarian *practice,* as it has been pursued "time out of mind" … "law" was deeply imbricated within the very basis of productive relations, which would have been inoperable without this law. And … this law, as definition or as rules (imperfectly enforceable through institutional forms) was endorsed by norms, tenaciously transmitted through the community.[31]

[29] EP Thompson, *Whigs and Hunters. The Origin of the Black Act* (Harmondsworth: Penguin, 1977) p 266.
[30] *Ibid*, pp 260–61.
[31] *Ibid*, p 261.

It is facts like these that lead Thompson to declare that 'the notion of the regulation and reconciliation of conflicts through the rule of law—and the elaboration of rules and procedures which, on occasion, made some approximate approach towards the ideal—seems to me a cultural achievement of universal significance'.[32] 'Cultural achievement' is a well-chosen phrase.

Of course, analysis of the rule of law must go further than this, if only to check that the good claimed actually existed, and that its purported causes have been well identified. But I think Thompson was right at least to seek his evidence where he did, rather than in contingent descriptions of institutional particulars, and still more, to avoid taking these contingent particular elements, as Dicey appeared to take them, to be the universal essence of the *Ding an sich*—the thing in itself.

This is particularly the case if the *Ding* is so elusive. Whatever Voltaire admired about the English rule of law, as Dicey boasted, it is unlikely to have been that it was 'general, equal, and certain'. Listen (these were lectures, which it must have been a delight to *listen* to) to Dicey's contemporary Maitland on eighteenth-century English law. I quote this passage at length since it is *so* charmingly counter-intuitive, at least counter to Hayekian intuition:

> I take up a list of the statutes of 1786. There are 160 so-called public acts, and 60 so-called private acts. But listen to the titles of a few of the public acts: an act for establishing a workhouse at Havering, an act to enable the king to license a playhouse at Margate, an act for erecting a house of correction in Middlesex, an act for incorporating the Clyde Marine Society, an act for paving the town of Cheltenham, an act for widening the roads in the borough of Bodmin. Fully half of the public acts are of this petty local character. Then as to the private acts, these deal with particular persons: an act for naturalizing Andreas Emmerich, an act for enabling Cornelius Salvidge to take the surname of Tutton, an act for rectifying mistakes in the marriage settlement of Lord and Lady Camelford, an act to enable the guardians of William Frye to grant leases, an act to dissolve the marriage between Jonathan Twiss and Francis Dorrill. Then there are almost countless acts for enclosing this, that and the other common. One is inclined to call the last century the century of *privilegia.* It seems afraid to rise to the dignity of a general proposition; it will not say, 'All commons may be enclosed according to these general rules,' 'All aliens may become naturalised if they fulfil these or those conditions,' 'All boroughs shall have these powers for widening their roads,' 'All marriages may be dissolved if the wife's adultery be proved.' No, it deals with this common and that marriage.[33]

[32] *Ibid*, p 266.

[33] FW Maitland, *The Constitutional History of England* (Cambridge: Cambridge University Press, 1965) (first edition 1908) p 383. I am grateful to Mark Aronson for bringing this passage to my attention.

Either eighteenth-century England had a strong measure of the rule of law or it did not. I think Dicey, Thompson and Reid are right to think it did. I also think the sources of this blessing need to be sought somewhere other than where lawyers are accustomed to seek them.

III. MODERNITY

There was a time, 1989 to be precise, when I assumed that the rule of law without adjectives was what the world needed and that it was well captured in Lon Fuller's 'internal morality', or something like it. And so it seemed to me that in all the excitement of the collapse of communism, this was a product ripe for export. So I was shocked in that same year to read an article by Edward Rubin which took this alleged morality apart, as it applied, or rather was argued not to apply, to 'Law and Legislation in the Administrative State'.[34] Rubin argues that the bulk of modern legislation is not, as Lon Fuller thought law to be, 'the enterprise of subjecting human conduct to the governance of rules',[35] but rather 'a series of directives issued by the legislature to government-implementation mechanisms, primarily administrative agencies, rather than as a set of rules for the governance of human conduct'.[36] A great deal of modern legislation is 'internal', that is, concerned at least initially with administrative agencies rather than individual citizens. Within 'external' legislation, moreover, much is 'intransitive', that is, though concerned ultimately with citizens, it does not specify precisely what rules an agency is expected to apply to them. There is a vast amount of such legislation in the modern state, and it 'did not arise out of some lapse of moral vigilance. It is central to our beliefs about the role of the government in solving problems and delivering services'.[37] In relation to this legislation Rubin argues that Fuller's principles are unhelpful, and: 'Even for transitive statutes, most of Fuller's principles are persuasive only when the statute relies on courts as its primary implementation mechanism. When a transitive statute is enforced by an agency, our normative system simply does not make the demands that Fuller perceives.'[38] It still makes sense to oppose arbitrary uses of power against citizens, but a great deal of law needs to be thought about in other terms, and where the concern *is* appropriate, antidotes to it are often likely to be very different from those that Fuller suggests.

[34] (1989) 89 *Columbia Law Review* 369–426.
[35] L Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1969) p 106.
[36] Rubin, n 34 above, pp 371–2.
[37] *Ibid*, pp 406–7.
[38] *Ibid*, p 399.

Now it might be that a closer reading of Fuller would reveal that he was not setting up universal measures simply to be applied, whatever the form of law, whatever the circumstance. I think that is likely,[39] but my point is different. We do not have legal institutional recipes that explain the rule of law, even in the places where it is strong. And what we do have is of unclear application to a great deal that modern legislatures do. Why do we think we have products ready for export?

IV. TELEOLOGY

So, and particularly for those in the export business, I advocate starting with the ends of the rule of law, rather than what purports to be its institutional anatomy. The overarching end I have focused on, as does so much discussion of the rule of law, is opposition to the arbitrary exercise of power. I am uncomfortably conscious that I, and not only I, have yet to provide a satisfactory and sufficiently complex and textured analysis of what arbitrariness includes (caprice? whim? unreasonableness? unreasonedness? discretion? if not all discretion, how much?, and so on) and excludes. The concept is key and would repay close attention. I find it easier to give examples than an analysis. That might make the conceptual haziness less dramatic, however, since many of these examples are far from subtle. Stalin provides a lot, Saddam Hussein many others. Fuller, away from his formula, and in his explorations of law as a form of social architecture, has sensitively analysed others, closer to home. So too has Philip Selznick.[40] Still, it is a weakness.

It might be, as Gianluigi Palombella has argued,[41] that too great a focus on 'arbitrariness' miscasts (or misses) some of the dangers that the rule of law is thought to combat. In particular, the *Rechtsstaat* tradition, which simply takes law to be 'the structure of the State, not an external limitation to it', also seeks to avoid arbitrariness. Perhaps there are non-arbitrary ways of acting, of invading *jurisdictio,* which still need to be

[39] See his *The Principles of Social Order*, revised edn, ed KI. Winston (Oxford: Hart Publishing, 2001), and the insightful introductory essays by Winston.

[40] In his discussion of the principles of due process, near the end of *Law, Society, and Industrial Justice*, Selznick suggests some examples: 'Rule-making that is based on evident caprice or prejudice, or that presumes the contrary of clearly established knowledge violates due process. Procedure cannot be "due" if it does not conform to the canons of rational discourse or if it is otherwise outside the pale of reasoned and dispassionate assessment. Thus legislative classification of persons or groups may be struck down as arbitrary and against reason if they have no defensible connection with, or inherently frustrate, the professed aims of the legislation. Similarly a host of administrative actions, though they may enjoy large grants of discretion, are subject to this ultimate appeal' (New Brunswick, NJ: Transaction Books, 1969) p 253.

[41] Personal communication. And see also ch 2 in the present volume.

tamed by the rule of law. I find Palombella's argumentation, his insistence that the rule of law adds the protection of elements of right to legal pursuit of the good, extremely persuasive. But if arbitrariness is not the only danger the rule of law is meant to prevent, it is a central one. Moreover, if other values are added to one's conception of the rule of law, it would not actually augment my claim that it is to those values that we should look first, rather than to institutional structures that too often threaten to be treated as ends in themselves. And for the meantime, if the edges are blurred, the contours of what the rule of law opposes are identifiable and the importance of arbitrariness as an (even if perhaps not *the*) anti-value among those who have written about the rule of law for centuries is not open to doubt.

I have suggested two reasons to applaud the reduction of arbitrariness in the exercise of power, and doubtless there are others. Mine are quite unoriginal, however, and I take that to be a strength. Political theory has reiterated the first argument for millennia, and economic theory depends on the second, even if not all modern economists are aware of it. Two reasons to welcome the reduction of arbitrariness are that it is frightening, and that it is confusing.[42] So, in the contrast between tyranny and government under law, reduction of reasonable fear of power has been a central motivating concern. And given the need that Adam Smith attributed to all members of 'civilised society' for 'the co-operation and assistance of great multitudes, while his whole life is scarce sufficient to gain the friendship of a few persons',[43] the reduction of arbitrary power, and the reasonable apprehension of its exercise, is also a valuable thing to achieve.

Where the rule of law is strong, confident interaction and co-ordination among non-intimates are reasonable expectations. These are crucial conditions for a large modern society in good shape. The rule of law can provide fellow citizens with crucial information and security, 'a basis for legitimate expectations',[44] by enabling them to know a good deal about each other, although many of them are strangers; to co-ordinate their actions with each other; and to feel some security and predictability in their dealings with each other. For although not everything can ever be made predictable, much that would otherwise be up for grabs can be tied down. Fixed and knowable points can be established in the landscape, on the basis of which the strangers who routinely interact in modern societies can do so with some security, autonomy and ability to choose. This can

[42] I elaborate on these two reasons in 'The Rule of Law', and 'Transitional Questions …': see n 3 above.

[43] A Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Indianapolis, IN: Liberty Fund, 1981) vol 1, p 26.

[44] J Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) p 238.

provide a foundation and scaffolding for the building of 'civil' relations between state and citizens and among citizens themselves.[45] They can *rely* upon the state, the law, and each other, not merely live at suspicious or fearful distance from them.

However much we add to, refine, or render precise, the goals that have motivated attention to the rule of law, my suggestion has been and still is (with one significant qualification to be taken up later),[46] that that is where we should start. With these goals in view, investigations might begin into how they might be attained. Of course in this quest no one today is Christopher Columbus. Many people have exercised a lot of thought on these matters. Lessons have been learned. It would be foolish to ignore them. One very general lesson, very old indeed, is that if you want to avoid the arbitrary exercise of power, do not just trust to luck or virtue. When there is room for those with power to act repressively, they are likely to do so sooner or later. If you want to avoid this, something must be done and someone must be in a position to do it. And once is not enough, so the ability to restrain the ways in which power is exercised needs to be *institutionalised*. That is certainly what Montesquieu believed, and he was right, very right. Montesquieu also believed that it was not a great idea for all the jobs to be done by the same institutions or for the same people to run all of the institutions. These are good ideas too. There have been others.

Thinking about such ideas can yield, in the first instance, some conditions that institutions must satisfy to be able, routinely and reliably, to help avoid the arbitrary exercise of power. I have suggested four such general conditions, relying on nothing much more than a combination of intuition and reflection. This level could be explored much more deeply than I have done. Anyway, my conditions for institutional contributions to the rule of law have to do with four general criteria. The first concerns the *scope* of the reach of institutions of restraint—if they are to matter, they have to be able to reach those who matter. This must include both state and non-state actors. The significant question is not where they sit but what they can do.[47] The second has to do with the

[45] I have discussed connections between legality and civility in 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law' in A Sajó (ed), *Out of and Into Authoritarian Law* (Amsterdam: Kluwer, 2002) pp 221–56.

[46] See Section VI of the text below.

[47] *Cf* G O'Donnell, 'Polyarchies and the (Un)Rule of Law', in JE Méndez, G O'Donnell and PS Pinheiro (eds), *The (Un)Rule of Law and the Underprivileged in Latin America* (Notre Dame, IN: Indiana University of Notre Dame Press, 1999) p 318: 'if the legal system is supposed to texture, stabilise, and order manifold social relations, then not only when state agents but also when private actors violate the law with impunity, the rule of law is at best truncated. Whether state agents perpetrate unlawful acts on their own or *de facto* license private actors to do so, does not make much difference, either for the victims of such actions or for the (in)effectiveness of the rule of law.'

character of the norms that guide, channel and restrain—they have to be such that people can know what they require. This is the basis of those lists of characteristics of norms that lawyers commonly take to be the rule of law. As we have already noted, Fuller and Raz have produced influential lists of this sort; Geoffrey de Q Walker has magnified them.[48] I think the lists are systematically inadequate, as I will argue below, for they imagine that one can read off how laws will be received in societies from lawyers' intuitions about them, but they do have a rationale: unless people can know what the law requires, they cannot abide by it or hold those in power to it. Nor can the reciprocity among law-makers, law-interpreters, and law-receivers work on a common base of understanding and knowledge. Third, there must be a real and knowable link between the norms and the ways they are *administered*. This will often require complex practices of interpretation, and there is room for real and extensive controversy, but unless the controversy is about what the norms require, you have moved away from the rule of law. Finally, the condition that is most important of all, and least explored in the legal literature, the institutionalised norms need to *count* as a source of restraint and a normative resource, usable and with some routine confidence used in social life.

The last condition is socially, if not doctrinally, the most important, since unless the norms do count nothing else much matters. We need to know in what ways they need to count, for potential arbitrariness to be diminished. An account of what it means and how it happens that law counts must be developed further than I have done.[49] One way in which laws count is that people, by and large, obey them; and particularly if our concern is to restrain the possibility of arbitrary power, that the powerful do so. Why people obey laws, who does and when, are large questions, the answers to which vary greatly between societies, and depend only in part on the character of the laws themselves. Apart from obedience, patterns of use and manner of use are other major sources of distinction between societies where law counts and those where it does not. I am taken with the Bulgarian saying that law is like a door in the middle of an open field. Of course, you could go through the door, but only a fool would bother. Where that saying has resonance, the rule of law is not likely to. We need then to explore what generates circumstances in which the norms do count in these useful, indeed precious, ways. We will not find the answer in Dicey.

[48] G de Q Walker, *The Rule of Law. Foundation of constitutional democracy* (Carleton, Victoria: Melbourne University Press, 1988).

[49] I have a few guesses in 'Transitional Questions', n3 above, at pp 12–18, but the work is left to do.

V. SOCIOLOGY

Specification of all these conditions could be refined, and should be—particularly for the last and most important condition. Whatever we decide them to be, my point is only that these legal conditions *themselves* depend on conditions that are not legal. For they all have to do with the social *reach* and *weight* of law, which are matters of sociology and politics, as much as of law. Indeed, social and political questions are central ones to ask about the place of law in a society, and they will be answered differently in different societies, whatever the written laws say or have in common. This is not because the law has no significance, but because the nature and extent of that significance depend on so many factors outside, or underlying, the law itself.

Particularly when these questions are asked by someone concerned with how law might to be *encouraged* to count where it does not, or in ways it does not, we should keep in mind and generalise Holmes' observation about Russia:

> Lawyers are trained to solve routine problems within routine procedures. They are not trained to reflect creatively on the emergence and stabilization of the complex institutions that lawyering silently presupposes. Ordinary legal training, therefore, is not adequate to the extraordinary problems faced by the manager of a legal-development project in Russia. The problem is not Russian uniqueness and exceptionalism, but the opposite. In Russia, as everywhere else, legal reform cannot succeed without attention to social context, local infrastructure, professional skills, logistic capacities, and political support … So legal knowledge alone is never enough.[50]

It is not enough in practice, but it is not enough in theory either. Recall Thompson. What was key for him, as it has been for dissidents under countless despotisms, was 'the imposing of *effective* inhibitions upon power and the defence of the citizen from power's all-intrusive clams'.[51] This is a social and political result, to which law is supposed to be able to contribute and, needless to say, it depends on many things beside the qualities of the formal law. Yet far too often lawyers and philosophers discussing the rule of law move from some legalistic conception of the first three of the conditions distinguished above to the assumption that where they exist so does the rule of law. Which it might, if the law were the single unmoved mover of the social world. Since no one believes that, this assumption is as odd as it is common.

Take, for example, the second condition, which has to do with knowledge of the law. One *a priori* hypothesis, for example, extremely common

[50] S Holmes, 'Can Foreign Aid Promote the Rule of Law?' (1999) 8(4) *East European Constitutional Review* 71.

[51] Thompson, n 29 above.

among lawyers and legal theorists, is that whatever contributes to making legal rules less vague, ambiguous and open-ended and renders them more precise, tightly specified and univocal contributes to making law more certain, and therefore reliable. It seems to stand to reason, after all, that if a rule is sharper, more precise, less open to interpretation, it is easier to understand and follow. Indeed, Max Weber built a theory of law's contribution to capitalism on this premise. He argued that modern capitalism depended on predictability, and that since formal rational civil law promoted the greatest degree of legal generality, clarity and formal certainty, it must be the most predictable. Therefore, maximum formal rationality of law, as found in continental Europe, was indispensable for the rise of modern capitalism; except, as in the great capitalist nations of the nineteenth and early twentieth centuries, England and the US, where it was not! Given that these were exemplars of modernity and capitalism this, the so-called 'England problem', was no small embarrassment for the theory. Driven by the logic of 'the more the better', but chastened by facts he was too observant and too honest to deny, he was led to a series of *ad hoc* explanations of how Great Britain managed to do capitalism better than anywhere else with a highly 'irrational' legal system, compared, say, with the rationality of German law, which accompanied a less developed economy. These concessions were a tribute to his character and powers of observation, but not to this aspect of his social theory.[52]

For, as his contemporary Eugen Ehrlich[53] emphasised, so much that promotes security of expectations is not the doing of formal legal institutions, but of what Ehrlich identified as the 'living law' that regulates the lives of communities for so much of the time. The interrelationships between official 'rules for decision', as Ehrlich called them, and 'living law' are complex and variable, but there is no reason to believe that ratcheting up the formal rationality of the former will produce its direct and faithful reflection in the latter.

Again, Joseph Raz gives one 'fairly obvious' reason for preferring rules to principles in the direct regulation of behaviour as being that 'Principles, because they prescribe highly unspecific acts, tend to be more vague and

[52] This argument is developed at greater length in my 'Ethical Positivism and the Liberalism of Fear', in T Campbell and J Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism,* (Aldershot: Ashgate, 2000) pp 73–7. It gains further, even poignant, support from analyses then unknown to me that suggest the common law is superior to civil law in supporting economic growth: see FB Cross, 'Identifying the Virtues of the Common Law' (http://papers.ssrn.com/sol3/papers.cfm?abstract_id=812464), and the references cited there.

[53] See his *Fundamental Principles of the Sociology of Law,* with original introduction by R Pound and a new introduction by KA Ziegert (New Jersey, NJ: Transaction Publishers, 2002), first published in English 1936, and in German 1913.

less certain than rules', and 'Since the law should strive to balance certainty and reliability against flexibility, it is on the whole wise legal policy to use rules as much as possible for regulating human behaviour because they are more certain than principles and lend themselves more easily to uniform and predictable application'.[54] On that assumption, numerous advocates of the rule of law insist that it should be a 'law of rules',[55] where rules are understood to act as 'exclusionary reasons',[56] rather than more open-ended principles, since the former are assumed to be more certain and predictable than the latter.[57] Even those, like Ronald Dworkin, who are fond of principles are so not on the grounds that they are as predictable as rules; indeed, they concede that they are not. Dworkin commends them for offering other virtues of justice which a strict regime of rules might thwart.

Yet whether or not precision of legal rules yields certainty of law is a major and unresolved issue of socio-legal investigation. Not only is it unresolved, it is very difficult to resolve, since it is an empirical question for which it is hard to gather evidence. Such evidence as we have suggests, at least to John Braithwaite, that while rules might be more certain than principles in relation to 'simple, stable patterns of action that do not involve high economic stakes'—like driving a car—'with complex actions in changing environments where large economic interests are at stake' principles are more likely to enable legal certainty than rules. Indeed, Braithwaite argues: 'When flux is great it can be obvious that radically abandoning the precision of rules can increase certainty.'[58] The argument is complex and the evidence, as Braithwaite readily concedes, incomplete and hard to obtain, but his arguments are powerful and the evidence on which he draws, though limited, is strong. A complex order of fixed and rigid rules, for example, is typically more open to 'creative compliance', 'legal entrepreneurship' and 'contrived complexity', particularly at 'the big end of town'. This is both because certain sorts of precise rules, and regimes where

[54] J Raz, 'Legal Principles and the Limits of Law' (1972) 81 *Yale Law Journal* 823 at 841.

[55] *Cf* A Scalia, '"The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175. This is the central theme of Tom Campbell's *The Legal Theory of Ethical Positivism* (Aldershot: Dartmouth, 1996). Campbell's 'ethical positivism' is 'an aspirational model of law according to which it is a presumptive condition of the legitimacy of governments that they function through the medium of specific rules capable of being identified and applied by citizens and officials without recourse to contentious personal or group political presuppositions, beliefs and commitments' (p 2).

[56] J Raz, *Practical Reasons and Norms* (London: Hutchinson, 1975) pp 15–84. See Campbell, n 55 above, p 5: 'a system of law ought to be a system of rules. Further, the rules in question must be "real" rules, that is rules which have, in Raz's term, "exclusionary force".'

[57] See Campbell, n 55 above; Scalia, n 55 above; Walker, n 48 above; PS Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law*, Inaugural lecture, delivered at Oxford University, 17 February 1978, and published by the Clarendon Press in 1978.

[58] J Braithwaite, 'Rules and Principles: A Theory of Legal Certainty' (2002) 27 *Australian Journal of Legal Philosophy* 54.

such rules predominate, lend themselves to such exploitation more readily than certain sorts of principles and also because 'there is uncertainty that is structurally predictable by features of power in society rather than by features of the law'.[59] One might speculate that some of the tendencies Braithwaite identifies might even be stronger in less rule-focused countries than the Western, comparatively law-abiding polities (Australia, the UK, the US) on which this and allied research primarily draws.

Whether or not Braithwaite's particular hypotheses are confirmed by further work, the point remains that we will not be able to confirm or deny them without such work. Yet the literature of the rule of law is largely innocent of these sorts of inquiry. Lawyers often stop at the place where social investigation should start—at the legal vehicle of transmission—or at a somewhat skewed sample of law-affected behaviour later, where legally relevant bruises and projects are brought to them. They do not regularly investigate those places where legal transmissions are most typically and crucially received and acted upon—in the myriad law-affected everyday interactions of individuals and groups, which go nowhere near lawyers or officials but where law in a rule-of-law society does its most important work.

Moreover, sources of and impediments to legal knowledge differ between societies. So, even were lawyers interested and equipped to look more widely, they would still typically only have local knowledge. And since philosophers of law rarely go beyond the writings of lawyers for their data, they have even less to work with: vicarious local knowledge. This would need to be supplemented by comparison and reflection, and of sorts which need to go beyond where lawyers usually feel comfortable looking or philosophers thinking. One does not expect lawyers or philosophers to do something alien to their natures, namely empirical social research, but it would be gratifying if, once in a while, they acknowledged the significance of such investigations for so much that they say in ignorance of them.

In any event, whether the law is known or knowable cannot just be read off merely from legal forms. For success in communication of law surely depends on how the law is *received*, not on how it is expressed or even delivered. And that depends on many—and various—factors that intervene between law and life. But what in a particular society are the sources of and impediments to orienting one's actions by law is essentially an empirical, socio-legal question to which we have few certain answers. And since we do not, it is odd that lawyers and philosophers are so confident that we do.

This is just one example of a more general point, that the successful attainment of the rule of law is a *social* (broadly understood: it is obviously

[59] *Ibid*, pp 58–9.

political and other things as well) outcome, not a merely legal one. What matters, here as everywhere with the rule of law, is how the law affects subjects. But since the distance between law in books and law in action is often great, the space full of many other things, and in different places full of different things, it is a matter of comparative social investigation and theorisation what might best, in particular circumstances, in particular societies, further that goal. A docket of the *rechtsstaatlich* features of legal instruments, even buttressed by citations to Fuller, Hayek, Raz or even Weber, will not do the trick.

And even if there were a linear relationship between the formal purity of our legal instruments and the predictability of the law, it is not obvious that social predictability would increase in proportion. Law can only offer us tolerable threshold conditions, not total security or foreseeability. That is to say, what people need from the rule of law (together with other things), and what the successful institutionalisation of it can help provide, is, first, an adequate shield against the worst sorts of fears, uncertainties and surprises that arbitrarily exercised power can produce and, second, adequate and commonly interpretable cues by which strangers can orient their behaviour and interact with some confidence and mutual understanding. Without such a shield and such cues, life can be intolerable. But nothing can protect us against all surprises, since there are so many that the law cannot control. Nor should we hope for such security, for that would be the life of a prisoner not a free citizen. So we must recognise that more rule of law, above threshold levels, is not necessarily better.

Extremes of achievement are easier to identify than thresholds, but that there are thresholds and that they are valuable should not be controversial. Unceasing cranking-up of the clarity, certainty, consistency, and so on, of legal provisions is not obviously the only way, nor the best, to deliver what we need the rule of law to deliver. As a corollary, some diminution in these features is not necessarily the beginning of a slide into the abyss.

Again, to move from my second condition to the fourth and most important, the only time the *rule* of law can occur, when then law might be said to rule, is when the law counts significantly, distinctly and even in competition with other sources of influence, in the thoughts and behaviour, the normative economy, of significant sectors of a society. But we do not know what makes law count.[60] Knowability of legal provisions is

[60] For some intelligent, still controversial and unsettled, speculations in a particular context, see K Hendley, S Holmes, A Åslund and A Sajó, 'Debate: Demand for Law' (1999) 8(4) *East European Constitutional Review* 88–108. *Cf* also 'Citizen and Law after Communism' (Winter 1998) 7(1) *East European Constitutional Review* 70–88, and IG Cashu and MA Orenstein, 'The Pensioners' Court Campaign: Making Law Matter in Russia', with reply by K Hendley, '"Demand" for Law—A Mixed Picture' (Fall 2001) 10(4) *East European Constitutional Review* 40–60.

obviously only a part of the story. Jurists say little about this large issue, beyond bromides about 'legal effectiveness' or, more occasionally, the importance of legal culture or a culture of lawfulness. However, as seekers of the rule of law in societies without it are discovering in many parts of the world, what these generalities depend on, and even more how to produce them, are mysteries. And, since what works in one place does not necessarily work in the same way or at all elsewhere, many mysteries.

The notion of legal effectiveness merely hints at the complexity of the conditions of the rule of law, far greater complexity than is needed merely(!) to ensure the effectiveness of a legal order. That is no simple matter either, of course, but one can imagine that, for a while at least, effectiveness might come 'out of the barrel of a gun'. But not the rule of law.

If the laws are there but governments bypass them, it is not the law that rules. So exercises of governmental power must be predominantly channelled through laws that people can know. But governments, as we have seen, are not the only addressees of the rule of law. And for the rule of law to count in the life of its subjects, as important as mere *submission* to law, or even adequate *access* to and *supply* of laws and legal institutions, though far less remarked on than either, is constraint achieved by dint of *demand* for, and (often unreflective) use of, legal services and resources.[61] Such demand and use extend beyond, and frequently will not involve, direct enlistment of legal officials or institutions. They are manifest in the extent to which legal institutions, concepts, options and resources, frame, inform and support the choices of citizens.

More socially significant than citizens' (generally rare) direct invocations of official channels is the extent to which they are able and willing to use and to rely on legal resources as cues, standards, models, 'bargaining chips', 'regulatory endowments', authorisations and immunities, in their relations with each other and with the state, as realistic (even if necessarily imperfect) indicators of what they and others can and are likely to do. For it is a socio-legal truism, which still escapes many lawyers, that the importance of legal institutions is poorly indicated by the numbers who make direct use of them. The primary impact of such institutions, as Marc Galanter has emphasised,[62] is not as magnets for social disputes, a very

[61] See Hendley et al, n 60 above.

[62] See M Galenter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism* 1–47. As he observes: 'The mainstream of legal scholarship has tended to look out from within the official legal order, abetting the pretensions of the official law to stand in a relationship of hierarchic control to other normative orderings in society. Social research on law has been characterised by a repeated rediscovery of the other hemisphere of the legal world. This has entailed recurrent rediscovery that law in modern society is plural rather than monolithic, that it is private as well as public in character and that the national (public, official) legal system is often a secondary rather than a primary locus of regulation' (at 20).

small proportion of which ever come to them, but as beacons, sending signals about law, rights, costs, delays, advantages, disadvantages and other possibilities into the community. Of course, it helps if the beacons are bright rather than dim, but that is not all that is needed. It is the job of legal officials to try to make the signals they send clear and encouraging (or, in the case of criminal law, discouraging), and that of enforcement agencies to try to make them salient. But even when these signals are bright and visible, they are not the only ones that are sent out or received in a society.[63] They may be blotted out by more immediate, urgent, extra-legal, often anti-legal messages, sent from many quarters. Or by discouraging messages, such as ones conveying that, whatever the courts say, it will not be implemented (often alleged in Russia), or that the courts are less powerful than local patrons (again alleged in Russia, and elsewhere), or that whatever one gets from the courts will not compensate for the costs, difficulties, delays and even dangers of getting it. And other systems, not always co-operative with the law, come into play. Finally, even after the legal messages have been sent, and not diverted, occluded or misdirected, there are still the receivers, who are nowhere a single entity or homogeneous group, but plural, different, self-and-other-directed, within numerous, often distinct, sometimes and in some respects overlapping, 'semi-autonomous' groups, which affect them, often deeply. Law 'means' different things to different 'communities of interpreters', especially since for most of them interpretation of law is not their major interest.

The extent to which citizens are able and willing to use and to rely on legal institutions to protect and advance their interests varies, again within and between societies and over time. In many times and places, citizens are willing to use the law but excluded from access to it. In others, it appears that they are unwilling to make much use even of laws they could use. In yet others, such as the US, many citizens, perhaps too many, are both willing and able to do so. We know a bit about how to affect the supply of law, but we know a good deal less than we might about how to affect demand for it.

Law never means everything in people's lives, and it rarely means nothing either. But to speak sensibly of the rule of law as a significant element in the life of a society, the law's norms must be socially *normative*. If people know nothing of the law, or knowing something think nothing of it, or think of it but do not take it seriously, or even, taking it seriously do not know what to do about it, then their lives will not be enriched by the rule of law (although if it applies to governments they might still be partly

[63] For a classic statement of these points, see S Falk Moore, 'Law and social change: the semi-autonomous social field as an appropriate subject of study', in *Law as Process* (London: Routledge and Kegan Paul, 1978) pp 54–81.

protected by it). As to how such normativity might be generated, we have few universal prescriptions worth offering.

Where the law really does count, we can foreshorten the question why, as lawyers commonly do, and answer it in terms of the provisions and institutions of the law. For when the law is socially and politically significant, the legal position will bear closely on the factual position, and the hour of the lawyer is at hand. But that is only because what lawyers do not know, the conditions of legal effectiveness, gives significance to what they do, the law. When those conditions are lacking, lawyers' talk is beside the point. For if no one is listening it does not matter too much what the law is saying.

VI. LOCATING AND RELOCATING

I have used Dicey as something of a whipping boy in this chapter and in the articles it draws on. That was probably because his self-satisfied parochialism irritates me and because he has had such a large influence, at least in the English-speaking world. But I have recently come to think there is a reading of him (and of Fuller, for that matter) that is more interesting than the one I have given them, whether or not it is the right one. I have been writing in a context where the rule of law has been proposed to help many societies where it was not strong or long embedded, and where it often faces fierce competition from forces that have no concern with it, and whose major interests allow no accommodation for it. My argument is that responses to such proposals that begin with the legal-institutional features of success stories are for many reasons a bad way to start. Roughly, I have been saying: start with function, not with form. However, it is arguable that some of the greatest success stories of the rule of law started the other way around. No one designed them from the ground up; typically they were inherited, occasionally tinkered with, and at least once, in the US, tinkered with greatly and to great effect. Their rule of law was not a grand rationalist programme of institutional design, but what Michael Oakeshott has called the 'pursuit of intimations'[64] of existing, sometimes very old, traditions. I do not think that is the only way that institutions can develop, but a society is very lucky indeed when it has good institutional intimations to pursue.

In those circumstances, exploring how we do things 'here' might well start better by exploring the *genius loci*, to begin with existing forms, try to

[64] 'In politics, then, every enterprise is a consequential enterprise, the pursuit, not of a dream, or of a general principle, but of an intimation': M Oakeshott, 'Political Education' in *Rationalism in Politics and other essays*, new and expanded edn (Indianapolis, IN: Liberty Press, 1991) p 57. And see *ibid*, pp 66–9, 'The Pursuit of Intimations.'

understand what they do, and how they have come to do what one values in what they do. Perhaps that is all that Dicey, and Fuller when he examined the forms and limits of different legal practices with which he was familiar, sought to do. If so, I think that is a locally important and valuable enterprise, even if limited in scope because it rests with only part of the whole. For in a sense this is an exception that proves the rule. The reason one is better off to start with forms that are established and of which one approves, with however many qualifications, is that one already has a live and healthy organism, the further growth of which one supports. If we do not have the full story of its conditions of life, even if we cannot fully understand how it works, that does not really matter, since it has done fine before us and without us. Taken as a basis for transplantation to a landscape full of organisms one wishes to transform—cadavers, clones, embryos, and other species, some quite voracious—the anatomical/legalistic approach to relocating the rule of law seems to me in principle misguided.

Relocating the rule of law has its own rigours. Not every *locus* has a *genius* for the rule of law. The intimations of local traditions must be explored even if they are odious, both because unless they are taken into account there will usually be a price to pay, and because they may not be hospitable to every import. Moreover, much that goes to make up the intimations of rich and complex institutional traditions will not accompany their institutional emanations when the latter are asked to travel. For institutions rest on and are interwoven with traditions, interpretations and understandings that are themselves not easily identified or transported. They might depend, too, on ingredients which are not found in the recipient country or might be nullified by ones which are. Function, in other words, will not necessarily follow form; so we cannot avoid the difficult task of working the other way around, with all the attention to particularity, local history and traditions, and allowance for variety, that that implies.

4

The Rule of Law in Post-Communist Constitutional Jurisprudence

Concerned Notes on a Fancy Decoration

RENATA UITZ[1]

The rule of law as a quality, value or guiding principle features prominently in post-communist constitutions. The Czech Republic is proclaimed to be a 'sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens' (Czech Constitution, Article 1.1).[2] According to its constitution, Hungary is an 'independent, democratic rule of law state' (Hungarian Constitution, Article 2.1). 'The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice' and 'the organs of public authority shall function on the basis of, and within the limits of, the law' (Polish Constitution, Articles 2 and 7).[3] In a similar fashion, the Slovak Republic is 'a sovereign, democratic, and law-governed state.' (Slovak Constitution, Article 1),[4] while Romania is 'a democratic and social state, governed by the rule of law, in which human dignity, citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values, in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989, and shall be guaranteed' (Romanian Constitution, Article 1.3).[5]

[1] I am grateful to the participants at the Florence Conference for questions and comments which helped to clarify my argument. Unless otherwise indicated, all translations from the original Hungarian are mine.

[2] Available in English at http://test.concourt.cz/angl_verze/constitution.html.

[3] Available in English at http://www.kprm.gov.pl/english/106_105.htm.

[4] Available in English at http://www.vescc.com/constitution/slovakia-constitution-eng.html.

[5] Available in English at http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=1#t1c0s0a1.

In addition to establishing a constitutional democracy and providing meaningful protection to human rights, strengthening the rule of law has become a promise, a moral and intellectual programme, as well as a political expectation throughout the transitional democracies of Central and Eastern Europe.[6] In the words of Martin Krygier: 'Post-communist reformers have almost universally, and at least rhetorically, been committed to implementing the rule of law, a *Rechtsstaat*, a "law-governed state".'[7] From serving as a fundamental premise of transition to democracy, the observance of the rule of law became a key to success for applications for admission to the Council of Europe[8] and then to the European Union. From the early years, the degree and success of the transformation of state communist systems into constitutional democracies was measured by many scholars according to principles of constitutionalism and the rule of law.[9] The Copenhagen Criteria permitted the accession to the European Union of only those states which, inter alia, had achieved 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities'.[10] Over the years, references to the rule of law as an aim or a standard have become all too familiar for actors as well as observers of national public discourses throughout the region. The Polish foreign minister has even referred to the rule of law as a basic principle of Polish foreign policy.[11]

Where did this preoccupation with living up to the principles of the rule of law come from, and what does the protection of the rule of law entail in Central Europe? Does the rule of law have a minimum core

[6] And, as Thomas Carothers notes, the celebration of the rule of law to this effect did not halt at post-communist Central and Eastern Europe. On this, see his 'The Rule of Law Revival' (1998) 77 *Foreign Affairs* 95–106 (also available at http://www.carnegieendowment.org/files/CarothersChapter11.pdf). Among its numerous other virtues the article provides an elegant checklist on the minimum core of the rule of law as a constitutional principle in real-life operation.

[7] M Krygier, 'Rethinking the Rule of Law after Communism,' in A Czarnota, M Krygier and W Sadurski (eds), *Rethinking the Rule of Law after Communism* (Budapest, and New York: CEU Press, 2005) p 266.

[8] See Art 3 of the Statute of the Council of Europe, which provides that 'Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the aim of the Council'.

[9] See eg R Teitel, *Transitional Justice* (Oxford: Oxford University Press, 2000).

[10] As established by the European Council in *Conclusions of the Presidency*, Copenhagen, 21–22 June 1993, para 7.A.iii, available at ue.eu.int/ueDocs/cms_Data/docs/pressdata/en/ec/72921.pdf.

[11] 'Justice and the rule of law at the international level are seen in our foreign policy as the basic principles': 'The Rule of Law and International Order', Opening speech delivered by Professor Adam Daniel Rotfeld Minister of Foreign Affairs of Poland at the meeting of the Institute of International Law (Kraków, 20 August 2005), available at http://www.mfa.gov.pl/The,Rule,of,Law,and,International,Order,Opening,speech,delivered,by,Professor,Adam,Daniel,Rotfeld,Minister,of,Foreign,Affairs,of,Poland,at,the,meeting,of,the,Institute,of,International,Law,(Krakow,,20,August,2005),2390.html.

when in operation? Were essential ingredients of the rule of law imported from established constitutional democracies, and to what extent did these foreign goods become internalised over the years, if at all? Is respect for the rule of a law more than mere decoration or window dressing in the vocabulary of post-communist newspeak? With a view to addressing these questions, in the present chapter I attempt to explore the constitutional and human rights developments which have been adopted in order to promote the rule of law, or which have at least been justified in the light of the principles of the rule of law. The chapter will not introduce a new theory of the rule of law, nor does it attempt to conceptualise a particular set of legal developments in terms of a comprehensive theory on the rule of law. Instead, I propose to revisit key constitutional court decisions, many of which might be familiar to seasoned experts of the field.

A gloomy yet familiar conclusion seems to emerge out of these decisions. Although the language of the rule of law is part of everyday political and even legal discourse in Central Europe, it is little more than a rhetorical ornament. The times when cries for the rule of law were to be interpreted as calls for transplanting Western legal solutions are long gone. Looking at constitutional jurisprudence, one may see that vernacular applications of the term flourish and differ greatly from one another. Some of the local meanings, applications and claims submitted in the name of the rule of law are plausible, although one often finds contradictory or at least competing legal solutions even within the jurisprudence of the same constitutional court. Bizarre claims and developments are also emerging, and the misuse of the phrase is widespread, as becomes even more apparent when constitutional court decisions are juxtaposed with examples from the jurisprudence of the European Court of Human Rights (ECtHR). This chapter thus concludes that the rule of law is not without significance in Central Europe. It is a fancy rhetorical decoration used to detract attention from material and structural flaws of ships rebuilt and patched up on the open seas.

I. TRANSITIONAL RULE OF LAW: REPEATING SOME LESSONS FROM THE RETROACTIVE CRIMINAL JUSTICE AND COMPENSATION JURISPRUDENCE

An account of the rule of law in post-communist Central Europe is almost fated to commence with some reflections on transitional justice measures. Whether discussing 'lustration' (that is, purification), retroactive criminal justice measures, or restitution for harm caused by the illegal activities of former regimes (state actors), the fundamental dilemma of the transitional justice literature readily surfaces: how much deviation may be allowed from ordinary (that is, non-transitional) principles of constitutionalism

and the rule of law in the name of transition to democracy? Ruti Teitel's well-known argument accommodates most transitional justice measures within a rule of law paradigm, claiming that these legal rules amount to a *sui generis* category of the rule of law. For Teitel, in times of transition to democracy the ordinary institutions and premises of the rule of law do not function.

Teitel's theory was informed by numerous court decisions in which references to the rule of law and its requirements were abundant. Hungary may pride itself on an early constitutional court decision where the 'ordinary rule of law' was protected in the face of attempts to introduce retroactive criminal punishment (by waiving the lifting of the statute of limitations) for crimes which were not prosecuted for political reasons under the previous regime.[12] The sponsors of the retroactive criminal justice Bill argued that the 'rule of law cannot be used to shield injustice'.[13]

Invoking the principle of the rule of law enshrined in the Constitution (Article 2.1), the basic premise of the Constitutional Court's reasoning was that of the legality of transition and of constitutional continuity between the previous regime and the emerging democratic system. Although reaching a decision which ultimately prevents the prosecution of serious criminal offences that went unpunished for political reasons during previous oppressive regimes is not a trivial stance to take for a constitutional court in the early phase of democratic transition, the reasoning of the Hungarian Constitutional Court is couched in the rather abstract language of the requirements of the rule of law and legal continuity. Indeed, the Hungarian Constitutional Court was strongly criticised for its reliance on the conception of the rule of law and for its adherence to a continuity rhetoric which was short on any harsh condemnation of the previous regime. This criticism prompted then Chief Justice László Sólyom to make an unusual gesture and explain the Constitutional Court's decision, stressing the moral imperatives informing the Court.[14]

A year after the Hungarian Constitutional Court's decision, the Czech Constitutional Court approved the constitutionality of the Law on the

[12] 11/1992 (III. 5.) AB decision. The full title of the Hungarian retroactive criminal justice Bill was 'On the Prosecutability of grave Crimes Committed between 21 December 1944 and 2 May 1990, which were Not Prosecuted for Political Reasons'. On the passing of the Bill in English, see G Halmai and KL Scheppelle, 'Living Well is the Best Revenge: The Hungarian Approach to Judging the Past' in JA MacAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame: University of Notre Dame Press, 1997) pp 158–60.

[13] Quoted by J Kis, 'Az első magyar Alkotmánybíróság értelmezési gyakorlata' ('The first Hungarian Constitutional Court's interpretation practice'), in G Halmai (ed), *The Constitution Found? The First Nine Years of Constitutional Review on Fundamental Rights* (Budapest: INDOK, 2000) p 61.

[14] The incident is described in H Schwartz, *The Struggle for Constitutional Justice in Post-communist Europe* (Chicago, IL: The University of Chicago Press, 1999) p 100.

Illegality of the Communist Regime and Resistance to It.[15] In addition to waiving the statute of limitations to allow for the prosecution of crimes committed between 25 February 1948 and 29 December 1989 which had not been prosecuted for political reasons (Article 5), the law denounced the Czech Communist regime as 'illegal and contemptible' (Article 2(1)) and declared the Czech Communist Party to be a criminal organisation (Article 2(2)). The Czech constitutional justices, in their very first decision, upheld the law, arguing that there was a discontinuity of values between the Communist regime and the new regime in the following terms:

> The Czech Constitution accepts and respects the principle of legality as a part of the overall basic conception of a law-based state; positive law does not, however, bind it merely to formal legality, rather the interpretation and application of legal norms are subordinated to their substantive purpose, law is qualified by respect for the basic enacted values of a democratic society and also measures the application of legal norms by these values. This means that even while there is continuity of 'old laws' there is a discontinuity in values from the 'old regime'. This conception of the constitutional state rejects the formal-rational legitimacy of a regime and the formal law-based state.[16]

The Czech Constitutional Court attached significance to the fact that during the Communist regime certain crimes were not prosecuted, for ideological or political reasons, that is extra-legal reasons. Therefore, according to the Czech justices, the ordinary logic of legal certainty could not be invoked in the case: 'This "legal certainty" of offenders is ... a source of legal uncertainty to citizens (and vice versa). In a contest between these two types of certainty, the Constitutional Court gives priority to the certainty of civil society, which is in keeping with the idea of a law-based state.'[17] Upon such considerations the Czech Constitutional Court decided to uphold the law on the illegality of the Communist regime.

It is worth pointing out that in 1992, in the first lustration decision the then Constitutional Court of the (still existing) Czechoslovak Federal Republic expressed similar views on the rule of law (calling it a law-based state) and legal certainty and regime change in the following terms:

> As one of the basic concepts and requirements of a law-based state, legal certainty must, therefore, consist in certainty with regard to its substantive values … Respect for continuity with the old value system would not be a guarantee of legal certainty but, on the contrary, by calling into question the values of the

[15] Act no 198/1993 (9 July 1993). The full text of the Czech law is available in English in N Kritz (ed), *Transitional Justice, How Emerging Democrats Reckon with Former Regimes, Vol 2: Country Studies* (Washington, DC: US Institute of Peace Press, 1995) pp 366 *et seq*.

[16] Pl. ÚS 19/93. Available in English at http://test.concourt.cz/angl_verze/doc/p-19-93.html.

[17] *Ibid*.

> new system, legal certainty would be threatened in society and eventually the citizens' faith in the credibility of the democratic system would be shaken.[18]

So while a discussion on the requirements of the rule of law and legal certainty drove both the Czech and the Hungarian Constitutional Courts towards looking into the past and elaborating on the consequences of historical and legal continuity, the two constitutional courts sharply differ in their overall approach. If the Czech Constitutional Court was ready to condemn the previous regime in the name of protecting the rule of law, the Hungarian Constitutional Court was keen where possible to avoid any such comments. The Hungarian Constitutional Court emphasised formal legal continuity and its consequences. In contrast, Czech constitutional judges opted for a value-based reasoning, which ultimately led them to considerations about victims' and perpetrators' justice.

Note that despite the Czech Constitutional Court's clear stance on legal continuity and moral (value) discontinuity with the Communist regime, the ordinary Czech courts were reluctant to follow this path in cases where criminal charges against the highest-ranking Communist Party and government officers came before them.[19] In 1997 the Superior Court of Prague found that the statute of limitations had run out and refused to convict Milos Jakes and Josef Lenárt, who were charged with treason for their role in inviting the Soviet military invasion to suppress the 1968 Prague Spring.[20]

In Hungary by contrast, after two more rounds of deliberation the Hungarian Constitutional Court finally approved a law applicable to criminal prosecutions for offences committed during the previous regimes, without allowing for retroactive criminal measures.[21] Current Hungarian law allows for prosecutions in such cases where the statute

[18] Pl. US 1/92: Czechoslovak (first) lustration decision, available in English at http://test.concourt.cz/angl_verze/doc/p-1-92.html.

[19] See E Wagnerowa, 'The Effects of the Decisions of the Constitutional Court in Relation to Other Jurisdictions', available at http://www.concourt.am/hr/ccl/vestnik/2.24-2004/wagnerowa.htm.

[20] Milos Jakes was the first (general) secretary of the Czechoslovak Communist Party at the time of the Velvet Revolution of 1989. Jozef Lenárt occupied numerous high positions in the Czechoslovak Communist Party, including that of prime minister between 1963 and 1968. The first charges against Jakes were dismissed in 1995 on procedural technicalities. On the 1997 proceedings see 'Constitution Watch—Czech Republic', (1997, Autumn) 6 *East European Constitutional Review* (online). The two officials were acquitted again in 2002 (see RFE/RL Newsline, 24 September 2002), and the Czech government gave up on its prosecution for treason in 2003. Yet, in 2003 both stood as defence witnesses in the trial of Karel Hoffmann, who was also charged with treason in relation to the events of 1968. See http://www.rferl.org/newsline/2003/06/3-CEE/cee-030603.asp.

[21] The second retroactive criminal justice Bill was reviewed by the Constitutional Court in 42/1993 (X. 13.) AB decision, while the third and successful attempt was upheld in 53/1993 (X. 13.) AB decision. See also 36/1996 (IX.4.) AB decision concerning the applicable substantive law in such cases.

of limitations did not apply to the offence at the time the crime was committed, or where the offence amounts to a crime under international law for which the statute of limitations does not apply. While there are not too many cases of this kind left, and those which are still pending do not affect high-ranking Communist Party or governmental officials, the Hungarian courts were willing to decide on the merits of the indictments brought before them.[22]

Although there are several differences between the Hungarian and the Czech contexts which cannot be explored here in detail,[23] it is clear that, unlike the Czech Constitutional Court, ordinary criminal courts in Hungary were more comfortable with a formalistic conception of legal continuity and the rule of law. It is true that the stance of the Czech Constitutional Court might be more appealing to an audience which expects moral leadership from a constitutional court at least in the phase of democratic transition. Ultimately, however, the more abstract and more formalistic approach followed by the Hungarian Constitutional Court turned out to be more workable in actual cases. Nonetheless, it can still be concluded that the conviction of volunteers within the Communist riot police and 'medium-ranking' (professional) military officers responsible for ordering mass shootings by firing squads during the 1956 revolt[24] is hardly a major prize coveted by the proponents of doing justice in regard to the wrongs perpetuated by previous regimes.

Still the Hungarian Constitutional Court was not so stubborn about complying with the requirements of the rule of law in all cases involving transitional justice measures. Departure from the norm is the clearest in cases involving the compensation of victims who suffered economic or moral harms resulting from illegal operations of the previous regime.[25] It should be noted that the full restitution of expropriated property was not even raised by the political forces in charge of orchestrating democratic transition. The Constitutional Court was also ready to declare that the government had a broad discretion over matters of economic reconstruction and in dismantling the communist system of ownership. In a case from early 1990, the Constitutional Court was prepared to find the government under no legal obligation to provide full compensation for expropriated property, nor was anyone entitled to claim or receive such compensation.

[22] For an analysis of court decisions see K Morvai, 'Hungarian Criminal Court Cases concerning the (Retribution for the) 1956 Revolution', in A Sajó (ed) *Out of and Into Authoritarian Law* (The Hague: Kluwer International, 2003).

[23] It is worth noting that Communist Party leaders and high-ranking officers tended to go unprosecuted and unpunished in the post-communist countries of Central Europe for a wide range of reasons.

[24] Morvai, n 22 above, p 28.

[25] Here I follow my *Constitutions, Courts and History, Historical Narratives in Constitutional Adjudication* (Budapest: CEU Press, 2005) at pp 258 *et seq*.

In the compensation cases the justices departed from the requirements of rule of law and legal continuity, focusing instead on the *ex gratia* nature of compensation. The subsequently enacted legislative scheme introduced partial compensation for the entire class of so-called 'previous owners', without regard to the history and manner in which they suffered harm. As a result, victims of illegal convictions whose property was confiscated as a result of criminal proceedings ceased to be entitled to full restitution of confiscated property, and became entitled only to partial compensation under the newly enacted transitional justice measures.

As Ruti Teitel put it, during the course of the transition to democracy, facilitated by so many actors: 'What seems right is contingent and informed by prior injustice ... [and] it is the legal responses that themselves create transition.'[26] Nonetheless, if we pay proper attention to historical contingencies, it is clear from the above cases that constitutional courts were ready to shape rule of law arguments to their liking, sometimes even switching between rule of law considerations and other justifications. A comparison of the Czech and Hungarian retroactive justice cases reveals how rule of law considerations result in completely different conclusions in relation to very similar issues. Furthermore, a comparison of judicial reasoning in the Hungarian retroactive justice and compensation cases reveals how easy it was for a constitutional court to abandon the language of the rule of law and introduce completely new intellectual constructs which later resulted in outcomes at odds with rule of law considerations.

Constitutional court decisions concerning transitional justice measures may appear to be misleading guides in a study of the rule of law, as they offer lessons not at the core but from the periphery. When reading about the so-called transitional justice cases one might have the impression that these judicial decisions constitute an isolated set of cases, which are left undisturbed by constitutional justices when they decide on 'normal' cases. If this were the case, deviations from the ordinary rule of law, the apparent flexibility of rule of law arguments in constitutional cases, together with the special liberty which courts take in invoking or abandoning these arguments in transitional justice cases, would not be cause for serious concern. After all, transitional justice measures are not only on the periphery, but are slowly becoming history. Unfortunately, however, it is important to stress that several lines in the transitional justice story are still far from completion.

When the then Czechoslovak Constitutional Court upheld the constitutionality of the lustration law in 1992, it attributed special significance

[26] R Teitel, 'Transitional Justice as Historical Justice', in LM Meyer (ed) *Justice in Times, Responding to Historical Injustice* (Baden-Baden: Nomos, 2004) p 216.

to the fact that lustration measures were to remain in effect for a limited (transitional) period of time.[27] More recently, the Polish Constitutional Tribunal[28] clashed with the political branches of state in a high-profile case in which it invalidated the latest lustration law in May 2007—just before the contested lustration procedure was to take effect.[29] The Bill was the Kaczynski government's pet project in its mission to clear the public sector of Communists from the old regime. In the decision, Chief Justice Jerzy Stepien recalls that 'a state based on the rule of law should not fulfil a craving for revenge instead of fulfilling justice'.[30] Yet a commentary in the Polish edition of *Newsweek* reminded readers that, whilst the Constitutional Tribunal preserved its independence in the face of constant attacks from the ruling coalition in striking down the lustration decision, the Tribunal's ruling was reached with a record number of dissenting opinions.[31]

By contrast, the rule of law was envisioned to command a rather distinct set of guarantees in lustration procedures outside the constitutional court's sphere of influence. These aspects and arguments are of increasing practical significance as complaints arising out of lustration cases are now reaching the European Court of Human Rights (ECtHR). It gives a special edge to these cases that the ECtHR is willing to listen to a range of constitutional arguments to which national constitutional courts were not sensitive. In this conversation between courts, the fate of rule of law arguments is especially noteworthy as the ECtHR pays attention to voices which were left largely unheard in national courts.

[27] See Pl. ÚS 1/92: 'The conditions prescribed by the statute for holding certain positions shall apply only during a relatively short time period by the end of which it is foreseen that the process of democratization will have been accomplished (by 31 December 1996)' and 'The basic purpose of this statute is to prescribe, exclusively for the future, the preconditions for holding certain narrowly defined offices or for engaging in certain activities precisely specified in the statute, and not permanently, but only for a transitional period'.

[28] Previously the Constitutional Tribunal had clashed strongly with the government when it invalidated legislation aimed at ending the mandate of those local authorities which were late in filing property (wealth) declarations. (The law was an attempt by PiS (the Law and Justice Party) to remove its political opponents from major local posts, including in particular the office of mayor of Warsaw.)

[29] Decision K 2/07. Available in Polish on the website of the Constitutional Tribunal, see http://www.trybunal.gov.pl/index2.htm.

[30] Quoted in English from 'Poland's anti-communist law "unconstitutional"', in *The Daily Telegraph*, 12 May 2007. at http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2007/05/12/wpoland12.xml. See also Parliamentary Assembly of the Council of Europe Resolution 1096 (1996) on measures to dismantle the heritage of former Communist totalitarian systems at para 12, emphasising that 'Revenge may never be a goal of such measures, nor should political or social misuse of the resulting lustration process be allowed. The aim of lustration is not to punish people presumed guilty—this is the task of prosecutors using criminal law—but to protect the newly emerged democracy', (available at http://assembly.coe.int/Documents/AdoptedText/TA96/ERES1096.HTM.

[31] As reported in English in *Polish News Bulletin*, 17 May 2007.

In 1996, still at the height of the lustration efforts, the Parliamentary Assembly of the Council of Europe was, for instance, fairly demanding in ensuring compliance with the rule of law in developing criteria for lustration processes. In a resolution on measures to dismantle the heritage of former communist totalitarian systems, it was reaffirmed that lustration measures:

> can be compatible with a democratic state under the rule of law if several criteria are met. Firstly, guilt, being individual, rather than collective, must be proven in each individual case—this emphasises the need for an individual, and not collective, application of lustration laws. Secondly, the right to a defence, the presumption of innocence until proven guilty, and the right to appeal to a court of law must be guaranteed.[32]

These guarantees were also repeated and detailed in the 'Guidelines to ensure that lustration laws and similar administrative measures comply with the requirements of a state based on the rule of law', which provide, inter alia:

> In no case may a person be lustrated without his being furnished with full due process protection, including but not limited to the right to counsel (assigned if the subject cannot afford to pay), to confront and challenge the evidence used against him, to have access to all available inculpatory and exculpatory evidence, to present his own evidence, to have an open hearing if he requests it, and the right to appeal to an independent judicial tribunal.[33]

These safeguards are particularly interesting as they provide protection against the use of the otherwise rather unreliable and manipulated archives of communist secret services in legal proceedings operated by the institutions of emerging democracies. In the ECtHR's.recent decision in *Matyjek v Poland*,[34] Polish lustration legislation of 1997 was contested, inter alia, for not permitting the applicant proper access to the relevant files of the communist secret services which would have been essential to his defence against a charge of collaboration. Discussing the extent of procedural safeguards under Article 6, the ECtHR's final judgment emphasised (at para 62) that

> at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, it reiterates that if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the

[32] Parliamentary Assembly of the Council of Europe Resolution 1096 (1996), para 12.

[33] The Guidelines are a part of 'Measures to dismantle the heritage of former Communist totalitarian systems', Doc 7568 of 3 June 1996. The full text is of the Guidelines is available at http://assembly.coe.int/Documents/WorkingDocs/doc96/EDOC7568.htm.

[34] *Matyjek v. Poland*, Application no 38184/03, Judgment of 24 April 2007, Final, 24 September 2007.

> Convention in respect of any proceedings relating to the application of such measures. The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case because what is accepted as an exception must not become a norm.'

Interestingly, the ECtHR was more willing to attach rule of law considerations to more concrete constitutional guarantees of due process, in particular the right to fair trial and the equality of arms. It is also of note how, unlike national courts, the ECtHR took care to stress that the files of communist secret services do not per se qualify as national secrets in the successor regimes built on the ideals of constitutionalism, human rights and the rule of law. Time, which did not seem to make much difference for national constitutional courts, was of major significance for the ECtHR. This might be of some reassurance for those who saw how rule of law-based reasoning did not succeed in persuading national constitutional courts to restrict lustration projects to the status of short-term and temporary efforts. Nonetheless, transitional justice cases decided by national constitutional courts foreshadow fundamental concerns about how easy it is to transport elastic rule of law arguments into ordinary (that is non-transitional) constitutional cases. In the light of the above, the Czech Constitutional Court's position that 'true retroactivity has no place in a state governed by the rule of law in situations where the legislature already could have had its 'say' but did not do so'[35] sounds more unsettling than reassuring. The following section offers examples which expose the elasticity of rule of law considerations and arguments in ordinary constitutional court decisions in post-communist central Europe.

II. THE RULE OF LAW IN ORDINARY CONSTITUTIONAL JURISPRUDENCE

As Martin Krygier has remarked:

> though the meaning and the worth of the rule of law have long been contested, the major claims of its partisans have equally long been quite clear: that law can and should contribute in salutary, some say, indispensable ways to channelling, constraining, and informing—rather than merely serving—the exercise of power, particularly public power.[36]

[35] Pl. ÚS 33/01, available in English at http://test.concourt.cz/angl_verze/doc/p-33-01.html.

[36] M Krygier, 'Rethinking the Rule of Law after Communism', n 7 above, p 265.

Jeffrey Sachs made a similar observation when he argued that it is already a good thing if citizens take the law seriously and press the government to observe the law.[37] The minimum requirement of the rule of law is that all actors, including both private individuals and the state, behave in accordance with the law.

Legal certainty or foreseeability conditions routinely appear in cases concerning tax legislation throughout the region.[38] In most countries, constitutional courts found no difficulty in deriving numerous important procedural or formal requirements from the rule of law. By way of illustration, one may turn to a recent decision of the Lithuanian Constitutional Court.,[39] which listed requirements derived from the 'universal constitutional principle' of the rule of law as: the prohibition of ultra vires legislative and regulatory acts; the need for legal norms to be general (and not individualised), clear, consistent, and relatively stable; the prohibition of ex post facto legislation; and the requirement that legal norms be accessible together with the requirement to observe the hierarchy of norms—to highlight just a few of the items drawn from the established jurisprudence of the Lithuanian courts.

The following section intends to look beyond such evident and familiar premises in search of a more comprehensive understanding of the evolution of constitutional requirements associated with the rule of law. The present study certainly cannot provide a comprehensive overview of Central European constitutional jurisprudence on the rule of law. For present purposes, I will simply focus on a few examples where constitutional review fora provided rich accounts of the rule of law, thus triggering inconsistent, and at times problematic, consequences.

A. Rule of Law and Criminal Justice: How much of the Rule and How much of the Justice?

The reliance on the requirements of the rule of law assisted constitutional courts in infusing entire legal fields with constitutional guarantees. The Hungarian Constitutional Court derived a number of requirements from the rule of law in order to establish the constitutional guarantees

[37] JD Sachs, 'Globalization and the Rule of Law,' available at http://www.law.yale.edu/documents/pdf/Globalization_and_the_Rule_of_Law.pdf, p 5.

[38] Eg POL-2002-3-028 a) Poland / b) Constitutional Tribunal / c) / d) 22-05-2002 / e) K 6/02 / f) / g) *Dziennik Ustaw Rzeczypospolitej Polskiej* (*Official Gazette*), 2002, no 78, item 715; *Orzecznictwo Trybunalu Konstytucyjnego Zbiór Urzedowy Seria A* (Official Digest), 2002, Series A, no 3, item 33 (CODICES database).

[39] Case No. 51/01-26/02-19/03-22/03-26/03-27/03, of 13 December 2004, at para 11, available in English at http://www.lrkt.lt/dokumentai/2004/r041213.htm.

of criminal law (*alkotmányos büntető jog*). In its famous decision on the unconstitutionality of retroactive justice laws, the Constitutional Court derived the constitutional prohibition on retroactive criminal legislation from—or at least closely associated it with—the requirement of legal certainty and the rule of law.[40] As a requirement of legal certainty the Constitutional Court thereby recognised the significance of leaving settled legal relations undisturbed, unless a compelling reason (such as the application of an unconstitutional statute)[41] required otherwise. The mere fact, however, that the legal relationship resulted in an unjust consequence should not justify a departure from the rule of law. The presumption of innocence is another criminal justice principle which is routinely associated in Hungary with the requirements of legal certainty and the rule of law.[42]

In another early decision on the criminal prohibition of incitement of national or ethnic hatred, the Hungarian Constitutional Court added that the concept of constitutional guarantees under criminal law stemming from the foundational value of the rule of law imposed formal as well as substantive limitations on the criminal justice-related powers of governments.[43] In that case Hungarian justices considered whether (1) the criminal prohibition was absolutely necessary and (2) the limitation was proportionate, that is whether the limitation imposed by the criminal sanction was necessary and appropriate.[44] The Constitutional Court's powers, however, do not extend to assessing the criminal policy decisions of the government of the day.[45] In its early jurisprudence, the Constitutional Court also emphasised the fact that criminal measures are measures of last resort in a constitutional democracy: criminal law sanctions should serve as the ultimate legal consequence: 'It is the task of criminal sanctions, the rule and purpose of criminal

[40] 11/1992 (III. 5) AB decision. Note that the same prohibition could also have been based on Art 57(4) of the Hungarian Constitution, which provides that 'No one shall be declared guilty and subjected to punishment for an offence that was not a criminal offence under Hungarian law at the time such offence was committed.' Available in English at http://mkab.hu/en/enpage5.htm. This reading was reaffirmed in a subsequent retroactive criminal justice case in 42/1993 (VI. 30.) AB decision. Also 2/1994 (I. 14.) AB decision.

[41] This exception was important, as the Law establishing the Constitutional Court contains a special section governing the review of criminal cases in which the judgment was rendered on the basis of an unconstitutional statute. See Art 43(3) of the Law establishing the Constitutional Court, and also 10/1992 (II. 25.) AB decision.

[42] See 63/1997 (XII. 11.) AB decision, also reaffirmed in 26/1999 (IX. 8.) AB decision. Note that Art 57(2) of the Hungarian Constitution expressly acknowledges the presumption of innocence.

[43] 30/1992 (V. 26.) AB decision. The essential holding as formulated therein was most recently reaffirmed by the Constitutional Court in 41/2007 (VI. 20.) AB decision.

[44] Reaffirmed eg in 6/1998. (III. 11.) AB decision.

[45] See eg in 1214/B/1990 AB decision from 1995, reaffirmed more recently in 13/2002 (III. 20.) AB decision; 54/2004 (XII. 13.) AB decision; 18/2006 (V. 31.) AB decision and 20/2006 (V. 31.) AB decision.

prohibitions to preserve the inviolability of legal and moral norms when sanctions of other legal fields cannot help.'[46] The Hungarian justices thus emphasised the prohibition on arbitrary and random criminal sanctions.[47] Criminal provisions shall be clear and be phrased in a manner that limits the opportunity for arbitrary interpretation and application.[48] In addition, the Constitutional Court emphasised the importance of procedural guarantees surrounding an independent and impartial judiciary in safeguarding the constitutional guarantees of criminal law.[49]

The Czech Constitutional Court for its part also associated the principles of the rule of law with the constitutional guarantees of fair procedure in a decision on the constitutionality of criminal procedural requirements concerning the prolongation of custody. The Court held that: 'The purpose of criminal proceedings is not only "just punishment of a perpetrator". The goal of a criminal proceeding is also to have a "fair" process. The existence of fair procedure is an indispensable condition for the existence of a democratic, law based state.'[50]

The Lithuanian Constitutional Court derived similar principles from the union of the rule of law and principles of justice, finding that

> the constitutional principles of justice and of a state that is subject to the rule of law also mean that there must be a just balance (proportionality) between the objective sought in order to punish violators of law and to ensure prevention of violations of law and the chosen means to achieve this objective, and that the sanctions (penalties, punishments) established for violations of law must be proportionate to these violations … The penalties established for violations of the laws must be of such magnitude as is necessary for the legitimate and generally important objective pursued—to ensure the observance of the laws, and the fulfilment of the established duties.

In the decision concerning the constitutionality of fines imposed by the law on tobacco production and retail sale, the Lithuanian Constitutional Court used the above considerations to test the constitutionality of excessive fines, finding that the high level determined for the fines amounted

[46] See 30/1992 (V. 26.) AB decision. As a general rule, the Constitutional Court found no problems in invalidating such criminal prohibitions as restricted constitutional rights, such as freedom of expression (eg *ibid*; or a more recent decision on incitement to hatred at 12/1999 (V. 21.) AB decision; also 18/2000 (VI. 6.) AB decision); or freedom of religion (46/1994 (X. 21.) AB decision on conscientious objection in the military); or freedom of association (58/1997 (XI. 5.) AB decision).

[47] See also in 14/2000 (V. 12.) AB decision on the criminal prohibition of authoritarian symbols.

[48] Reaffirmed more recently in 47/2000 (XII. 14.) AB decision on the constitutionality of the criminal prohibition of doping (in sports); also in 18/2004 (V. 25.) AB decision on the criminal prohibition of incitement to hatred.

[49] See 6/1998 (III. 11.) AB decision.

[50] Pl. ÚS 4/94, available in English translation at http://test.concourt.cz/angl_verze/doc/p-4-94.html.

to a criminal prohibition. The Lithuanian Court found that the excessive mandatory minimum fines imposed by the law violated the principle of the rule of law, because they impaired judicial independence.[51]

Indeed, the most important difference between the Hungarian and the Lithuanian positions involves whether to place considerations of justice alongside or outside the requirements of the rule of law. Unlike for the Hungarian justices, in Lithuanian constitutional jurisprudence there is a deep conviction that 'when legally regulating public relations it is necessary to give consideration to the requirements of natural justice comprising inter alia the requirement to ensure the equality of persons before the law, the court and state institutions and officials'.[52]

More recently, the Constitutional Court added a novel consideration to its understanding of the constitutional guarantees of criminal justice, stipulating that in a state governed by the rule of law the government must exercise its criminal law powers subject to such rules as to strike a proper balance between (a) constitutional rules meant to protect individual rights and (b) expectations about the proper functioning of the criminal justice system.[53] The Constitutional Court stressed that the risk of enforcing criminal justice measures had to be borne by the state (and could not be shifted onto the individual).[54] Relying on such considerations affecting the distribution of risks in criminal prosecutions, the Constitutional Court limited the legitimate scope of the application of secret surveillance measures.[55]

Indeed, when questions about the proper division of the burden of prosecution are put in their broader context, constitutional courts face issues concerning not only the fundamentals of criminal procedure but also of judicial independence. A recent decision of the Czech Constitutional Court in a case where the constitutionality of the so-called 'complaint concerning violation of the law' was at issue stands as an excellent illustration of this point. Under the Czech criminal law then in force, such an exceptional complaint could only be launched by the Minister of Justice and not by other participants in criminal cases including, most importantly, the accused—leaving it as the only such one-sided complaint procedure in European constitutional jurispudence.[56] This was especially problematic

[51] Case No 02/03-03/03-04/03-05/03-39/03-05/04-16/04-02/05-04/05, of 3 November 2005, see especially 10.4. Note that the Hungarian Constitutional Court dealt with the relationship of judicial independence and sentencing rules in 13/2002 (III. 20.) AB decision.

[52] Case No 51/01-26/02-19/03-22/03-26/03-27/03, of 13 December 2004, available in English at http://www.lrkt.lt/dokumentai/2004/r041213.htm., at para 11.

[53] 42/2005 (XI. 14.) AB decision.

[54] *Ibid*; also 20/2006 (V. 31.) AB decision.

[55] 2/2007 (I. 24.) AB decision.

[56] This extraordinary remedy was introduced by the Communist Criminal Code in the Czech Republic and was preserved even after transition without essential changes. The idea behind this legal measure is to ensure and preserve the observance of the law, irrespective of subjective considerations.

in cases where such a complaint could be filed to the benefit as well as to the detriment of the accused. Petitioners argued in the case that this legal measure violated the principle of equality of arms. In addition, the Chief Justice of the Supreme Court pointed out that while such a complaint might be aimed at guaranteeing observance of the law and procedural propriety, these aims were calculated to be achieved independently of one another and without regard to the rights of the accused or of the victim.

In its decision the Constitutional Court acknowledged that this type of extraordinary complaint was introduced in order to allow for executive oversight and control over a judiciary which was not trusted by the Communist governing elite, in line with a legal philosophy which saw the public prosecutor as a 'guardian of socialist legality'. According to the Czech Constitutional Court, in the context of an accusatorial criminal procedure (as opposed to an inquisitorial one), the 'institutional division among different procedural entities of the procedural functions of preparing and filing an accusation, and deciding on guilt and punishment is an essential part of the democratic criminal trial, respecting the value of independent judicial decision making'.[57] The Czech Constitutional Court thus invalidated rules governing 'complaints concerning violation of the law' to the extent they were used to the detriment of the accused.[58]

When talking about criminal justice and rule of law considerations, again one cannot help but look at ECtHR jurisprudence. Still in the field of secret surveillance measures, the ECtHR noted in *Amann v Switzerland*, in the context of its analysis under Article 8 of the European Convention on Human Rights (privacy protection), that:[59]

> the phrase 'in accordance with the law' does not merely refer back to domestic law but also relates to the quality of the 'law', requiring it to be compatible with the rule of law, which is expressly mentioned in the preamble to the Convention ... The phrase thus implies—and this follows from the object and purpose of Article 8—that there must be a measure of legal protection in domestic law against arbitrary interferences by public authorities with the rights safeguarded by [Article 8(1)] ... Especially where a power of the executive is exercised in secret, the risks of arbitrariness are evident ... the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference.

[57] Pl. ÚS 15/01, available in English at http://test.concourt.cz/angl_verze/doc/p-15-01.html.

[58] In the course of the proceedings before the Constitutional Court the relevant legal rules were amended and this recodification of criminal procedure was also one of the factors considered by the Constitutional Court.

[59] *Amann v Switzerland* [GC] Reports 2000-II, (2000) 30 EHRR 843, para 56. Reaffirmed more recently, eg in *Volokhy v Ukraine*, Application no 23543/02, Judgment of 2 November 2006, final on 2 February 2007.

The ECtHR then added in *Volokhy v Ukraine* (at para 52) that

> [t]he rule of law implies, inter alia, that interference by the executive authorities with an individual's rights should be subject to effective supervision, which should normally be carried out by the judiciary, at least in the last resort, since judicial control affords the best guarantees of independence, impartiality and a proper procedure.

It is worth pointing out that the ECtHR attaches rule of law-inspired requirements to a number of rights provisions in the Convention. Access to the courts is regarded as a means of limiting the arbitrary exercise of powers;[60] for example, the emphasis on the lawfulness of the detention results in the requirement for a scrupulous adherence to the rule of law in the eyes of the court.[61] Note also, that the requirement of clear statutory language was also inferred by the ECtHR on the basis of the phrase 'in accordance with the law', recurrent in the limitation provisions of the Convention. According to the ECtHR, this phrase 'also refers to the quality of this law, demanding that it should be accessible to the person concerned, who must moreover be able to foresee its consequences for him or her, and compatible with the rule of law'.[62]

As even such a short overview suggests, the rule of law and the premises derived from it are capable of hosting a constantly growing family of unwritten constitutional requirements. It seems to be a matter of the intellectual vigour of a constitutional court whether requirements prescribed in this way are associated with certain constitutional provisions, or are simply derived from the principle of the rule of law. Also, it is clear that some courts may prefer minimalist justifications for their arguments, while others clearly associate rule of law considerations with the dictates of justice or other constitutional or democratic values. The boundaries of the concerns signalled in the above cases will be stretched further in the following sections.

B. The Rule of Law as an Incidental Source of Unwritten Constitutional Rights and Obligations

The Polish Constitutional Tribunal is famous for developing a rich rights jurisprudence with the assistance of a rule of law clause.[63] One of its

[60] See *Golder v. the United Kingdom*, Series A, no 18 (1975) 1 EHRR 524, paras 28–36.

[61] *Winterwerp v. the Netherlands*, Series A, no 33 (1979) 2 EHRR 387, para 39.

[62] As emphasised recently in *Association for European Integration and Human Rights and Ekimdzhiev v Bulgaria*, Application no 62540/00, Judgment of 28 June 2007, para 71.

[63] For an English language account of the context see eg J Kurczewski, 'The Rule of Law in Poland' in J Priban and J Young (eds), *The Rule of Law in Central Europe, The Reconstruction of Legality, Constitutionalism and Civil Society in the Post-Communist Countries* (Aldershot: Dartmouth, 1999) p 187.

decisions which deserves special attention for the purposes of the present discussion concerns abortion.[64] The case involved a challenge against an amendment to abortion rules, which intended to make non-therapeutic abortion available in the first trimester of pregnancy.[65] In its decision the Constitutional Tribunal derived constitutional protection for foetal life from the principle of the rule of law in the following terms:

> The binding Polish constitutional regulations do not contain any provision that would directly address the protection of life. Nevertheless, it does not mean that human life is not a value protected under the Constitution. The fundamental provision from which the constitutional protection of human life should be inferred is Article 1 of the constitutional provisions that have been upheld and, in particular, the democratic rule of law. Such a state can only exist as a commonwealth of people and only people can be recognised as the actual carriers of rights and obligations laid down by the State concerned. Life is the fundamental attribute of a human being. When that life is taken away, a human being is at the same time annihilated as the holder of rights and obligations. If the essence of a rule of law is a set of fundamental directives inferred from the sense of law proclaimed through democratic procedures, providing for the minimum level of fairness thereof, therefore, the first such directive must be the rule of law's respect for the value, ie human life from its outset, as its absence excludes the recognition of a person before the law. The supreme value of a state under the democratic rule of law shall be the human being and his/her interests of the utmost value: Life is such an interest and, in a state under the democratic rule of law, it must be covered by constitutional protection at every stage of development.

Furthermore, while the Constitutional Tribunal acknowledged constitutional protection for female decisional autonomy, the scope of this autonomy was defined in extremely narrow terms, namely as the decision whether or not to engage in sexual activities. The decisional autonomy thus defined, however, does not include the freedom to decide whether to terminate an already existing pregnancy. In the words of the Constitutional Tribunal 'the right to a responsible decision to have children is solely reduced to the right of refusing to conceive a child. However, when a child has already been conceived, that right can only be

[64] K.26/96. For an unofficial English translation of the most important excerpts of the decision see http://www.trybunal.gov.pl/eng/Judical_Decisions/1986_1999/K_%2026_96a.pdf.

[65] Poland's strict abortion law was amended on 25 October 1996 to allow abortion within the first trimester of pregnancy in cases of difficult financial or personal conditions. In December 1996, a group of 37 Solidarity, PPP, and FU parliamentarians complained to the Constitutional Tribunal that the law violated constitutional guarantees of the right to life and that Parliament 'does not have an absolute power to make laws and should take into consideration inviolable values and unalienable rights of man and family', as reported in the Constitutional Watch column of the *East European Constitutional Review* 6 (1997), available at http://www3.law.nyu.edu/eecr/vol6num2/constitutionwatch/poland.html.

exercised in the positive sense thereof, that is as inter alia the right to give birth and to raise a child.'

The above construction of the constitutional protection of foetal (conceived) life and the limitation of the pregnant woman's decisional autonomy is among the strictest in Europe. As a recent decision of the ECtHR alarmingly reminds us, the practical application of the Polish abortion law in cases where therapeutic abortions should be permitted is also problematic.[66] The *Tysiac v Poland* decision is of primary concern for students of the rule of law as the ECtHR was most concerned about the unpredictable and arbitrary fashion in which the otherwise narrowly tailored Polish abortion rules were applied. The ECtHR did not take issue with the Polish rules allowing for legally permissible abortion on very strict grounds. What the European justices found most problematic was the manner in which the Polish law was applied in practice. In this respect the ECtHR stressed in the context of its Article 8 analysis (at paras 116–17) that

> 116. … the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility …, can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case. The provisions regulating the availability of lawful abortion should be formulated in such a way as to alleviate this effect. Once the legislature decides to allow abortion, it must not structure its legal framework in a way which would limit real possibilities to obtain it.
>
> 117. In this connection, the Court reiterates that the concepts of lawfulness and the rule of law in a democratic society command that measures affecting fundamental human rights be, in certain cases, subject to some form of procedure before an independent body competent to review the reasons for the measures and the relevant evidence … such a procedure should guarantee to a pregnant woman at least a possibility to be heard in person and to have her views considered. The competent body should also issue written grounds for its decision.

What makes the words of the ECtHR worthy of attention for the current analysis, is the weighty expectations of the merely procedural aspects of the rule of law which constitutional courts were willing to embrace routinely and furthermore without much textual encouragement. The Polish abortion decisions are therefore even more alarming when it is realised, in the light of the ECtHR's clear words, how easily such commonly accepted fundamentals are abandoned for the sake of heavily value-laden narratives conveniently appended to a constitution's rule of law clause.

[66] Case of *Tysiąc v Poland*, Application no 5410/0, Judgment of 20 March 2007.

C. Paying the Bill issued by Constitutional Courts in the name of the Rule of Law

References to the rule of law and associated concepts came to play a critical role in a decision of the Hungarian Constitutional Court when in 1995 the central measures of the first comprehensive post-communist austerity package were challenged before the Constitutional Court. Also called the 'Bokros package', after the Minister of Finance Lajos Bokros who introduced the measures, the austerity or stabilisation package seriously reduced social security provision under the aegis of a large-scale public finance reform, withdrawing welfare benefits which were previously regarded by political forces as untouchable.[67] Amongs other measures, the austerity package made redundancies in higher education and introduced a monthly tuition fee for students, required contributions to be made for various healthcare services, introduced restrictions on maternity and child support, limited sick leave payments for employees and imposed higher contributions on employers.

To the surprise of many, in its leading decision on the Bokros package[68] the Constitutional Court departed from the lines of argument which would have been expected in the light of the previous jurisprudence. Without, however, resolving the controversy about the proper interpretation of the right to social security, the Constitutional Court held that individual contributions to welfare schemes give rise to acquired rights (as with an insurance policy). According to the Constitutional Court, such acquired rights should then be protected as normal property rights. The Constitutional Court found that such an inclusion of social welfare (social security) benefits in the right to property was in line with the Constitutional Court's understanding of property as a safeguard of individual autonomy. However, at the core of the Constitutional Court's reasoning lay the following argument: to the extent that a welfare scheme is not based on prior contributions (that is, where property protection does not apply), but is supplied as pure welfare aid on solidarity grounds, the rule of law and legal certainty protect welfare recipients from any

[67] For a description of legal and economic developments, see JJ Dethier and T Shapiro, 'Constitutional Rights and the Reform of Social Entitlements' in L Bokros and JJ Dethier (eds), *Public Finance Reform during the Transition, The Experience of Hungary* (Washington DC: The World Bank, 1998) pp 323–45 at pp 330 *et seq*; also available at www.worldbank.org/wbiep/decentralization/library1/Dethier.pdf.

[68] The Constitutional Court passed a series of decisions on the measures contained in the austerity package in the second half of 1995. For a detailed analysis see A Sajó, 'How the Rule of Law Killed Welfare Reform', (1996) 5(1) *East European Constitutional Review* 44–9; A Sajó, 'Social Welfare Schemes and Constitutional Adjudication in Hungary' in J Priban and J Young (eds), *The Rule of Law in Central Europe* (Aldershot: Dartmouth, 1999) pp 160–78; also P Sonnevend, 'Szociális jogok, bizalomvédelem, tulajdonvédelem,' in Halmai, n 13 above, pp 354–79.

unexpected diminution of entitlements.[69] This approach, relying on the language and constitutional standards of property protection (acquired rights) as well as the requirements of legal certainty and the rule of law, was used by the Constitutional Court to invalidate the central provisions of the government's austerity package which sought to revoke welfare benefits.

It is important to note that the concept of acquired rights used by the Constitutional Court in 1995 differs substantially from the understanding of acquired rights articulated by those judges who advocated an expansive reading of the right to social security in the early cases. Although, when explaining their conception of acquired rights, those judges drew a—perhaps unfortunate—parallel between property rights and acquired rights to social security, they did not, however, equate the two. When acknowledging welfare benefits as acquired rights, the new democracy was supposed to appreciate that 'real' acquired rights (that is, contributions to a savings-based insurance plan securing pensions) were out of the question due to the Communist government's policies. In the 1991 decision[70] the dissenters make it clear that in their understanding, these acquired rights gave access to the proceeds or returns of state property, while not seeking to root them in petitioners' private property. In contrast, in the 1995 decision the majority used the concept of acquired rights to protect petitioners' contributions to the governmental pension plan in a manner analogous to that applied to the protection of private property. The treatment of solidarity-based payments in the 1995 decision was in fact closest to the conception of acquired rights as understood in 1991 by the dissenting judges.[71] So in the leading decision on the Bokros package the Constitutional Court held that where there is no individual contribution to a scheme, safeguards stem not from property protection, but from the requirements of legal certainty.[72] It is not entirely clear from the Constitutional Court's decisions whether property protection is triggered by the individual's prior contributions to the scheme or by the fact that welfare benefits fulfil the same function in citizens' personal finances which (that is, in a non-post-communist reality) would normally be funded out of savings. The inclusion in the opinion of an explanation of this point could have clarified the judges' stances on the positions adopted by the dissenting judges in the early cases on the extent, if any, to which the Constitutional Court was to give consideration to the basic operational philosophies underlying the communist welfare state.

[69] 43/1995 (VI. 30.) AB decision. ABH 1995. 188 at 192–3.

[70] 21/1990 (X. 4) AB decision.

[71] L Sólyom, *Az alkotmánybíráskodás kezdetei Magyarországon* [*The beginnings of constitutional review in Hungary*] (Budapest: Osiris, 2001) p 669 affirms this distinction.

[72] 43/1995 (VI. 30.) AB decision. ABH 1995, 188 at 196.

Moreover, the scope of property protection which is relevant in the field of welfare rights remains uncertain. These loose ends were then drawn together by chance in subsequent cases, which made for a rather colourful jurisprudence. In 1997, the Constitutional Court held that contributions to the health insurance scheme amounted to a deprivation of property, although the judges went on to state that where such contributions were made in connection with an insurance principle, the Constitutional Court would not rule them unconstitutional.[73] In a more recent case in which petitioners challenged the alteration of the indexing of old-age pensions to their detriment, the Constitutional Court said the new and clearly disadvantageous indexing of pensions did not amount to a deprivation of property.[74] The Constitutional Court invoked the rationale of acquired rights in 2000, when it found a legal regulation which did not include unemployment benefits among income relevant for setting the amount of pensions to be unconstitutional.[75]

Since the late 1990s the rhetoric of acquired rights and property protection has not been followed by the Constitutional Court in social welfare jurisprudence.[76] In subsequent judgments, traces of arguments from the pre-Bokros package era seem to surface with noticeable frequency. This conclusion also supports the view that Hungarian constitutional jurisprudence on welfare rights has become marked by competing strategies of reasoning: one approach, based on a strong individual rights language using the language of the rule of law and the toolkit of property protection (that is acquired rights), and another approach, relying on a weak and deferential stance, which leaves the institutional arrangements in the welfare sector largely at the discretion of the political branches of government.

Hungary is far from being the only post-communist country where rule of law considerations have coloured constitutional court decisions in matters with serious financial implications for both government and private property-owners. For an example one might consider the Czech Constitutional Tribunal's decision on the equalisation of pension insurance (also known as the 'Slovak pensions decision').[77] Due to

[73] 36/1997 (VI. 11.) AB decision, quoting 64/1993 (XII. 22.) AB decision (on the concept of deprivation of property in the affirmative).

[74] 39/1999 (XII. 21.) AB decision.

[75] 16/2002 (III. 29.) AB decision. The line of cases mentioned in the affirmative to this point included 43/1995 (VI. 30.) AB decision (the lead decision about the Bokros package) and 39/1999 (XII. 21.) AB decision (on indexing pensions).

[76] Sólyom, n 71 above, pp 675 *et seq*, and more recently, Z Balogh, 'Paradigmaváltás lehetőségei a szociális jogok védelme terén' ('Opportunities of a paradigm-shift in the protection of social welfare rights') (September 2005) *Jogtudományi Közlöny* pp 366 and 370.

[77] II. US 405/02, available in English at http://test.concourt.cz/angl_verze/doc/2-405-02.htm.

an international agreement between the Czech Republic and Slovakia, the pensions of Czech citizens living in the Czech Republic are paid by the Slovak social security services if they were employed by a company which is currently registered in Slovakia. Due to some Czech legislative amendments and also as a result of a change in the exchange rate between the two currencies, differences between Czech and Slovak pensions continue to increase.[78]

In this case, the Czech Constitutional Court reviewed a pension scheme which differentiated between pensioners on the basis of the nationality of their employers, putting pensioners with foreign (here Slovak) employers at a disadvantage—the distinction being introduced with reference to an international agreement. The Czech Constitutional Court found that the

> application of an international agreement … cannot lead to retroactively denying him fulfilment of that condition. This is inconsistent with the principle of legal certainty and the foreseeability of law, which form the very basis of the concept of a state governed by the rule of law. The concept of a state governed by the rule of law must be understood not in isolation, but in connection to the constitutional requirement of respect for the rights and freedoms of the human being and the citizen.[79]

While the central finding of the Constitutional Court's decision rests on the prohibition of unequal treatment of the citizens of the Czech Republic, the rule of law rationale underscoring the decision is worthy of attention.

Despite the strong words and insistence on the observance of high principles, it is clear from the reports of the Czech ombudsman[80] that the Czech Ministry of Labour and Social Affairs refused to follow the Constitutional Court's ruling, with the ordinary courts also refusing to give effect to the decision of the Constitutional Court.[81] The ombudsman could do no more in the case other than to insist that the principles laid down in the Constitutional Court's decision be observed. Moreover, despite minor improvements, EU accession seems to have simply introduced further rhetorical pronouncements which further postpone

[78] The historical and present-day context of the so-called 'Slovak pensions decision' is explained in the Czech Ombudsman's report for 2004, in 'Annual Report on the Activities of the Public Defender of Rights in 2004', available in English translation via http://www.ochrance.cz/dokumenty/document.php?back=/cinnost/index.php&doc=137#, pp 66 *et seq*.

[79] II. US 405/02, available in English at http://test.concourt.cz/angl_verze/doc/2-405-02.htm.

[80] In particular with individual applications, see eg 'Annual Report on the Activities of the Public Defender of Rights in 2005', available in English translation via http://www.ochrance.cz/dokumenty/document.php?back=/cinnost/index.php&doc=480, pp 30–31.

[81] IV. ÚS 158/04, available in English at http://test.concourt.cz/angl_verze/doc/3-252-04.html.

resolution of this matter which would have severe financial consequences for both governments on which the obligation to pay out these pensions will ultimately fall.[82]

In the meantime, the Polish Constitutional Tribunal has been struggling with the issue of rent controls in privatised apartment buildings. This struggle is symbolic as the Constitutional Tribunal has been seeking to reinforce the protection of private property and legitimate expectations against waves of governmental attempts to re-establish rent controls in now privately owned buildings. On another level, however, the matter has serious financial implications and entails not only the loss of income by private property owners (a loss resulting from the continuing rent control scheme) but also the time-bomb of a potential governmental obligation to support the needy in the event that rent controls be removed in future.

In the latest decision, where the Polish Constitutional Tribunal hoped to halt the efforts of the government to freeze rents, the judges—again invoking the rule of law—held that:

> Legislation from the last decade and the Constitutional Tribunal's jurisprudence has carefully consolidated the social belief of interested owners and tenants that so-called regulated rents—limited to 3% of the reconstruction value and applying only in respect of some lease relationships—will remain in force only for a transitional period, until 31st December 2004. Adoption of the contested regulation, promulgation thereof on 29th December 2004 and the entry into force thereof on 1st January 2005, infringed the 'rules of the game' laid down in the earlier legislation, although no extraordinary circumstances or events occurred such as would justify prolongation of such 'rules'. Infringement of such a specific promise, expressed in statutory terms, must be treated as a reflection of particular irresponsibility on the part of the public authorities and, *ipso facto*, as a flagrant breach of the principle of protecting trust in the State and its laws, which constitutes one the fundamental elements of the.rule of law principle. (Article 2 of the Constitution)[83]

In the language of the Polish Constitutional Tribunal's decision one cannot avoid noticing the now familiar problem of constitutional judges being pressured to extend measures of dubious constitutionality which were previously introduced as temporary solutions for exceptional circumstances. Based on the above excerpt it indeed sounds as if the creditability of the words of the Constitutional Tribunal hinged on how seriously such rule of law arguments are taken. The rule of law narrative

[82] On this see 'Annual Report on the Activities of the Public Defender of Rights in 2006,' available in English translation via http://www.ochrance.cz/dokumenty/document.php?back=/cinnost/index.php&doc=695, pp 27–8.

[83] Judgment of 19 April 2005, K 4/05, available in an English language summary at http://www.trybunal.gov.pl/eng/summaries/documents/K_4_05_GB.pdf.

was instrumental in the Constitutional Tribunal's considerations on the permissible temporal limitations on private property rights. Nonetheless, Polish politicians continued to seek legislative solutions which fundamentally disregarded the Tribunal's guidance.

Luckily, the ECtHR came to the aid of the Polish Constitutional Tribunal when it found that the rent control scheme preferred by the government violated the right to private property.[84] Significantly, Zdenek Kuhn reminds us that a similar situation existed in the Czech Republic, and the Czech government changed its behaviour only in the shadow of the *Hutten-Czapska* decision.[85] In that case the Grand Chamber stressed (at para 168) that

> the Court must make an overall examination of the various interests in issue, bearing in mind that the Convention is intended to safeguard rights that are 'practical and effective'. It must look behind appearances and investigate the realities of the situation complained of. In cases concerning the operation of wide-ranging housing legislation, that assessment may involve not only the conditions for reducing the rent received by individual landlords and the extent of the State's interference with freedom of contract and contractual relations in the lease market but also the existence of procedural and other safeguards ensuring that the operation of the system and its impact on a landlord's property rights are neither arbitrary nor unforeseeable. Uncertainty—be it legislative, administrative or arising from practices applied by the authorities—is a factor to be taken into account in assessing the State's conduct. Indeed, where an issue in the general interest is at stake, it is incumbent on the public authorities to act in good time, in an appropriate and consistent manner.

A common element of the cases discussed in this section was the use by constitutional courts of rather abstract rule of law arguments (often in relation or as alternatives to property claims) to frame constitutional decisions of serious economic importance which would have a potentially harsh negative effect on the government and/or on private individuals. Instead of emphasising the differences in the various courts' understanding of the requirements of the rule of law, it is worth in conclusion emphasising that constitutional judges were ultimately unsuccessful in requiring the political authorities to adhere to the courts' vision of the rule of law—thus increasing uncertainty and opening up further opportunities for the arbitrary exercise of governmental powers.

[84] *Hutten-Czapska v Poland*, Application no 35014/97, Judgment of 19 June 2006 (Grand Chamber). Note that the Grand Chamber judgment contains a detailed discussion of domestic developments and Polish constitutional jurisprudence.

[85] See his draft paper, Z Kuhn, 'Constitutional Monologues, Constitutional Dialogues or Constitutional Cacophony? European Arrest Warrant Saga in Germany, Poland and the Czech Republic',available at http://www.mzes.uni-mannheim.de/projekte/typo3/site/fileadmin/research%20groups/2/Hanover2006/KuehnPaper2.pdf.

III. A LONG-WINDED CONCLUSION: REFLECTIONS ON AN EMPTY SHELL

Despite such noble goals and even reports of grand achievements, the record shows that the rule of law, or at least its reputation, has suffered much at the hands of its promoters in Central Europe. Admittedly, the rule of law is a fuzzy concept, and most rule of law theories tolerate a wide range of differing legal or constitutional solutions. Post-communist constitutional courts are not to be blamed for the inherent indeterminacy of the phrase. Intellectually consistent (coherent) theories, however, are rarely capable of approving one legal solution together with its complete opposite. It is distinctly problematic that by relying on the requirements of the rule of law, Hungarian constitutional court judges came to one conclusion while their Czech colleagues reached its direct opposite in largely similar real-life situations. It is equally problematic that within the jurisprudence of any one post-communist constitutional court the rule of law seems to call for conclusions so contrasting that they appear to be difficult to fit into one coherent conception. Reference to the circumstances, local constitutional cultures, traditions or auxiliary principles and particular judicial philosophies as factors qualifying a particular conception of the rule of law seem to offer little consolation to those who would like to find (or at least believe) that the rule of law is more than an pretty yet empty phrase.

Martin Krygier argues that the understanding of the rule of law emerged in Central Europe as the opposite of, or antidote to, anything communist.[86] Reflecting upon constitution-making experiences in post-communist Central Europe Jiri Priban notes that:

> The legal system, especially constitutional law, has been essential to the emerging public sphere and discourse of the 'political societies in transformation' that pursued the establishment of a new collective identity based on the liberal democratic rule of law. … Society needs a new consensus in the domains of politics and morality and explores possible ways of achieving it, including the system of positive law.[87]

The contents of claims submitted in the name of the rule of law to a large extent depend on what is associated with the ugly side of communism. The communist regime had, however, some characteristics which were more agreeable. The new consensus incorporates not only liberal constitutional

[86] M Krygier, 'The Quality of Civility: Post-Anti-Communist Thoughts on Civil Society and the Rule of Law,' in A Sajó (ed) *Out of and Into Authoritarian Law* (The Hague: Kluwer, 2002) p 223.

[87] Quoted from J Priban, 'Reconstituting Paradise Lost: the temporal dimension of postcommunist constitution-making,', Paper (2003), available at www.law.berkeley.edu/institutes/csls/Priban%20paper.doc.

values but also the comforts of state-provided benefits and services. The task of the rule of law under the new constitutions was not to filter the inheritance through the sieve of high principles, but to explain how some items of this otherwise despised heritage—say, 'free' public education, healthcare, pensions or welfare benefits—were not to be discarded in the formation of the new identity. András Sajó argues forcefully that the EU accession process did little to alter or impair what he calls 'welfarism and the perpetuation of the state-socialist endowment effect'.[88]

The rule of law is certainly not the only high legal or constitutional principle which was turned into an empty rhetorical panel in the maze of transition to democracy. What makes its unfortunate career disturbing is the realisation that by not taking the rule of law seriously the new regime has been built on a foundation of insincerity and (self-)deception—a phenomenon familiar from previous times. Once one is not sincere (or at least serious) about the rule of law, it is hard to accept claims and submissions about constitutionalism, the separation of powers, judicial independence or the protection of human rights. Thomas Carothers insightfully warns how easy it is to pay lip service to the rule of law at times of transition in order to create the facade of a democratic regime in the making.[89]

With the passing of the years, it is increasingly difficult to credit misreadings of the demands of the rule of law to lack of experience, limited access to adequate intellectual resources or short learning periods. Also, with the passage of time speculation about whether legal solutions were copied from foreign sources, or were simply imposed, appears increasingly less relevant. After all, many of the mechanically copied institutional solutions have been operating in post-communist legal systems for well over a decade. Dramas about ill-fitting pre-accession conditions are becoming rare.[90]

Now that post-communist countries have become members of the European Union, the perils of turning respect for the rule of law into a language game are becoming consistently less visible. After all, there are no more country reports to read and explain to a disinterested public (EU infringement procedures are in any case less spectacular). Still, it could not hurt to keep reminding ourselves, and also our courts and governments, that the importance of respect for the rule of law is critical—because

[88] See A Sajó, 'Becoming "Europeans": The Impact of EU "Constitutionalism"' on Post-Communist Premodernity', in W Sadurski, A Czarnota and M Krygier (eds), *Spreading Democracy and the Rule of Law? The Impact of EU Enlargement on the Rule of Law, Democracy and Constitutionalism in Post-Communist Legal Orders* (Dordrecht: Springer, 2006) pp 188–92.

[89] T Carothers, 'The End of the Transition Paradigm' (2002) 13 *Journal of Democracy* 12.

[90] Respect for gay rights was a major concern in the last phase of the accession process for post-Communist democracies. In particular, Baltic countries showed little enthusiasm, though appeared formally co-operative, when it came to the EU demand for abolishing higher age of consent rules for consensual homosexual sex.

otherwise the European Union may censure its 'immature' post-communist members. Adam Czarnota has already warned that post-communist countries 'with their own networks and facade-type rule of law are well prepared to become part of an infranational European Union'.[91] It should, however, be noted that where it is not sincere and candid about living up to the principles of the rule of law, government may deteriorate into a volatile series of deals involving redistribution in favour of a privileged clientele, and individual liberties may turn into empty words.[92]

[91] A Czarnota, '*Barbarians ante portas* or the Post-Communist Rule of Law in Post-Democratic European Union', in Sadurski, Czarnota and Krygier, n 88 above, p 297.

[92] On the subtle relationship of civil society and the rule of law see Krygier, 'The Quality of Civility', n 86 above, especially pp 249 *et seq*.

5

Law's Golden Rule

DAVID BEATTY

> The law does not consist in particular instances, though it is explained by particular instances and rules, but the law consists of principles which govern specific and individual cases, as they happen to arise. (Lord Mansfield in *R. v Bembridge* (1783) 22 How St Tr 155)

I. INTRODUCTION: A CONTESTED TRADITION

The rule of law is in trouble. One of the great virtues of Western politics is in danger of becoming a victim of its own success. Over time, the rule of law has come to be accepted as one of the important litmus tests that distinguish good governments from bad. Almost everyone agrees that societies that do not respect it are not as just as those that do.

At the same time, however, there is considerable uncertainty and disagreement about what the 'rule of law' actually means.[1] It has been defined in so many ways that it has become fuzzy and confused. Some say it is on the verge of losing its critical edge. Others brood about a dark side to it and caution that the concept does not only and always do good.

The present circumstances and the future of the rule of law are important questions. In a world that is overheating politically, as much as climactically, discussion of these questions is to be encouraged. A gathering in the hills overlooking Florence is perfect, the irony of restoring the law's sovereignty in the land where Machiavelli counselled the Prince quite delicious.

The risk of the rule of law losing its credibility should be taken seriously. There are so many versions of what the concept entails that it has become more of a political slogan than a meaningful standard against

[1] For a comprehensive review of the different ways the rule of law has been defined, see BZ Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004).

which the records of governments can be measured. When the rule of law is endorsed by Abdul Rashid Dostum—an Afghan warlord, Mohammed Khatami when he was President of Iran, Robert Mugabe and George W Bush, something cannot be right.

Even among philosophers and legal theorists there are sharp differences over its meaning. 'Thick' versions compete with 'thin'. For some, the rule of law is a purely formal concept that insists on a certain level of generality, certainty, and equality in the law. For them, the rule of law is concerned only with the procedure by which law comes into being and its form. Laws cannot, for example, be directed at one person. Neither can they be secret or retroactive and they must treat everyone (including the ruler) equally.

For others, the rule of law has a substantive, moral dimension that finds its highest expression in the numerous constitutional and international covenants of basic human rights. Even among those who say that the core idea of the rule of law is protection against governmental abuse of power, there is disagreement as to its reach. For some, government officials are the focus of the rule; for others, it constrains their political masters as well.

Compounding all this is the widely held view that the meaning of the rule of law is also shaped by each country's own legal traditions. The rule of law means one thing in Germany, another in France and something different again in countries that have inherited the tradition of the English common law.[2] In the face of such widespread disagreement on fundamentals, it is easy to dismiss the rule of law as a myth, 'an essentially contested concept' in danger, in the face of its multiple meanings, of having none of its own.[3]

In some parts of academia the rule of law's reputation has fallen so low that its advocates are denigrated as imperialists and marketeers. We are told to be wary because the rule of law can be a threat to democracy. It is equated with rule by the lawyering class. There are places, it is said, where it is best if the law does not rule. The pessimism of the philosophers and academic lawyers is certainly understandable but it is, I think, premature. If one looks instead at the opinions of the legal professionals, it turns out that there is reason for hope. In the judgments of the most respected courts around the world one can find a conception of the rule of law that simultaneously captures its traditional ideals and speaks to the modern condition.

[2] M Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *South California Law Review* 1307.

[3] J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137.

II. LAW'S GOLDEN RULE

At first glance, the jurisprudence on the limits of legitimate law-making does not look very promising. It is now standard practice for multiple opinions to be written in all the important high-profile cases. The truth is that there are as many different opinions among jurists about what the rule of law entails as there are among politicians and philosophers of law.

But scattered throughout the judgments handed down over the last 25 years one can find a conception of the rule of law that has been endorsed by the most distinguished courts around the world—one that seems capable of achieving the coherence and consensus we lack. Although the model is frequently ignored or misapplied when it is used to guide a court's reasoning, it seems capable of not only overcoming the disagreements of the past but of making the concept the best it has ever been.[4]

The jurists' conception of the rule of law makes a principle of proportionality the ultimate rule of conflict resolution. Although it goes by different names, proportionality is a test of fairness and reciprocity. It provides a lens through which judges can determine whether, in any particular case, the scales of justice are balanced. It is like a measuring device that allows judges to compare the gravity of the claims that have been placed on opposite sides of the scales. With it, judges can see if the interests of those who are affected by a law or ruling have been properly calibrated.

To understand how the jurists' model works, we might consider how tolerant it is of laws that assert a state's authority over what people may wear in public. Disputes about dress codes are about as basic as they come. Clothes are something that just about everyone thinks about every day, and often indeed more than once. For many people, an important part of life is being able to dress as one wishes.

In many cases, however, a person's choice (nudity, to take an extreme example) may have a disturbing effect on others, and so it is also a matter of legitimate community concern. In fact, for long periods throughout human history, the ruling classes enforced detailed rules controlling what their subjects could and could not wear. In medieval times, 'sumptuary laws', that prescribed clothing by class, really did make the man. In the Kingdom of Bhutan a national dress code is still the order of the day.

Remnants of these clothing laws can still be found in most countries in the world and in many places they remain highly controversial.

[4] Some of the comparative jurisprudence in the areas of religious freedom, sex discrimination and social and economic rights is collected and analysed in David M Beatty, *The Ultimate Rule of Law* (Oxford: Oxford University Press, 2004).

Instinctively, for many people, they represent an excessive assertion of government authority in a sphere of life that is considered to be personal. A fundamental aspect of identity and autonomy is lost if a person's appearance is dictated by someone else. So, the question is how compatible modern dress regulations are with the rule of law as interpreted by contemporary jurists.

The answer can be found in a case that a young Sikh teenager called Gurbaj Singh Multani recently took to the Supreme Court of Canada.[5] Multani wanted to go to school dressed in accordance with the requirements of his religion. This included concealing a kirpan, a 10-centimetre steel knife, inside his clothes. The government authorities in charge of his school told him he was not allowed to do so. They said he had to leave his kirpan at home.

The Court listened to what both Multani and the school had to say. Multani explained that the kirpan was one of five essential elements (one of the five 'k's) in the uniform of his religion. From the perspective of the school administration, the kirpan was a dangerous weapon. They said that regardless of its religious significance, the threat it posed to the safety and security of his fellow students and teachers justified its being banned from the school.

In considering how to resolve this conflict, the Court assumed that personal security and religious freedom were equally important values. There was no hierarchy of rights. On the scales of justice, the competing interests were treated as having equal legitimacy and put on opposite sides of the balance. The question for the Court was which one 'weighed' more. Which side stood to lose more if the ban were enforced as an absolute rule or if an exception were to be made for Sikhs?

All eight judges who ruled on the case found in Multani's favour. For all of them it was an easy case. Stripped of its legalese, the Court said that prohibiting Multani from dressing as his religion required would have imposed a burden on him that was excessive compared to the loss of personal safety and security that would result if the kirpan were allowed. Outlawing the kirpan imposed a restriction on his life that was out of all proportion to the good it could do.

The evidence in the case overwhelmingly indicated that safety and security would not be significantly improved by banning the kirpan from the school premises. Multani himself had never exhibited any behavioural problems and there had never been an incident involving a kirpan in a Canadian school in over a hundred years. The judges also noted that the kirpan was kept in a sheath that was sewn into Multani's clothing so that it was actually less dangerous than other potentially violent instruments,

[5] *Multani v Commission Scolaire Marguerite-Bourgeoys* (2006) 1 SCR 256.

like scissors and baseball bats, which could easily be picked up by anyone in the school.

The fact of the matter was that the threat posed by the kirpan was tiny and was of a kind that did not cause undue concern to the school authorities. The fact that the school allowed other potentially dangerous objects like scissors and bats to be left lying around unprotected showed it was willing to tolerate some degree of risk. Its real interest was in being able to provide a reasonable measure but not an absolute guarantee of safety, and the evidence showed that the threat posed by Multani in particular and kirpans in general was minimal or even non-existent.

By contrast, prohibiting Multani from wearing what his religion prescribed was highly significant. The kirpan is one of the core symbols of Sikhism. It is at the centre of Sikh identity. In Multani's case, his religious commitments were so important in his life that, rather than abandon them, he left the public school system. He was, in effect, forced to attend a private school and pay for his religious beliefs.

When one stands back and reflects on Multani's case, the jurists' conception of the rule of law looks like an unalloyed good. At least three important virtues can be claimed on its behalf. First, and perhaps most importantly, the principle of proportionality is a just rule of conflict resolution, one that always minimises hardship and harm. It provides a way of resolving disputes that is perfectly fair. It is the law's version of the golden rule.

Multani is such a compelling story because justice prevails in the end. His is as good as a David and Goliath story can get. A 13-year-old adherent of a minority religion stands up to the Leviathan and wins. And he prevails not because he is faster or smarter or because of an act of God. Justice triumphed purely and simply because reason and the rule of law required that it should do so. The provision of a check on arbitrariness in government packs a powerful ethical punch. The only weapon which Multani used to overcome the school authorities was the principle of proportionality. This formal rule of law and the scales of justice determined the outcome of the case. An absolute ban on knives in schools constituted a major burden for him. The cost to the school of making an exception for Sikh boys was trivial. Justice set the balance right.

The *Multani* case mirrors many multicultural conflicts in asking when an exception should be made to a rule. In *Multani*, an exception is consistent with (that is it 'proves') the rule. The general prohibition on knives in schools meets the requirements of proportionality in the standard case. So does the exception for Sikhs whose spiritual beliefs differentiate them from other students. One can generalise and say that proportionality makes the criterion of justice the litmus test of legitimacy in law. By always avoiding excessive burdens, justice can be done in every case; a right answer can be found every time. Proportionality provides an

all-purpose solution whenever cultures collide and civilisations clash. It is an antidote to excessiveness and extremism. It is an uncompromising rule of reciprocity and fair play.

The second great virtue of the jurists' conception of the rule of law is its practicality. It works. Proportionality casts judges in a role that is compatible with our basic ideas about democracy and the sovereignty of the people. Politicians set the goals and objectives, the values and priorities for their communities. In *Multani* the core question was one of security and personal safety. Judges decide whether in pursuing such values anyone is forced to bear burdens that are excessive—out of proportion to the good they will do.

Judges' core function is to do justice in every case. They ensure that whatever interests are put on the scales they are given their proper weight. Judges are primarily concerned with the probable truth of empirical propositions about comparative burdens, rather than providing an elaborate gloss on a legal text. Proportionality gives judges a job they can do. They decide cases one at a time on an ordinal (rather than a more demanding cardinal) ranking or measure. Both the scales of justice and proportionality work by comparison and rank ordering: first and second; more and less; big and little, etc. From the facts of any case it is possible to say whether the impact of laws on people's lives and the community's well-being is major, moderate or minor. Through the lens of proportionality, one can look at the interests on both sides of the scales and see whether either is being burdened unduly.

Judges remain objective and impartial by using the parties' own evaluations of their interests whenever they can. The judicial standard is one of consistency and even-handedness. A judge's personal values never enter into consideration. The politics and philosophies of the eight judges who ruled in Multani's favour were irrelevant. The relative weights would be the same no matter who sat on the Bench. Given the attitude of the school authorities towards other potentially dangerous weapons, there was (and still is) only one right answer in the *Multani* case.

The third great virtue of the jurists' idea of equating the rule of law with the principle of proportionality is its strict neutrality and impartiality. Everyone is treated in the same way. It does not favour any political or philosophical or religious worldview. It is completely neutral between whatever values are put in the balance. On the scales of justice, it is the 'weightiness' and not the value of the interests that counts.

None of the judges in *Multani* questioned the values of religious freedom and personal security that were at stake in that case. It was accepted that physical and spiritual well-being were equally legitimate interests. The decision of the school authorities was unjust not because its objectives were bad or less important. The flaw was that, compared to the added safety the ban produced, the hardship imposed on Multani was unreasonable.

In terms of traditional understandings of the rule of law, proportionality is located at the thin end of the spectrum. It is sensitive to formalist concerns about grounding the rule of law in substantive ideas of justice and morality. Proportionality is a purely formal principle. It is, to borrow Peter Westen's phrase, 'an empty idea'.[6] It contains no moral imperatives about how to live one's life. Except in insisting that everyone's interest must be put on the balance, it imposes no substantive limitations on what governments can and cannot do.

Because of its rigorous impartiality, proportionality is a principle that, in principle, no person who attempts to resolve conflicts (such as the one between Multani and his school) on reasonable terms could reject. The balance it strikes is always the least unacceptable from everyone's point of view. No one can object that there is some other solution that will burden someone else less. No one can say his or her interests were not given the same consideration and calibrated the same way as those of everyone else.[7] Its moral neutrality means that it should be an appropriate criterion for legitimate law-making in every society that respects each person's equal right to choose his or her own path through life. It is certainly compatible with all major secular and legal traditions. It is law's golden rule.

Multani's story will resonate in many parts of the world, but none more so than in Western Europe. Not surprisingly, perhaps, on a continent committed to high fashion, religious dress codes have proven to be contentious and controversial. In the last 15 years, cases of Muslim women being told that they are not allowed to wear a headscarf or a veil have flared up all over the continent. The French have said no to primary and secondary school students wearing headscarves (*hijab*) in class. The Germans and Swiss have imposed a similar ban on their public school teachers, while the British have designated schools as places where face veils (*burka* or *niqab*) are not allowed. In the campaign leading up to the 2007 Dutch general election, the government proposed passing a law that would have made it illegal for anyone to cover his or her face in public.

So far, the rule of law that rendered justice in Multani's case has had almost no influence in any of these disputes. Even when Leyla Sahin, a medical student in Turkey, asked the European Court of Human Rights to recognise her right to wear a headscarf in class, 22 of the 23 judges who listened to her plea refused to accept her arguments. They said that there was no consensus among European states on religious dress codes and so each country enjoyed a margin of discretion that the Court was bound to respect.[8]

[6] P Westen, *Speaking of Equality* (Princeton, NJ: Princeton University Press, 1990).

[7] LB Tremblay, 'Proportionality, the Optimisation of Values and Justifying Limits on Rights', presented at a symposium, 'The End of *Oakes*', University of Montreal, December 2006.

[8] *Leyla Sahin v Turkey* Application no 44774/98, 10 November 2005, available at http://cmiskp.echr.coe.int.

The judgment which the Court wrote to justify its decision to permit the Turkish authorities to ignore the principle of proportionality is appalling. It amounts to a complete abdication of the rule of law and is based on a factual claim that it knew to be false. The only judge on the Court to rule in Sahin's favour, Francoise Tulkens, explicitly told her colleagues that the reason they gave for suspending the rule of law was simply not true.

As Justice Tulkens pointed out, there was in fact a clear European standard of allowing women who were sufficiently mature to attend a university to cover their hair with a scarf. Although countries differed on other places where headscarves could be worn, they uniformly embraced a rule of tolerance with respect to university students. Even after they had had their attention drawn to their mistake, none of the other 16 judges who sat in the Grand Chamber had the integrity to revise their opinion.

Had the judges applied the principle of proportionality, it is inconceivable that they would have ruled against Sahin. Once again, there is only one right answer in this case. Her circumstances were identical to Multani's. Like him, she had reason, justice and all the facts on her side. As with Multani, no one questioned the sincerity of Sahin's religious faith or the importance to her of wearing a headscarf in public. Because of her age and educational qualifications, it was accepted that her choice of clothing was voluntary and uncoerced. Like Multani, when she was not allowed to dress in accordance with her religious beliefs, she left university. Indeed, in her case, in order to continue her education she was forced to leave the country! The burden she bore was very onerous. Telling a Muslim woman who wants to cover her hair that she cannot is as bad or worse as telling an 'infidel' that she must do so.

On the other side of the scales, the cost to the university of allowing Sahin and other Muslim students to wear headscarves was minimal to non-existent. Under the banner of secularism, the university defended its policy on the basis that it was necessary for public order and the protection of the rights of others who dressed in styles of their own choosing. However, as in the Multani case, it had no evidence to back up its claims.

The facts of the case were that for the first four-and-a-half years that Leyla Sahin attended university she had worn a headscarf without incident. She testified that her choice was a purely personal one and she had no ambition to proselytise or impose it on others. In addition, the Court had before it the experience of all the member states of the Council of Europe, including strongly secular countries like France, that allowed women to wear religious headscarves in universities without any apparent disruption of public order or violation of the rights of others.

As in Multani's case, the government's position was contradicted by its own behaviour. The evidence showed its commitment to secularism was neither absolute nor unyielding. Universities in Turkey did not exclude

everything religious from their campuses, just as the school authorities in Montreal did not ban all potentially dangerous weapons. The Court heard evidence, for example, that the ban on headscarves was not rigorously enforced. Students were also allowed to use university premises to pray. If the university could tolerate students praying on campus, what would be lost letting them remain dressed as their religion taught when they went back to class?

In one respect, the injustice that Leyla Sahin suffered was even worse than what Gurbaj Singh Multani had to endure. However intolerant, the Montreal school authorities could at least say they treated Multani the same as everyone else. No knives of any kind were allowed. In Sahin's case the university singled out the Muslim students. Only religious headscarves were banned. The general rule was women could dress as they liked. Traditional ethnic (Anatolian) headscarves that were looser and did not cover the neck were allowed. Not only did the university deny Sahin the right to adhere to her religion, but it discriminated against her as well. Students who wore headscarves for cultural reasons were allowed to attend university. Students who covered their hair on account of their faith were not. Far from adopting a stance of neutrality not influenced by religious considerations, the Turkish authorities twisted the idea of secularism into an anti-religion rule.

Sahin is a shocking case. It should act as a wake-up call. It tells us that, even at the centre of the Western legal tradition, the commitment to the rule of law is still hesitant and partial. It also shows that when civilisations bump into each other, unconstrained by the rule of law, ordinary people can get hurt. It is hard to be optimistic about our chances of solving the big, global conflicts if our highest courts are unwilling to stop gratuitous, petty injustices when they are asked for help.

Moreover, *Sahin* is not as isolated case. There are many teachers and students in Europe who find themselves in similar circumstances. In order to remain faithful to their religious beliefs, they have been forced to give up an education or a career in the public schools. At least 47 students (including three Sikhs) were expelled from French state schools following the adoption of a law in 2004 that prohibited the wearing of conspicuous religious symbols. In her report of March 2006, the UN Special Rapporteur on freedom of religion found that the rights of those who freely chose to wear a religious symbol as part of their religious beliefs had been violated.[9] However, because her findings are not binding, unless and until the judges in Strasbourg are willing to reinstate the rule of law, this injustice, like Sahin's, will go unremedied.

[9] United Nations Economic and Social Council, *Report of the Special Rapporteur on Freedom of Religion or Belief on her Mission to France* (18–29/09/05), E/CN.4/2006/5Add.4, para 99.

If the French law were tested against the principle of proportionality, it could not be sustained. The burden it imposes on French students is exactly the same as Multani's and Sahin's. The law forces them to choose between their right to a public school education and their right to religious freedom. It does not allow them to enjoy both. The government extracts a heavy price from those who remain faithful to their religious beliefs.

The government has no interest of equivalent importance on the other side of the balance. As far as the protection of the secular character of the state, public order and the rights of others are concerned, the evidence suggests that if religious symbols like headscarves and turbans were allowed in schools, nothing would be lost. As one commentator put it 'a secular republic won't necessarily capsize if some students wear religious symbols'.[10] In fact, allowing everyone the choice of whether to cover their hair is more consistent with the core French values of liberty, equality and fraternity than telling everyone they must dress '*à la mode*'.

The French government's assessment of the weight of its case seems to be badly overstated. While it is certainly true that the principle of *laïcité* is fundamental to the character of French society, evidence shows that it tolerates, and even supports, a significant degree of religion in its public life. Most of its public holidays, for example, celebrate important dates in the Christian calendar. Catholic private schools receive massive subsidies from the state, as do churches in some departments and overseas territories.[11]

Having shown its willingness to compromise the secular character of the French state for the benefit of Christianity, the government authorities cannot claim that allowing students to wear personal religious symbols would be such an important issue. If headscarves can be accommodated in universities, why should secondary schools be any different? The experience of Muslim women in institutions of higher education shows that there is room for religious symbols in the public domain. The universities' tolerance teaches that wearing religious symbols does not disqualify people from simultaneously embracing core values of French citizenship and participating in the formation of a 'general will' for the school.

Nor can it say that allowing headscarves in schools would constitute a major threat to public order and/or the rights of others. From 1989 when the *Conseil d'Etat*, the country's highest administrative court, first ruled that wearing headscarves in schools did not violate the principle of *laïcité*, until 2004 when the ban was introduced, it appears that schools were able to operate normally and other students were not pressured to follow suit.[12] Disputes that arose were settled peacefully with the help

[10] M Cohen, 'France Uncovered', *New York Times*, 1 April 2007.

[11] *Report of the Special Rapporteur*, n 9 above, para 30.

[12] The recent history of the issue of headscarves in French schools is recounted in J Klausen, *The Islamic Challenge* (Oxford: Oxford University Press, 2005), ch 6.

of state mediation. France's experience was no different than that of any of the other countries in Europe that have allowed headscarves to be worn in state schools without disruption to or interference in the lives of others.

At the time of its enactment, many supporters of the French law defended it as an appropriate and timely response by the state against sexism and the subordination of women. Too often, they said, students were pressured by males in their families to wear a headscarf. They said that the freedom of young women who did not want to cover their hair was just as important as those who did. They defended schools as public spaces in which future citizens are given the means to free themselves of the religious and ethnic chains of their families.[13] Protecting people from being forced to wear religious clothing is certainly a legitimate concern for any government. The question is whether the French law pursued it in a balanced and even-handed way. Were the circumstances of young girls who were made to wear a headscarf against their will so pressing that they justified overriding the freedom of women who chose voluntarily to cover their hair? Was an absolute ban a proportionate response?

The broad scope which French law gives parents to impose their spiritual and moral values on their children suggests that the ban was not a proportionate response. If, as it does, French law allows parents to indoctrinate their children into any of the major religious faiths, what is gained by excluding from that authority the right to insist that their children dress according to the requirements of their religion? Even in a culture that puts a lot of emphasis on appearances, can clothes be that important? In a society that allows parents to circumcise their male children in the name of religion, recognising their right to dress their offspring according to their faith is a concession that seems small fry in comparison.

The French government is caught in the same kind of contradiction that undermined the position of the school authorities and university in *Multani* and *Sahin*. In each case, the state showed that its interest in safety and secularism was not absolute and unyielding. Such significant concessions had already been made that nothing much would be lost if students were allowed to follow their faith in deciding what to wear. Moreover, even if the government could establish that protecting the freedom of children to override their parents' objections in choosing their clothing was pressing and substantial, the law would still fail the proportionality test because it is not focused specifically on that objective. Proportionality requires not only that an interest be sufficiently weighty, but also that it

[13] JR Bowen, *Why the French Don't Like Headscarves* (Princeton, NJ: Princeton University. Press, 2007). See also P Birnbaum, *The Idea Of France* (New York: Hill and Wang, 1998) pp 224–37.

be pursued in a way that does as little damage as possible to the interests of others. Even if protecting the right of children to dress as they choose is the most important issue in the French case, it must be achieved by using the least burdensome means possible. Rather than a law that banned all headscarves, the prohibition should at least have been limited to the targeted group. In order to comply with the principle of proportionality, the law would have to make an exception for girls of a certain age and maturity who wanted to wear a headscarf and who could show that their choice was voluntary and uncoerced.

The way the French lawmakers struck the balance between church and state was balanced unfairly in their own favour. This is perhaps an example of French 'exceptionalism'—of an historic preference for universalistic ideas and resistance to pluralism and liberalism. It leaves no room for individual choice. It substitutes one absolute rule for another and has, for that reason, attracted a lot of criticism. It must be remembered, however, that France is not alone in Europe in making its public schools unwelcome places for religious minorities. Germany and Switzerland, as already noted, have imposed similar bans on wearing headscarves on their teachers. If German and Swiss lawmakers exercised their powers in conformity with the rule of law, these injustices would have to be rectified as well. There is no reason why the religious commitments of teachers in Germany and Switzerland should count for less than those of students in Turkey and France.

The European Court of Human Rights upheld the right of the Swiss authorities to tell Muslim teachers that they had to work in schools with their heads uncovered, because it was worried that in a class of young impressionable children a teacher wearing a headscarf might have a proselytising effect.[14] However, as in its ruling in the *Sahin* case, it referred to no evidence in support of its presumption. If the risk were real, there should have been evidence of it in countries that have allowed Muslim teachers to cover their hair in school. The fact that other European states (the Netherlands, Spain, Sweden and the UK) tolerate teachers wearing headscarves suggests that it is recognised as a purely personal expression of religious faith and has no significant proselytising effect. In the light of their experience, the fears of the Swiss authorities and the judges in Strasbourg seem to be exaggerated and to lack a solid foundation in fact.

Although the principle of proportionality works in favour of the interests of religious minorities in all of the cases we have considered so far, it should not be assumed that they will always prevail. Change the article of

[14] *Dahlab v Switzerland* Application no 42393/98, 15 February 2001.

clothing and/or the place where it is worn and it is easy to imagine cases where the community's loss will prove to be the weightier factor in the balance. Would anyone say, after 9/11, that Multani has the right to wear his kirpan on a plane? Or consider the cases of police officers, prosecutors and judges who want to wear a *niqab* or a *burka* at work. The community's right to insist that everyone, including Muslim women, must show their faces is strongest when the force of the law is involved. The importance of openness and transparency in the legal system is paramount in the Western idea of justice. The requirement that justice must not only be done, but be seen to be done, is acknowledged all over the world. In the UK, senior members of the judiciary have issued guidelines instructing counsel that full face veils should not be worn in court, and in Pakistan women lawyers have been ordered by the Chief Justice of the Peshawar High Court to keep their faces uncovered.[15]

On the other side of the scales, the sacrifice of religious beliefs that would result from banning face veils from police stations and courthouses seems to be comparatively less burdensome. Dress codes are not one of the five pillars of Islam. The Koran's injunction to dress modestly is generic. It does not specifically direct women to cover their face or their hair. The fact that most Muslim women believe that they can satisfy the Koran's requirements by wearing a headscarf shows it would not constitute a major compromise of a person's faith if, instead of wearing a veil, she wore a headscarf.

The balance seems to be the same in the cases of the teachers and students in the UK who want to cover their faces in school. Again, because of the headscarf alternative, the sacrifice required of religious beliefs in not being allowed to wear a veil at work should not be excessive. And the sacrifice of community values would still be substantial.

Facial expression is as important in teaching and learning as it is in police interrogations and cross-examination in the courts. Looking at a student's face helps a teacher see whether she is engaged. Veils make it harder to know if the message is getting across. Their purpose, after all, is to impede communication. Even in Islamic countries, teachers talk to their students face to face. If veils were allowed in schools, they would take away some of the familiarity and personal connection that is an important part of the learning experience. There would be a barrier in communication, a rejection of a certain level of reciprocity and trust between teachers and their students and among teachers themselves.

Veils are inconsistent with the idea that public schools are communities in which teachers and students can look at each other and treat each other

[15] See timesonline.co.uk, 5 February 2007 (law); http://jurist.law.pitt.edu (paperchase, 4 November 2006).

in a supportive, non-threatening way. They are based on assumptions about relations between the sexes that stereotype and are demeaning to women. They are at odds with our commitment to a culture of employment equity in which both sexes are expected to work together in an environment of mutual respect. Telling a Muslim teacher that she cannot cover her face in school is a restriction of her religious freedom, but it is neither unjustified nor discriminatory. Community control of what people wear is not limited to religious clothing. At the same time as Muslim women are made to uncover their faces, nudists and anarchists (for example, Doukhobors) are told to wear more clothes. In conventional Western morality, at least in schools,[16] the former don too much clothing whilst the second do not wear enough. Veiling laws and obscenity laws are aimed at countering opposite extremes.

The fact that the rule of law allows governments to insist that Muslim police officers, judges and teachers show their faces at work underscores the impartiality of the proportionality principle. In disputes between church and state about what people can wear, neither side is going to win every time. In these cases, the community's value of transparency weighs more heavily in the balance. However, as we have seen, where the facts change, the case may swing the other way.

III. CONCLUSION: PROPORTIONALITY AND THE RULE OF LAW

At this point, probably enough has been said, even for sartorially conscious Europeans, about who should decide what people can wear when they step outside their homes. Considering other restrictions in state dress codes will not further our understanding of the jurists' conception of the rule of law very much. As Mansfield explained, in law, the principle and the method remain the same and everything turns on the facts. It is time to examine how the principle of proportionality bears on the questions of whether the rule of law is an exhausted concept, and whether it is suitable and/or capable of relocation—subjects central to the overall concerns of the present volume.

On the question of its current vitality, the *Multani* case is proof that the rule of law offers a way for cultural conflicts to be resolved fairly and non-violently. With such strong moral, political and multicultural credentials, it would be perverse to think that the rule of law has become an exhausted concept. Quite the contrary. On the jurists' model, proportionality is

[16] On the street, or on the beach, what constitutes too much or too little clothing is likely to be defined quite differently. See eg *R. v Jacob*, (1996) 142 DLR (4th) 411, in which the Ontario Court of Appeal ruled that a woman who walked bare-breasted in public on a hot summer day did not violate Canada's obscenity laws.

relevant to all social conflict. Its potential is inexhaustable. The failure of the European Court of Human Rights to remedy the injustice suffered by Leyla Sahin tells us there is still much work to do.

Multani also teaches us that the rule of law can flourish on any soil. Proportionality has long figured prominently in the way people think about law and justice. It was important in the writings of Plato and Aristotle, and even before them crude versions were central to the earliest codes of punishment. Although the jurists' model refines and extends the reach of the rule of law to its logical limits, characteristically, it is grounded in an idea that is neither new nor revolutionary.

Its deep roots in history show that the principle of proportionality has a proven facility to relocate and adapt to new conditions. And it is still capable of growth. Today the principle provides direction in disputes that transcend individual governments and nation states. Proportionality already plays an important role in fixing rules of international relations. Alongside subsidiarity (proportionality by another name) it is one of the core principles governing relations between the member states of the European Union. The principle is firmly embedded in the rules of world trade.[17] Even when relations between states break down, the standards of armed conflict and just wars are fixed by proportionality.[18] Recently, Israel's Supreme Court has shown how the principle is also well suited to sorting out the nitty-gritty detail of border disputes.[19] With such dazzling range, it is easy to project proportionality as the central pillar of a just world order.

In our enthusiasm for rescuing the rule of law from the abyss of ambiguity, and mapping out new territory in which it can reign, we must be careful, however, not to get ahead of ourselves. An important lesson of the cases we have been considering is that before surveying new, non-state horizons where law might be king, we must do much better, in our homage to its sovereignty, ourselves. We must re-establish our own credentials as states wedded to the rule of law.

For members of the Council of Europe, an obvious first step would be to agree that, from now on, only those who have publicly declared their commitment to enforcing the rule of law and applying the principle of proportionality faithfully in every case will be appointed to the European Court of Human Rights. An act of injustice, such as the one the judges in Strasbourg inflicted on Leyla Sahin, should never happen again. Indeed, anyone who aspires to be a judge (or an international human rights

[17] ML Trebilcock and R Howse, *The Regulation of International Trade*, 3rd edn (London: Routledge, 2005).

[18] M Walzer, *Just and Unjust Wars* (New York: Basic Books, 1977).

[19] HCJ 2056/04, *Beit Sourik Village Council v The Government of Israel and Commander of the IDF Forces in the West Bank*.

monitor)[20] should be made to make a similar pledge. If, as the US Supreme Court has put it, 'the men and women who administer the judicial system [are] the true backbone of the Rule of Law',[21] then they must always be its most resolute defenders. It should be part of the appointment process to any court that candidates be required to explain to the elected representatives of the people the standards of moderation and fairness they will require them to meet.

Relocating the rule of law in our own courts is an essential first step in establishing our *bona fides* to the rest of the world, but it cannot be the whole story. Peace and understanding between people who disagree over fundamentals will only be achieved when all of us show in our daily lives the moderation and even-handedness that the principle of proportionality requires. In the end, this is the responsibility of each and every one of us and not of the courts. It is not only a rule for the lawyers. To claim the mantle of a rule of law state, every person in it should be schooled in the way the principle of proportionality and the scales of justice work. Our goal should be universal fluency in the language and method of the law. Before we think about how the rule of law can operate on the international stage, we need to show its importance as a moral compass much closer to home.

After resolving the question of what people can wear, we could move on to look at the way we have settled other disagreements with our religious minorities to ensure they also meet the test. There is, for example, a feeling among those most directly affected that all too often the legal enforcement of religious (for example matrimonial or dietary) laws, public funding of religious schools, and blasphemy and hate laws are biased against them and do not measure up. Checking the balance in these cases comes before pressing the sovereignty of law beyond the borders of any nation state.

It would be better still if using the logic of law in our daily lives on simple things, such as how we address each other (think of the Danish cartoons lampooning the Prophet Mohammed), became a habit, or second nature. Everything (including humour) should be in proportion. Nothing (except proportionality) should be excessive.[22]

It may often be prudent, from a personal perspective, to turn away from injustice, but it can never be right. Modesty and humility in the face

[20] Even the Special Rapporteur accepted the ban on public servants wearing religious clothing without testing its compatibility with the principle of proportionality: n 9 above, para 38.

[21] *Bush v Gore* 531 US 98, 128–9, per Stevens J.

[22] Even if Barry Goldwater (the Republican presidential nominee in 1964) was wrong when he claimed that 'extremism in defence of liberty is no vice', he was surely right in insisting that 'moderation in defence of justice is no virtue'.

of arbitrariness and abuse amount to acquiescence and approval. That is what makes the decision of the European Court of Human Rights so unjust. So long as we are willing to tolerate the misuse of force against people like Leyla Sahin, we can never be credible when we insist that solutions to the really big international conflicts that put the whole planet at risk can also be worked through the law.

Part 3

The Wider Frontiers of the Rule of Law: European and Global Perspectives

6

The Rule of Law and the EU: Necessity's Mixed Virtue

NEIL WALKER

I. INTRODUCTION

The preservation of the rule of law is a fundamental and abiding concern for all established polities. For a still-emerging polity such as the EU, the relationship with the rule of law is more fluid and more dynamic. Put starkly, the untapped potential for the rule of law to make a positive difference—and not just for its absence to make a negative difference—is greater in the case of the EU than that of most other contemporary polities and, in particular, most states. At the same time, however, the EU's effective capacity to draw upon the various 'use-values' of the rule of law is highly precarious. What is more, the attraction and the vulnerability of the rule of law in the supranational context are two sides of the same coin. They spring from some of the same sources—the same background political circumstances of limited and uncertain polity legitimacy—with ambivalent consequences for the long-term resilience and adaptability of the rule of law idea beyond its statist domicile.

The discussion that follows seeks to elaborate on these propositions, and to suggest, in conclusion, that the potential of the rule of law need not be exhausted by the conditions of its initial emergence within and adaptation to the supranational arena. But first we should say something about matters of definition. As many of the contributions to the present volume make clear, the rule of law is a highly variegated and contested concept—perhaps even, as Jeremy Waldron suggests, drawing on familiar terminology, 'an essentially contested concept'.[1] Yet, as the present chapter is primarily interested in the *social significance* of the rule of law in the supranational domain, this conceptual instability is less an analytical hurdle than a threshold insight. That it attracts a variety of candidate

[1] J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137–64.

definitions and interpretations within and between quite diverse contexts of application, and that it generates contestation over these definitions, interpretations and applications, is itself an important social fact about the rule of law, and one that has a significant bearing upon its overall use-value. This is not to suggest that we should be uninterested in the analytical question—in the ideal sense or highest justification of the rule of law as opposed to its social and political functions. Rather, it is to plead that since commitment to its proper purpose and best understanding is typically what the diverse and contested articulation of the rule of law purports to be *about*, then absent some objective and unchallengeable standard of judgement, we can best test the practical credentials of different understandings of the rule of law—their viability and efficacy in making a difference for the better—in the social contexts in which they are pursued and challenged.

II. THE MANY FUNCTIONS OF THE RULE OF LAW

To think of the rule of law in terms of its full diversity of social applications is to introduce a range of differences of meaning and emphasis, and of their complex interconnections, that is not always appreciated in the literature. We may think of the social and political use-value of the rule of law in any polity along five distinct but closely intertwined functional dimensions—regulation, authorisation, instrumentalisation, identification and promotion. Let us look at each of these in turn, and then examine their application to the EU context.

By the *regulatory* dimension of the rule of law, we refer to what most commentators understand as being its focal concern and core function. We are here concerned with the way in which the rule of law operates as a kind of meta-rule—a rule about the importance and priority of legal rules—for a polity. Of course—and this is key to the elusiveness and contestability of the rule of law—the basic idea of a meta-rule already carries a whiff of paradox, a circular sense of a justification that purports to possess, and must therefore justify for itself, the same (that is, rule-like) properties as the thing for which it provides higher and external justification (that is, the law). Again, Waldron conveys this well when he says that the rule of law in this primary regulatory sense is a 'solution-concept' rather than an 'achievement-concept'.[2] A solution-concept is one which is defined in terms of a problem which we identify as being important to solve, even though, as in the case of the paradoxical quality of a 'rule that (legal) rules should rule', we are not sure what that solution is or whether we can ever fully achieve it.

[2] *Ibid*, p 158.

For Waldron, the focal concern of the rule of law considered as a solution-concept, from Aristotle through Hobbes and Dicey to Hayek, is '*how can we make law rule*?'.[3] And, indeed, the various particular regulatory aspirations which we tend to find collected under the rule of law—certainly when defined in a 'narrow'[4] or 'thin'[5] sense as a minimum over which we can all agree or at least over which there is significant overlapping consensus—invariably speak to this particular concern and how we might approximate a satisfactory answer. They speak, in other words, to the possibility of '*law being in charge* in a society'[6] in terms which contrast the rule of law favourably with the arbitrary[7] 'rule of men'.[8] The relevant cluster of regulatory aspirations—of approximate answers—includes the following: fairly generalised rule in a political community through law and the avoidance of large zones of non-law (either in theory or in practice) where other forms of domination prevail; a high degree of legal predictability through published and prospective laws; separation of the legislative and the adjudicative function; and general adherence to the principle that no one, least of all the government of the day, is above and immune from the law.[9]

Alongside and closely associated with its question-begging conceptual form, the other distinctive characteristic of the rule of law in this core regulatory sense is its direct dependence upon a culture of support within the relevant society.[10] This may seem obvious and unremarkable, but it is worth pausing for a moment to ask why that is the case. Support for the rule of law, conceived of in normative or quasi-normative terms, does not work in the same way as support for 'normal' legal norms. Normal legal norms often benefit from something like a 'double-institutionalisation'[11] effect. Their support derives both from first-order agreement with their particular content, and in addition—or, perhaps more pertinently, where that specific, first-order support is lacking, in the alternative—from a second-order general preparedness to comply with the law *just because it is the law*. The rule of law knows no corresponding double-order imperative. Precisely because *its* particular, first-order normative concern is with the

[3] *Ibid*.

[4] See eg M Rosenfeld, 'The Rule of Law and the Legitimacy of Constitutional Democracy' (2001) 74 *Southern California Law Review* 1307 at 1313.

[5] B Tamanaha, *On the Rule of Law* (Cambridge: Cambridge University Press, 2004) ch 7.

[6] Waldron, n 1 above, p 157.

[7] See eg M Krygier, ch 3 of the present volume; see also R Bellamy, *Political Citizenship: A Republican Defence of the Constitutionality of Democracy* (Cambridge: Cambridge University Press, 2007) ch 2.

[8] See Tamanaha, n 5 above, ch 9, and also his contribution (ch 1) to the present volume.

[9] This list is adapted from Rosenfeld, n 4 above, p 1313.

[10] See e.g. the contributions by Tamanaha and Krygier to the present volume (chs 1 and 3).

[11] P Bohannan, 'The Differing Realms of the Law', in P Bohannan (ed), *Law and Warfare: Studies in the Anthropology of Conflict* (New York: Natural History Press, 1967) pp 43–56.

(typically second-order) matter of law being deserving of compliance *in general*, there is no further and even more general normative justification to which it can appeal. In other words, just because its claimed virtues are already pitched at the highest level of normative generality, for the rule of law to function effectively requires a high level of *specific* support, or at least acquiescence, within the background culture.

If we now turn to the *authorisation* dimension, by this we mean the way in which the assertion or defence of the rule of law may serve an ideological purpose, tending to authorise a certain modality and structure of power, and so also to advantage those who are situated so as to benefit from that modality or structure of power. The rule of law clearly places a high priority on rule *through* the modality of law, as opposed to other modalities of power such as threat, economic incentive or appeal to first-order right reason. And in so doing, it may privilege those who claim to be practitioners of this modality of power, in particular judges, lawyers and bureaucrats. The rule of law clearly also lends authority to a structure of power that is configured in terms which promise to give full and faithful effect to its virtues. By this structure of power we primarily mean a 'legal system' comprising certain classic characteristics which indicate its maturity and secure its autonomy against both internal and external challenge. These features include self-definition (through possession of its own rule of recognition and change), self-ordering (through an exhaustive *internal* hierarchy and unbroken chain of validity), self-extension (through the corresponding power to decide the *external* boundaries of its own jurisdiction), self-interpretation (through provision of its own authoritative judicial organ), self-enforcement (through procedural and adjectival rules implementing its substantive rules) and, crucially and consequentially, self-discipline (through the generation of a capacity for and expectation of auto-limitation—that those empowered by the system remain constrained in advance by the system and be not generally immune from its substantive norms).[12] And in affirming these various systemic features, the rule of law, conceived of in its authorisation function, also validates the necessary or optimal institutional hardware of such a system—most notably an independent judiciary, but also whatever broader design principles (for example, the separation of powers) are required to undergird the system.

Importantly, then, we can already discern a complex relationship between the regulatory and the authorisation dimensions of the rule of law. The first is about the elusive pursuit of the ideal core of the notion of legality, while the second is about the institutionalisation of certain law-centred

[12] See further, N Walker, 'European Constitutionalism in the State Constitutional Tradition' in J Holder, C O'Cinneide and C Campbell-Holt (eds) (2006) 59 *Current Legal Problems* 51–89.

claims to authority. These may be separately motivated activities, and need not complement one another. Yet there is also scope for overlap, and for the development of a symbiotic relationship between the two dimensions. On the one hand, the plausibility of the claim to authority of the overall legal system or order, and also of its *dramatis personae*, depends in some measure on whether that legal order is deemed to instantiate the regulatory virtues of the rule of law. On the other hand, these regulatory virtues cannot be adequately nourished in the absence of a fully-fledged legal system or order. The values of publicity and predictability and of general coverage by and accountability to law *presuppose* a legal order sufficiently complete and 'self-contained',[13] and therefore sufficiently capable of self-discipline to articulate the values to the requisite degree of intensity.

By the *instrumental* dimension of the rule of law we mean the way in which it may be understood as a means to the realisation of other ends[14] rather than simply as a regulatory end and good in itself.[15] These extrinsic and instrumental benefits are in theory wide-ranging, but we may identify three clusters which have tended to predominate in the historical analysis of the instrumental benefits of the rule of law. In the first place, there is the idea that a settled, prospective and general framework of laws serves to protect the patterns of property rights and the predictability of exchange necessary for good commerce in general, and capitalist commerce in particular. In the second place, there is the idea of a settled, prospective and general framework of laws as the crystallisation and perfection of the will of 'the people' under a system of representative democracy. In the third place, and reflecting the post-substantive 'procedural turn' in legal thought over the past 30 years, there is the idea of law as a set of decision-making rules that, in their reliably settled, prospective and general character, are capable of responding accurately, fairly and effectively

[13] To use the language of international law when referring to the autonomy from the general matrix of international law of particular functionally specialist legal regimes: see eg B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483–529.

[14] For a recent wide-ranging discussion of the modern growth of legal instrumentalism, see B Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge: Cambridge University Press, 2006).

[15] Of course, the idea of the regulatory virtue of the rule of law as an end or good in itself does not rule out further discussion of the reasons why it may be considered a good in itself. There may be debate and disagreement over the more general values which the rule of law articulates, eg between freedom, human dignity and equality, and, indeed, over the optimal balance between these. Moreover, these differences tend to exacerbate the basic social conundrum, discussed in the main text, of seeking to invest a basic norm-authorising norm with its own authority. Nevertheless, there remains an important difference between the relationship of *abstraction* between values pitched at different levels of generality on the one hand, and the *causal* relationship between means and ends on the other, and instrumentalism is concerned only with the latter.

to the growing variety of decisional spheres within society and the increasing diversity and complexity of interest and preference constituencies affected within and across each of these spheres.[16]

By the *identification* dimension we mean the way in which the rule of law may be claimed and portrayed as a defining virtue of a particular polity or political community, and one that may contribute to the sense of common attachment and commitment which permits and sustains its self-identification *as* a political community. Much of the recent discussion of 'constitutional patriotism', for example, speaks precisely to the way in which certain general virtues of the just ordering of political relations associated with 'government according to law' may become a matter of common subscription and pride and, perhaps *in lieu of* certain traditional ties of affinity such as nation or ethnicity, a source of societal solidarity and political self-definition.[17]

By the *promotional* dimension, finally, we mean the way in which a polity may treat and benefit from the rule of law not only as a regulatory, authorising, instrumental or identifying mechanism for its own internal purposes, but as something to be disseminated and applied elsewhere for any combination of these purposes. This may at first sight seem like a merely incidental feature of the rule of law, one neither closely related to nor belonging in the same category of importance as the first four. But that would be a mistake. In the first place, claims made in favour of the rule of law in its regulatory and authorisation dimensions, and to some extent in its instrumental dimension, tend to be universal in nature. It is often assumed or asserted that the good reasons for following the law in general in a particular society are *ipso facto* good reasons for following the law in general in *any* society, and should be promoted as such. This, indeed, lies behind the historical centrality of rule of law and related concerns in motivating, justifying or qualifying many types of formal international or transnational legal projects, agreements and transactions. In the second place, the high visibility and avowed seriousness of purpose of the promotional role has certain reputational consequences within the sponsoring polity as well. Like many forms of external action perpetrated in the name of a political community, it acts as a mirror to the question of identity and feeds into understandings about the nature of the sponsoring political community. More specifically, any promotional policy raises questions of consistency between internal and external constituencies and

[16] See, famously, J Habermas, *Between Facts and Norms*, trs W Rehg (Boston, NJ: MIT Press, 1996); G Teubner 'Substantive and Reflexive Elements in Modern Law' (1983) *Law & Society Review* 239; P Nonet and P Selznick, *Law and Society in Transition: Towards Responsive Law* (New Brunswick, NJ: Transaction Publishers, 2001).

[17] See eg JW Müller, *Constitutional Patriotism* (Princeton, NJ: Princeton University Press, 2007).

audiences over the approach taken by the sponsoring polity to the various dimensions of the rule of law.

III. THE ALLURE OF THE EU RULE OF LAW

In the evolution of the EU, the rule of law has figured prominently, and increasingly so, within and across all five of these dimensions.

As regards its core regulatory function, we find both judicial and legislative support for the rule of law as a foundational value of the EU. Judicially, the language of the rule of law was vigorously asserted for the first time in the famous *Les Verts* case in 1986.[18] There, faced with the question of the reviewability of a decision on the allocation of election funding made by the European Parliament, the European Court of Justice (ECJ), in the name of a broad principle of judicial supervision, chose to extend the scope of reviewable acts beyond the institutions (that is, the Commission and the Council) specified in the plain words of the then Article 173 EC[19] to embrace those of the European Parliament. In justifying such an extension, the Court claimed that the EU was 'a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic Constitutional Charter, the Treaty'.[20] Not only, then, did this decision engage directly with an important plank of the regulatory case, to the effect that all institutions of government of a legal order, including in this case the European Parliament, should conduct themselves in accordance with the rules of that legal order. But it also did so in highly charged language, using this occasion to apply the 'constitutional' label for the first time as an appropriate descriptor of the EU legal order.[21] Legislative recognition came later, but has also been significant. In the Treaty of Amsterdam of 1997 the rule of law was included for the first time amongst the principles on which the Union was founded,[22] with respect for it demanded of all prospective members,[23] and a procedure introduced allowing for suspension of existing members in the event of

[18] *Les Verts v European Parliament* Case 294/83 [1986] ECR 1339, [1987] 2 CMLR 343; and see further, N Walker, 'Opening or Closure? The Constitutional Intimations of the ECJ' in M Maduro and L Azoulay (eds) *The ECJ after 50 Years* (Oxford: Hart Publishing, 2008).

[19] See now Art 230 EC, amended by the Treaty of Maastricht (1992) to provide for the explicit inclusion of the European Parliament as a reviewable institution.

[20] *Les Verts* [1986] ECR 1339, para 23.

[21] See Walker, n 14 above.

[22] See Art 6(1) Treaty on Europeam Union (TEU) for general founding principles. For common foreign and security policy in particular, see Art 11(1) TEU, and for development co-operation, see Art 177(2) EC.

[23] Art 49 TEU.

its breach.[24] What is more, equivalent recognition of the rule of law was provided against the more vivid backdrop of the Constitutional Treaty (CT) of 2004,[25] just as it was, once again, in the Treaty of Lisbon[26] agreed in December 2007 to replace the Constitutional Treaty following its ratification problems.

As regards the authorisation function of the rule of law, the symbiotic element of its relationship with the core regulatory function repays close attention in the context of the EU. As summed up in the abiding popularity of the slogan—and mindset—of 'integration through law',[27] the idea of law as a primary medium or agent of supranationalism continues to provide a key theme in pro-European thinking. Partly this is about the particular instrumental functions of law, and of the rule of law, in the EU—to which we will shortly return. But partly, too, it is about the early and self-reinforcing ascendancy of 'the law', conceived of as an autonomously efficacious and virtuous structure and culture, in the dynamic of integration. This ascendancy, we should immediately make clear, has always been linked to the absence of other powerful media of integration. Indeed, in some respects the casual nexus between the presence of law and the absence of other media may be very tight. For example, in his well-known thesis on the 'dual character of supranationalism',[28] Joseph Weiler insisted that the early prominence of *legal* supranationalism and the intrepid contribution of the ECJ to this in its famously self-assertive 1960s' jurisprudence on direct effect and supremacy,[29] would not have been possible unless *political* supranationalism remained largely undeveloped, with the member states retaining key *de jure* or *de facto* veto powers in many areas of European policy-making until the 1987 Single European Act and beyond. As with law's instrumental virtue, the importance of the absence of alternative steering mechanisms in explaining law's centrality to integration is something to which we must return in due course.

But for now let us concentrate on the supposedly autonomous efficacy and virtue of the law. On this view, the judges and the legal professionals become the custodians of the rule of law, and, crucially, the 'new legal order' championed in the ECJ's early self-assertive jurisprudence and subsequently developed serves both as effect and cause in the symbiosis

[24] Art 7 TEU, as amended by the Treaty of Nice (2000).

[25] See Preamble, Arts I-2, I-3(4), I-58(1), I-59, 111–292 CT (introducing the rule of law as a general principle guiding external action, and obviating the need for a specific provision in development co-operation).

[26] OJ 2007/C 306/01.

[27] M Cappelleti, M Seccombe and JHH Weiler, *Integration Through Law* (Berlin: De Gruyter, 1986).

[28] JHH Weiler, 'The Community System: The Dual Character of Supranationalism' (1981) *Yearbook of European Law* 267.

[29] *Van Gend en Loos v Nederlandse Administratie der Belastingen*, [1963] ECR 1; *Costa v ENEL* [1964] ECR 585.

of authorisation and regulation. That is to say, the accomplishment of a mature legal order is presented both as a realisation and a vindication of the rule of law's autonomous context-independent and so context-invariant virtue, and as a necessary condition for the full expression of that virtue.

What is more, in the narrative of self-authorisation in the name of the rule of law, it is striking that such authority is at least as likely be asserted against external as internal political forces. The *Les Verts* case may have concerned the legal subjection of an internal organ—the Parliament—but the other major pioneering case in which the ECJ articulated the notion of the European legal order as that of a Constitutional Charter based on the rule of law is one that centres on the power of judicial self-interpretation against external challenge. Asked to decide on the legality of a proposal for an overlapping free trade regime with a separate adjudicative organ, the ECJ in 1991 held that the Draft Agreement (later revised in a legally acceptable manner) on the formation of a European Economic Area (EEA) for some of the EU's geographically peripheral areas was impermissible to the extent that it threatened the integrity of the EU legal system, and in so doing also the predictable, calculable, comprehensive rule-governed ethos of the rule of law that underpinned it.[30]

Another, highly topical, example illustrates an even more forceful assertion of the rule of law-based autonomy of the EU legal system against external forces. In the controversial and protracted *Kadi* litigation, the ECJ recently decided to follow the Advocate General's proposal to set aside the earlier judgment of the Court of First Instance[31] to the effect that a person suspected of terrorism could not challenge an assets-freezing order passed by the Council in implementation of a binding UN Security Resolution.[32] The question here is not just one of self-interpretation—of the ECJ having the last word over the meaning of its own legal system. It is also a more basic one of integrity, of the very self-definition of the EU legal order *qua* autonomous legal order. In particular, the notion that the regional EU stands in a relationship of subordination to the global UN was rejected by the Advocate General, even with regard to 'exceptional' questions of terrorism and international security. Rather, the Court's 'duty to preserve the rule of law'[33] means—to recall an earlier formulation—that it is bound to ensure that EU 'law rules'[34] in all matters falling under its jurisdiction. It follows that even where the EU is effectively acting as an implementing agent for another entity, as in the instant case, such

[30] *Opinion 1/91(Draft Opinion on the EEA*) [1991] ECR I-6079. See further, Walker, n 14 above.

[31] *Kadi v Council and Commission*, Case T-315/01, 21 September 2005.

[32] Case C-402/05 Judgment of the Court (Grand Chamber) 3 September 2008: *Opinion of Advocate General Poiares Maduro*, 16 January 2008.

[33] *Ibid*, para 45.

[34] Note 3 above.

implementation has to respect all relevant aspects of the corpus of EU law, including these fundamental rights which are held to be part of the general principles of EU law. And since, of these fundamental rights, the contested regulation was held to infringe the right to be heard, the right to judicial review and the right to property, in the view of both the Advocate General and the Court itself it should be annulled.

If we turn now to the instrumental dimension, here the 'use-value' of the rule of law to the EU is just as central. Ever since its inception, many of the most prominent justifications of the EU have rested, implicitly or explicitly, on the instrumental capacity of a legal framework based on rule of law regulatory values to serve a broader polity-building rationale. In their very different ways, for instance, two of the most politically influential of the early grand theories of integration, the ordoliberal tradition[35] and Hans Ipsen's idea of the EU as a special purpose association,[36] were supported by rule of law premises. For the ordoliberals, the Treaty of Rome supplied Europe with its own economic constitution, a supranational market-enhancing system of rights whose legitimacy depended on the absence of democratically responsive will formation and consequential pressure towards market-interfering socio-economic legislation at the supranational level, a matter which should instead be left to the member states—and even there only insofar as compatible with the bedrock economic constitution. The ordoliberal theory, then, provides a classic case in which the rule of law, through ring-fencing and guaranteeing a sphere of private right and exchange, provides an instrumental platform for the efficient operation of a capitalist economic logic.

Ipsen's theory, to which Giandomenico Majone's contemporary work on the idea of a European 'regulatory state'[37] is a notable successor, shares with ordoliberalism the idea that supranationalism should transcend partisan politics. Here, however, the invisible hand of the market is supplemented by the expert hand of the technocrat. The scope of European law is not restricted to negative integration—to the market-making removal of obstacles to wealth-enhancing free trade—but it also extends to certain positive measures of an administrative nature. In Majone's elaborately developed model, these regulatory measures are concerned not

[35] See eg E-J Mestmacker, 'On the Legitimacy of European Law' (1994) *RabelsZ* 615; see also D Chalmers, 'The Single Market: From Prima Donna to Journeyman' in J Shaw and G More (eds), *New Legal Dynamics of European Union* (Oxford: Oxford University Press, 1996) pp 55–72. On the continuities between the legal and political thought of the Weimar Republic and post-war thinking about supranationalism more generally, see C Joerges and NS Ghaleigh (eds) *Darker Legacies of Law in Europe* (Oxford: Hart Publishing, 2003).

[36] H-P Ipsen, 'Europaische Verfassung—Nationale Verfassung' (1987) EuR 195.

[37] G Majone, 'The Rise of the Regulatory State in Europe' (1994) *Western European Politics* 77. On the connections between Ipsen and Majone, see C Joerges '"Good Governance" in the European Internal Market: An Essay in Honour of Claus-Dieter Ehlermann', EUI Working Papers, RSC No. 2001/29.

with macro-politically sensitive questions of distribution, but with risk regulation in matters such as product and environmental standards where expert knowledge is paramount, and where accountability is best served by administrative law measures aimed at transparency and enhanced participation in decision-making by interested and knowledgeable parties rather than the volatile preferences of broad representative institutions. Here, then, we have an example of an instrumentalism based upon the law's role as a procedural steering mechanism, and in particular its capacity to bring the predictable and comprehensive virtues of the rule of law to the task of reflecting and channelling the demands of highly varied contexts of decision-making within a polity.

Today, however, both the ordoliberal approach and the regulatory state approach are subject to increasing criticism for drawing an artificial distinction between technical questions of market-making and standard-setting and politically sensitive questions of resource and risk allocation.[38] Such a tension becomes all the more evident as the EU takes on a greater range of tasks whose effective performance involves the distribution of politically salient resources and risks and which reduces the capacity of states themselves to perform these tasks. The consequences of this for the instrumental value of the supranational rule of law are mixed. On the one hand, it has often proved to be a creative tension. The limitations of existing regulatory models have not deterred those 'proceduralists' who continue to hold that a distinctive characteristic of the EU is the extent to which its various sectoral policy horizons stand apart from one another in a decentred configuration and are dependent upon the contribution of special interest and epistemic communities from seeking new and imaginative ways of combining interest-responsive input and expertly informed policy output.[39] On the other hand, the instrumental versatility of law in the EU is significantly limited by the broader political context. In particular, short of the development of a more robust system of general political representation at the European level organised around a stronger framework of parliamentary responsibility, and for all that both the ordoliberals and the advocates of a regulatory state approach have tried to make a virtue of this, Europe simply cannot offer the third main form of contemporary instrumental legitimation of law, namely as a transmission belt and crystallisation of democratic opinion.

[38] See eg A Follesdal and S Hix, 'Why there is a democratic deficit in the EU: A Reply to Majone and Moravcsik' (2006) 44 *Journal of Common Market Studies* 533–62.

[39] See eg the work of Joerges on 'deliberative supranationalism', eg '"Deliberative Supranationalism": Two Defences' (2002) 8 ELJ 133. See also the work of the democratic experimentalists on the Open Method of Co-ordination and other forms of 'soft law', eg J Cohen and C Sabel, 'Global Democracy' (2006) 37 *NYU Journal of International Law and Politics* 762; C Sabel and J Zeitlin 'Learning from Difference: The New Architecture of Experimentalist Governance in the EU', Eurogov, 07/02 (http://www.connex-network.org/eurogov).

What of the rule of law's role in societal self-identification, in directly forging the bonds of social and political community? In this regard, the absence of a strong pre-existing pan-European cultural substratum and sense of common 'society'—an absence which operates in a mutually reinforcing relationship with the lack of a strong chain of political representation at the European level—has been an important negative stimulus. The legislative innovations already discussed under the regulatory function of the rule of law are of significance here. In particular, the attempts to centre the rule of law as a solidarity-inspiring value under a Constitutional Treaty[40] much more self-consciously dedicated to the symbolic engagement of its putative citizens than any of its Treaty predecessors, mark a watershed. No longer is the cultivation of the rule of law just a means of legitimating 'the law' itself, and its personnel—as in the regulatory and authorisation functions—and no longer is it even just a means of legitimating other social and political ends that can be achieved through law—as in the instrumental function. Increasingly, the very idea of the rule of law as a *shared* idea is invoked to respond to a broader need of polity legitimation through the expressive medium of constitutionalism. Just as we have seen how the early ground-breaking rule of law jurisprudence of the ECJ explicitly sought to amplify the legitimacy of its claim by invoking the small 'c' word, the use of the 'Big "C"' documentary constitutional process took these symbolic politics a stage further.[41] The drafters of the Constitutional Treaty sought to send an even more powerful message, one which invested heavily—if ultimately unsuccessfully—both in the general community-building aspirations of the documentary constitutional process and in the strong historical association between the founding of a constitutional order and a commitment to the rule of law over arbitrary or absolutist rule.[42]

If we turn, finally, to the promotional dimension, probably the area of EU activity where the rule of law figures in most explicit and active discursive terms is in the area of external relations.[43] The initial 1993 Copenhagen criteria governing the Central and East European wave of enlargement (finally implemented in ten countries in 2004 and in the remaining two in 2007) included a stipulation that applicant states should respect the rule of law, anticipating its formal specification as a condition of membership in the 1997 Treaty of Amsterdam.[44] A similar approach is

[40] See eg A von Bogdandy, 'The European Constitution and European Identity; text and subtext of the Treaty establishing a Constitution fore Europe' (2005) 3 *ICON* 295–315.

[41] See eg N Walker, 'Big "C" or small "c"?' (2006) 12 *European Law Journal* 12–14.

[42] See eg G Sartori, 'Constitutionalism: a preliminary discussion' (1962) 56 *American Political Science Review* 853–6.

[43] See at much greater length, Rachel Kleinfeld and Kalypso Nicolaïdis's contribution to the present volume (ch 7).

[44] Art 49 TEU.

taken today to the EU's 'new' near-neighbours under the Stabilisation and Association Process in the Western Balkans and the broader European Neighbourhood Policy (ENP).[45] Patently, given that external relations is the domain in which what distinguishes the Union can be placed in sharpest relief, the priority accorded to the rule of law here is not symbolically innocent. It has served to embellish the claim that adherence to the rule of law is an identifying criterion of the EU, even as the merits of such a policy are lauded in proselytising and universalistic terms. Indeed, in this regard the insistence upon the rule of law is but one plank of an emerging platform of external self-presentation and self-identification based upon the notion of Europe as an uniquely 'normative power',[46] relying upon example and civil persuasion rather than the military might or threat offered by other regional actors.

Clearly also, and as an extension of this approach, external relations provides a context within which the authorisation and instrumental functions of the rule of law can be and have been amplified. As regards authorisation, the importance accorded to legal institution-building as an earnest of commitment to the rule of law is a striking feature of the conditional strategies pursued in the country-specific Europe agreement leading to accession, and now, in the next generation, to the agreements under the Stabilisation and Association Process and the broader ENP. In both contexts—accession and neighbourhood policy—we also see many examples of an explicit instrumental endorsement of the rule of law, through its stipulation as a necessary means to the end of the development of a market economy and a democratic political system.[47] One final, cumulative effect of this high-profile pursuit of the identifying, authorisation and instrumental dimensions of the rule of law in the theatre of foreign policy is to provide a check on internal policy. Over many years, especially in the area of the mainstreaming and institutional protection of human rights, the external rule of law profile of the EU has provide an ideological resource for EU policy-makers and critics alike wishing either to reinforce or to question the EU's internal commitment to making the 'law rule'.[48]

[45] See *European Neighbourhood Policy* (European Commission, 2004) p 273. See also the European Security Strategy of the same period: *A Secure Europe in a Better World* (European Council, 2003). See more generally, M Cremona, 'The European Neighbourhood Policy: Partnership, Security and the Rule of Law' in A Mayhew and N Copsey (eds), *European Neighbourhood Policy and Ukraine* (Brighton: University of Sussex European Institute, 2005) 25–54.

[46] See eg I Manners, 'Normative Power Europe: A Contradiction in Terms?' (2002) 40 *Journal of Common Market Studies* 235–58; E Johansson-Nogues, 'The (Non) Normative Power EU and the European Neighbourhood Policy: An Exceptional Policy for an Exceptional Actor' (2007) 7 *European Journal of Political Economy* 181–94.

[47] See Cremona, n 45 above.

[48] For an influential early statement of this argument, see P Alston and J Weiler, 'An "Ever Closer Union" in Search of a Human Rights Policy' in P Alston (ed), *The EU and Human Rights* (Oxford: Oxford University Press, 1999).

IV. THE MIXED VIRTUE OF NECESSITY

In summary, therefore, we can see that the rule of law sounds powerfully and diversely within the EU's 'politics of law'. Its regulatory virtues are advertised increasingly prominently, and their pursuit is linked in a complex chain of cause and effect with the broader question of the authorisation of the modalities, structures and personnel of law as a central feature in the making and preserving of the EU polity. Much of the prominence accorded to law, and to its rule of law pedigree, has also to do with the diverse and changing instrumental demands made of it, while with the recent 'constitutional turn', the rule of law has been auditioned for a new role as a direct component in the construction and legitimation of supranational political community. In addition, these dramas are more and more often played out on the external as well as the internal stage, and indeed the highest-profile performance may be reserved for external audiences. Today it is as much through what the institutions of the EU say and do when they are looking outwards as when they are looking inwards, that the discourse and practice of the rule of law impacts on its identity politics.

Does this busy agenda demand too many things, and perhaps the wrong things, or incompatible things, of the rule of law? What is certainly true, and what forms the focus of the concluding section of the essay, is that the rule of law suffers from a twofold vulnerability in these circumstances. In the first place, as already briefly intimated, the centrality and diversity of contribution of the rule of law to the EU polity-in-the-making is to some extent a function of the weakness of other traditional media of common community—both political and cultural—at the supranational level. In the second place, and exacerbating the first difficulty, because the rule of law's own efficacy and legitimacy in some measure depends upon the kind of fertile environment in which these other media thrive, then just where more is demanded of it, it may in fact be less well placed to deliver.[49] This, in a nutshell, is what we mean by necessity's mixed virtue. The more indispensable the rule of law becomes to certain tasks, the more inadequately equipped it can appear. We can illustrate that conclusion, and the two themes that point towards it, by once again briefly reviewing the five dimensions of use-value.

To start with the core regulatory and authorisation functions of the rule of law, the difficulty with the championing of the rule of law as an unqualified virtue of the EU is that any such claim is bound to be compromised and exposed by the inevitable gaps in the symbiotic relationship between the

[49] See eg N Walker, 'Legal Theory and the European Union: A 25th Anniversary Essay' (2005) 25 *Oxford Journal of Legal Studies* 581–601, especially at 590; M Everson, 'Is it just me, or is there an Elephant in the Room?' (2007) 13 *European Law Journal* 136–45.

two. Indeed, as a negative image of the symbiotic relationship, to the extent that the two functions do not operate in mutual support we may observe a kind of double exposure. In the first place, in an environment in which the law lacks a deep reservoir of indigenous social and political support, the legal system's attempts at self-authorisation inevitably struggle against external challenge. In the second place, to the extent that the legal system is only partially successful in meeting that challenge, this reduces its capacity to achieve the regulatory virtues of the rule of law, so further undermining its legitimacy. Simply put, the self-projection of the EU legal order as a self-contained legal system, with all the developed attributes listed earlier, cannot gainsay the fact that, given its vast area of overlap with 'primary' national legal orders, it stands in a difficult and sometimes contentious relationship with these national legal orders, and this difficult and contentious relationship inevitably sullies the 'perfection' of its rule of law claims.

For example, as regards self-definition and the closely allied properties of self-extension and self-interpretation, for all the recent juridical successes of the EU when pitted against other transnational entities, such as the UN, which also lack indigenous social and political support, the scope—indeed, even the existence—of its autonomy-endorsing principle of supremacy remains disputed in at least some national constitutional settings (and in some national courts) where such indigenous support remains relatively strong.[50] What is more, this trend has been exacerbated by enlargement and by the historical fears of sovereignty loss on the part of some of the ex-Warsaw Pact accession states.[51] Equally, the EU's claim to comprehensive and internally coherent self-ordering is vulnerable to the existence of extensive 'grey zones', where either the basic competence of the EU or its possession of binding legal instruments is curtailed or qualified due to national resistance, and where EU measures are affected accordingly. This, indeed, is one key criticism of the recent turn to the typically 'soft law' methodologies of the Open Method of Co-ordination in those areas of social policy where national competence has only been reluctantly conceded.[52] As regards self-enforcement, the EU legal order remains heavily reliant on the uneven commitment of national courts, and other national political actors, to the application of its norms, and

[50] See eg N Walker, 'Late Sovereignty in the European Union' in N Walker (ed), *Sovereignty in Transition* (Oxford: Hart Publishing, 2003) pp 3–30.

[51] On recent challenges to the supremacy of EU law in the courts of new member states, see eg W Sadurski, 'Solange, Chapter 3: Constitutional Courts in Central Europe—Democracy—European Union' (2008) 14 *European Law Journal* 1–35.

[52] See eg C Joerges, 'How the Rule of Law Might Survive the European Turn to Governance', unpublished paper, NEWGOV Conference, Florence, 31 May 2007. But see eg N Walker and G De Burca, 'Reconceiving Law and New Governance' (2007) 13 *Columbia Journal of European Law* 519–37.

on their uneven willingness to pursue and enforce sanctions in the case of breach.[53] And as regards self-discipline, notwithstanding the heroic promise of *Les Verts*, the EU is still far from offering a complete system of institutional accountability in the courts. For all the advances of the Constitutional Treaty, substantially retained in the (unratified) Treaty of Lisbon, in extending the range of bodies whose acts are reviewable by the Court,[54] and in applying jurisdiction more comprehensively in the old 'third pillar' of Justice and Home Affairs,[55] gaps remain. In particular, in the old 'second pillar' of Foreign and Security Policy, the jurisdiction of the European Courts to supervise the acts of EU organs is still almost non-existent.[56]

If we turn to the instrumental dimension of the rule of law's claim to centrality, it has already been remarked how diversely articulated and deeply contested that is across the different visions of European integration. Market-making and optimal regulation of risk distribution across various policy spheres answerable to widely diverse functional and territorial interests remain the two basic but disputed grand polity ends to which the rule of law—through ring-fencing property rights on the one hand and providing responsive and contextually adequate decision-making procedures on the other—is the arguable means. But the absence of the institutional and cultural supports for the kind of strong democratic mandate familiar to states continues to militate against the emergence of a third, and arguably historically more stable, instrumentally grounded basis for the rule

[53] This is a vast topic, covering a range of controversial issues from the willingness of national courts to make preliminary references, to doctrines of effective and equivalent (to domestic law) protection of EU law in national courts, to principles of state liability, and to enforcement actions against member states. Each of these areas is in a state of constant judicial and legislative flux, which is inevitable given the dependence of EU law on national systems of application and enforcement on the one hand, and the jealousy of member states of the procedural autonomy of their legal systems on the other—a jealousy which can also be defended on rule of law grounds! To take but one example, the controversy surrounding the *Koebler* line of cases, in which the ECJ moved to extend the principle of state liability to mistaken judicial decisions in national courts of final instance may be defended at the European level as a vital link in the chain ensuring the integrity of European law, while it may be attacked at the national level as violating the principle of national legal certainty and interpretive autonomy. See *Koebler v Austria* [2003] ECR I-10239.

[54] In particular, acts of the European Council are now reviewable by the ECJ, while the European Council, the European Central Bank and other 'bodies, offices and agencies' can now be the subject of proceedings for failure to act. See Arts 230 and 232 EC, modified and replaced by the equivalent provisions of the new Treaty on the Functioning of the European Union (TFEU) as introduced by the Treaty of Lisbon.

[55] Although the ECJ remains excluded from reviewing the validity or proportionality of law enforcement operations or the exercise of other responsibilities incumbent upon member states with regard to the maintenance of law and order and safeguarding of internal security: see Art 240b TFEU.

[56] With the exception, introduced by the Treaty of Lisbon, of the power to monitor the legality of restrictive measures against natural or legal persons—presumably in the field of anti-terrorism: Art 240a TFEU. For an earlier critique of the shallowness of the EU's rule of law claims in this regard, see B de Witte, 'The Nice Declaration: Time for a Constitutional Treaty of the European Union?' (2001) 36 *International Spectator* 21–30 at 22.

of law, and one which might reinforce its capacity to perform these other instrumental objectives—namely the service of the majoritarian democratic will. Again then, for the very reasons that the EU rule of law is required to be strong—to provide a stable bulwark against ongoing disputation of the terms and limits of national and supranational encroachment upon market freedoms and to track and reconcile the complex diversity of its multi-polar constituency and 'open-ended'[57] mandate—it threatens to be weak.

A similar story can be told of the putative identifying function of the rule of law. Here, as already noted, the legitimising role of the rule of law is stretched further than ever before. Here the 'necessity' of the absence of other legitimating media requires that the rule of law not only be invoked to legitimate the law itself or other ends to which it may make an instrumental contribution, but that it present itself, as it has done most recently in the context of the documentary constitutional debate, as a direct constituent of a broader claim to the EU's own general polity legitimacy. Of course, some would contend that the EU is in need of no such holistically understood and collectively endorsed claim to legitimacy,[58] and that sceptical claim is closely linked to the strong continuing attachment to the models of disaggregated 'output' justification of the EU based on the market and regulatory benefits we have already discussed. But the very occurrence of the documentary constitutional debate, and its acrimonious failure, is arguably the best evidence of the continuing existence and urgency of a collectively recognised polity legitimacy deficit.[59] Moreover, absence of polity legitimacy is not just a question of political morality—of the lack of a shared sense of justification of a polity which has evolved well beyond any initial conception, or even of the urgency of the immediate symptoms of widespread social unease which manifested themselves in the referendum 'no' votes in France and the Netherlands.[60] It also has debilitating long-term consequences. For, as has often been observed, a political entity insufficiently trusted by its members either with the formal competence or the practical capacity to resolve collective action problems that, partly on account of its own earlier development, lie increasingly beyond the steering capacity of the individual states, is likely to face a 'growing problem solving gap'.[61]

[57] See eg M Maduro, 'Where to Look for Legitimacy?' in EO Eriksen, JE Fossum and AJ Menendez (eds). *Constitution Making and Democratic Legitimacy*, ARENA Report No 5/2002 (Oslo: Arena, 2002) p 81.

[58] See eg A Moravcsik, 'What can we learn from the collapse of the European constitutional project?' (2006) 47 *Politische Vierteilahresschrift* 219–41.

[59] See eg, N Walker, 'After finalité: The Future of the European Constitutional Idea' in G Amato, H Bribosia and B de Witte (eds), *Genèse et destinée de la Constitution européenne* (Brussels: Bruylant, 2007) pp 1245–70.

[60] See eg, M Qvortrup 'The Three Referendums on the European Constitution Treaty' (2006) 77 *The Political Quarterly* 89–97.

[61] F Scharpf, 'Problem Solving Effectiveness and Democratic Accountability in the EU' (2003) *Max Planck Working Papers* 03/1.

Yet the rule of law appears poorly suited to any such ambitious project of polity legitimacy. On the one hand, it seems too 'thin'. It is, to recall, a virtue that is often—and indeed quite persuasively—presented in universalistic rather than community-particular terms, a tendency increasingly evident in the EU's own external relations. On the other hand, it can quickly become too 'thick'—a virtue that divides rather than unites. We noted at the outset that the rule of law in a practical regulatory sense can only thrive if it obtains direct support from the immanent culture, and this cultural sensitivity is closely reflected in the nuances of its adaptation across different national environments. Indeed, once we appreciate this, it appears somewhat ironic that those seeking an alternative to a prior sense of common culture as a bonding ingredient in the making of political community would look to such a strongly culturally inflected concept. So, for example, we find that the very English language term 'rule of law' is only poorly translated into the venerable German term *Rechtstaat* or the more recent French term *Etat de Droit*. In both latter cases the sense of the relevant term betrays the absence of a common law tradition and the more prominent and proactive role of the state in the development of modern legal order in continental Europe, with the German term more accurately translated as 'state rule through law'[62] and the French term as 'constitutional state as legal guarantor of fundamental rights'.[63]

Quite apart from these differences, moreover, there is the discursively explicit 'statist' legacy to consider. There is something deeply incongruous in reading in Article 6 of the Treaty on European Union, or its equivalent in the new Treaty of Lisbon, that a polity *other than a state*, namely the EU, is founded on values that address the state, or rather the *Staat* or *état*, as their very genitive—as their anchor of reference. At best, this is to treat the legitimating foundations of the EU in secondary and borrowed terms. At worst, it feeds the sceptical suspicion that even to think of the political identity of the non-state EU in legal-constitutional terms may be a 'category error'.[64]

But none of this is to deny that necessity can indeed be a virtue as well as a vice. The rule of law is anything but redundant at the supranational level. At the very least, its core regulatory function remains vital, even if it is far from perfectly realised, and even if the fact that the EU is a secondary and 'relational'[65] legal order—in some measure both dependent upon and in marginal competition with state legal orders—means that it will always struggle to achieve the authoritative credentials necessary for a fuller realisation of these regulatory virtues. But it is also the case that the

[62] Rosenfeld, n 4 above, p 1319.
[63] *Ibid*, p 1330, where Rosenfeld also suggests that the best French equivalent for *Rechtstaat* is *Etat Légal*.
[64] A Moravcsik, 'A Category Error', *Prospect*, July 2006, 22–6 at 25.
[65] Walker, n 14 above.

restless activity and debate that surrounds the other use-values of the rule of law need not simply be reduced to and pilloried as the 'overreaching' and 'stretching out of shape' of an 'old' concept' forced to attempt 'new' tricks. In particular, its location in a supranational documentary constitutional frame need not be terminally dismissed as the desperate attempt to wish into being a sense of European solidarity around the rule of law and associated values simply through the written word—through the 'vindication'[66] of the *status quo ante* supposedly performed by the simple adhesion of a glossy new constitutional label, with all else staying the same.

For, in conclusion, this misconceived, or at least easily overstated, identifying function does not exhaust the potential of the coupling of the constitutional idea and the rule of law in the supranational domain. Instead, the supranational 'constitutional turn'—indeed, provided the time, place and generative process are adequate, a renewed *documentary* constitutional turn—can also be seen as a special vehicle for the rule of law's 'procedural turn'. Proceduralism in the medium of constitutionalism need not be viewed as a background reliance on legality as a means sufficient and appropriate to design and authorise a directly representative method of democratic legislation, as has been its role in many national constitutional settlements but as is not feasible in the supranational context. Neither, however, need the constitutionalisation of an inevitably complex, internally differentiated and often democratically attenuated set of decision-making procedures be viewed merely as the investment in a second-best alternative to a directly representative method of democratic legislation and a one-off compensation for its absence—an impression difficult to avoid given the historical association of the EU with a 'democratic deficit' and one which again may have contributed to the referendum 'no' votes. As an alternative to either of these instrumental agendas, if sufficiently open in consultation, intensive in consideration, ambitious in scale and depth, and iterative in response to changing circumstances, a rule of law-grounded procedural constitutionalism may be seen as the platform not for a post-democratic conception of decision-making but for a post-representative conception of democratic decision-making; an attempt to lay down and adapt as necessary the rules of the political game in a manner that is both democratically mandated and, cognisant of the reduced currency of representative democracy in the conduct of that game, productive of appropriately democratically sensitive alternatives.[67]

[66] See eg N Walker, 'Europe's Constitutional Momentum and the Search for Polity Legitimacy' (2005) 4 *International Journal of Constitutional Law* 211–38.

[67] See eg S Benhabib's discussion of 'democratic iteration'—the capacity of the democratic idea to find new functionally equivalent post-representative institutional forms crafted around participation on the basis of inclusive mechanisms of constituency recognition, diverse forums of interest negotiation and deliberation, multiple forms of accountability, etc, in R Post (ed), *Another Cosmopolitanism* (Cambridge, MA: Harvard University Press, 2006).

In this way, a renewed constitutional process at the supranational level may provide a limiting test of the instrumental capacity of the rule of law, viewed as a 'solution-concept',[68] to negotiate the problem of its social dependence in a boot-strappingly creative fashion. Whether and to what extent such an approach succeeds will depend on its procedurally creative, circle-breaking capacity to steer putative members towards the fair and appropriate terms of decision-making (which terms, to repeat, cannot—short of the unlikely and almost universally unwanted prospect of a European statehood which entirely absorbs the sovereignty of its member states—consist merely or predominantly of representative democracy on a European scale) for a 'polity' that will not obtain general endorsement from these putative members *as* a self-standing polity—a political community *capable* of legitimation through its own just and appropriate terms of decision-making—unless and until just such fair and appropriate terms are found and settled.

In the final analysis, then, the rule of law may indeed find a role to play in addressing the problem of supranational polity legitimacy holistically understood—as one of shared commitment and attachment. But it can only hope to perform that role productively if it is offered in modesty as a common *means* of a supranational community imagined as emergent, rather than reified as a common *end* of a supranational community imagined already to exist.

[68] Waldron, n 1 above, p 158.

7

Can a Post-colonial Power Export the Rule of Law?

Elements of a General Framework

RACHEL KLEINFELD AND KALYPSO NICOLAIDIS

The European dilemma in exporting the rule of law starts with the two faces of universalism: 'our system is better than yours and should prevail' and 'you deserve what we have'. Is exporting the rule of law a by-product of conquest and domination or of transnational responsibility and cosmopolitan solidarity? What would it take for the EU to act as a genuine 'post-colonial' power in this realm, self-reflexive about the echoes of its colonial past and legitimate in the eyes of other countries?

Be it as invaders, colonisers or traders, great powers have long viewed bringing their laws or even 'The Law' to other peoples as a mark of greatness. There was no higher honour Rome could bestow than bringing citizens from the edges of the Empire under the civilising shadow of Roman laws—which in turn became one of Rome's enduring legacies to Europe.[1] In the nineteenth century, the great European colonial powers exported their laws as 'standards of civilisation' to much of the world, whether directly colonised or the object of asymmetric treaties.

Exporting laws did not always mean, however, exporting the 'rule of law'. From Africa to the East Indies, colonisers generally imposed separate laws for the local populations and for colonial rulers. Even outside their direct colonial spheres, Europeans negotiated unequal rights to protect their merchants such as the 'capitulation treaties' with the Ottoman Empire. Keeping the colonial ruling power outside the reach of equal laws on the territory they controlled violated the most basic definition of the term 'rule of law'—but was often the norm.

At times, such as the British banning of *sati* in India, colonial powers did try to enforce equality before the law and provide laws that

[1] See, inter alia, N Davies, *Europe: A History* (Oxford: Oxford University Press, 1996).

empowered the weak—but their strategy was to force changes in local laws that clashed glaringly with their moral principles, not to seek endogenous change. Their strategic style was coercive paternalism. Deferential they were not. Indeed, as the concept of a common 'European civilisation' developed throughout the nineteenth century from a vague notion into a blueprint, Europeans would treat their own society as a standard guideline for the development of non-European societies, carrying within this teleology European conceptions of jurisprudence and basic justice to commercial and property law.[2] In short, exporting European laws and promoting the rule of law were considered one and the same thing.

In the aftermath of World War II and decolonisation, attempts at 'exporting' one's laws to the rest of the world could not escape opprobrium. 'The white man's burden' had become synonymous with paternalism, domination and exploitation—not only in the ex-colonies but also in the metropoleis themselves. When the European Community (EC) began to form in this cauldron of decolonisation, its founding fathers somehow hoped that the selective approach to the past that its member states applied within the Community would carry over outside, and allow it to start with a blank slate in its dealings with the rest of the world. Thus, the early EC aid provided to former colonies with no strings attached can arguably be seen as part of a more general attempt at post-colonial atonement by European powers.[3]

Nevertheless the rule of law promotion agenda made its comeback in the EU context through three separate routes.[4] One, the progressive route, fell within the development ambit and was developed by the epistemic community that saw 'good governance', with the rule of law at its core, as a prerequisite to sustained growth. The second was the security imperative, which grew from the realisation that lawlessness *outside* had direct effects on security *inside* the Union itself. And the third was the desire to improve market conditions for European companies—both to encourage trade-based development in the rest of the world, and as a self-interested goal in its own right. These mixed motives make it difficult to avoid the echoes of colonialism in today's rule of law-building activities, usually carried out for the same avowed mix of idealistic and instrumental reasons as their historical antecedents: on the one hand, the idea that all

[2] For a discussion see J Viehoff, 'Europe's Tainted Universalism? The Civilizing Mission Tradition in International Thought, 1870–1945', MPhil thesis, University of Oxford, 2007.

[3] The reading of EU aid as an attempt to continue providing for colonies while expiating post-colonial guilt after the severing of special trade relationships is the consensus view among development historians: see particularly, ER Grilli, *The European Community and the Developing Countries* (Cambridge: Cambridge University Press, 1994); M Lister, *European Union Development Policy* (London: Palgrave, 1998); and M Holland, *The European Union and the Third World* (New York: Palgrave, 2002).

[4] For an extended treatment of this history see R Kleinfeld, 'Lawyers as Soldiers, Judges as Missionaries: US and EU Strategies to Build the Rule of Law in Weak States from 1990–2004', unpublished dissertation, Oxford University, forthcoming. 2008.

good things, that is peace, stability, prosperity and security, can be brought to conflict-ridden lands by spreading (European) values and institutions seen as universal; and on the other, the lucky coincidence that such law promotion would be 'good for us too', by keeping these lands' (bad) exports, such as drug traffickers, Mafiosi or terrorists, out, while prising their (good) markets open for European companies. In this story, the will to atonement and the will to power are not always easy to disentangle.

Indeed, we can argue that EU universalism has inherited from colonial universalism the uneasy mix of a progressive side and a dark side, albeit in different proportions and in different guises.[5] The mission of the white man was no doubt predicated on a belief in hierarchy and superiority, a feature that allowed not only for unilateral but also imperial universalism (it is not far-fetched to apply this centre-periphery doxa to some of the EU's policies). But the 'civilisational' project then and now also stemmed from a liberal belief that progress was not only possible but was owed to all societies and all of humanity, a belief attacked at the time by scientific racism. Only later was the liberal understanding of the civilising mission undermined from within as the wave of self-determination exposed contradictions in the paternalistic promotion of universal progress. Yet, the cosmopolitan's question remains with us: does Europe's disproportional access to the spoils of modernity, coupled with its partaking in a global system which generates drastically unequal life chances, not create a responsibility to try to improve the lives of others? The end of the Cold War has definitely made room again for the promotion of genuinely liberal goals outside one's border even while scepticism both regarding the practical difficulties and the normative underpinnings of such an agenda continues to prevail in many circles.[6]

So, as we contemplate the EU's motivations and strategies in today's international context, we cannot but ask whether a post-colonial power can legitimately 'export' the rule of law.[7] While the EU does not differ significantly from the US and other developed countries in its efforts and strategies to promote the rule of law abroad, its own features and

[5] For a discussion of unilateral EU universalism see K Nicolaïdis, 'The Clash of Universalisms—Or Why Europe Needs a Post-Colonial Ethos', Paper presented at the ISA's 49th Annual Convention, Hilton San Francisco, CA, US, on 26 March 2008.

[6] For a discussion see A Hurrell, *On Global Order: Power, Values and the Constitution of International Society* (Oxford: Oxford University Press, 2007).

[7] On the EU as a post-colonial power see, inter alia, K Nicolaïdis, 'The Power of the Superpowerless' in T Lindberg (ed), *Beyond Paradise and Power: Europe, America, and the Future of a Troubled Partnership* (London: Routledge, 2004); K Nicolaïdis, 'L'Union Européenne, puissance post-coloniale en Méditerranée?' in T Fabre (ed), *Colonialism et postcolonialism en Méditerranée* (Marseille: Editions Parenthèses, 2004); K Nicolaïdis and J Lacroix, 'Order and Justice Beyond the Nation-State: Europe's Competing Paradigms' in R Foot and A Hurrell (eds), *Order and Justice in International Relations* (Oxford: Oxford University Press, 2002). See also H Mayer and H Vogt (eds), *Europe as a Responsible Power* (Basingstoke: Palgrave, 2006).

traditions may make this pursuit both more problematic and more promising. We will argue that, at a minimum, the EU must be self-aware of its post-colonial legacy in choosing both the objects of reform and the strategies it uses to pursue such reform. For a post-colonial power seeking to improve the rule of law in states with difficult colonial pasts, short-term efficacy and direct strategies must at times be sacrificed for legitimacy and more indirect strategies that build upon endogenous bases of support, if long-term sustainability is the ultimate goal.

In particular, by the 1990s, as the EU re-engaged in the project of building the rule of law abroad, it faced two obstacles. First, not all member states shared in the tradition of 'law export'; indeed, some had even historically been 'importers' as conquered territories of European (Austrian, Russian, Ottoman) empires. Would different imperial legacies across member states not prevent the design of a coherent strategy for intervening once again to change the culture or political system of others? Second, assuming such a strategy could be developed, how would it be received in the country in question? Would the EU be seen as acting in a neo-colonial manner, strong-arming weaker countries to do its bidding for its own benefit? Or could third countries be open to a truly post-colonial EU power, aware of the echoes of its past and forging the means to overcome it?

The present chapter does not purport to address all these questions. Instead, we hope to suggest a general framework and criteria to do so. It is organised in three parts, each corresponding to a conceptual building-block. First, we frame our enquiry by asking: *what* about the rule of law can be construed as universal and therefore legitimately exportable (Section I)? This first part provides us with broad assumptions about what aspects of rule of law promotion might be more or less sensitive to echoes of colonialism, but also shows, we hope, that no aspect can be ruled out or ruled in *a priori*. In each realm, alternative strategies, using direct or indirect, developmental or diplomatic tools, might address more or less well the post-colonial 'imperative'. So, second, we address the two questions above by mapping the different strategies deployed on the ground to promote the rule of law (Section II). And finally, we suggest a third conceptual layer to address the issue of how the legitimacy of post-colonial interventions affects effectiveness by disentangling the ways in which these strategies are received by reforming countries (Section III). We conclude on a prescriptive note.

I. *WHAT*? THE RULE OF LAW(S) FROM THE PAROCHIAL TO THE UNIVERSAL

With the convergence of idealistic and instrumental motivations, not only has the rule of law become the number one requirement for EU accession, but it has also emerged as a staple of the EU's neighborhood policy and its

country strategies in states as disparate as Albania and Indonesia. In 1992, the Maastricht Treaty made the extension of the rule of law one of the primary goals of the European Union's Common Foreign and Security Policy, and the Lomé IV Convention in 1995 allowed sanctions and political conditionality to be applied to aid recipients in the African, Caribbean and Pacific Group of States (ACP) who were in breach of these rule of law requirements.[8] The EU has also made respect for the rule of law one of its troika of requirements for new trade agreements with the world's biggest market.[9] As the EU allocates several hundred million euros to its agenda, there is no Weberian disillusionment in the armies of rule of law soldiers trekking the world under its flag.

There is great confusion, however, as to the battle that they wage. And in particular on the distinction between two agendas: exporting what can be seen as a concept or a value, the idea that power ought to be mitigated by 'paper', that something called 'the Law' can empower individuals against the arbitrary character of the state; and exporting specific ways of setting up well-functioning markets and societies and managing conflicts that may arise therein. These two agendas may be hard to distinguish in practice and their implications may indeed coincide. They nevertheless are often in tension, if not outright contradiction. While the idea of the rule of law may be packaged and presented as a 'thin universal', the specific laws or standards that are exported in its wake are unambiguously European or Western. From the receiving end, the slide from the 'rule of law' into 'laws' is not only slippery but also treacherous. You buy habeas corpus and end up with Habitat Corporation.

Indeed, as some argue in this volume, it is possible to say that as a normative ideal the rule of law is inexhaustible—if done properly, of course. The idea, or even ideal, of government *under* law rather than *by* law simply seeks to curb the lethal association of power and arbitrariness in the management of human affairs. Even at this broad abstract level, however, we could debate with Plato, Aristotle and Jefferson the relative desirability of executive margin of manoeuvre versus stronger checks and balances. More to the point, however, law ceases to uncontroversially enjoy the aura of universality as its specificity is increased. The way Europeans write laws, and the laws they write (if there is such a thing, given the diversity of European legal traditions) constitute a specific set of mechanisms for organising human interaction, making sense of or making visible localised traditions and understandings. There are, of course, other ways for societies to write laws or institutionalise predictable patterns of interaction and conflict resolution.

[8] Common Foreign and Security Policy, Art 11 TEU. Article 180 EC requires that EU development policy focus on these goals as well.

[9] G Crawford, 'Human Rights and Democracy in EU Development Co-operation: Towards Fair and Equal Treatment' in M Lister (ed), *European Union Development Policy* (New York: St Martin's Press, 1998) pp 136–7.

If we are to ask whether the rule of law can be imported, or rather under what conditions which elements are transposable between legal orders, the question is not only a positive one (how can such transposition be effective?) but a normative one (how can it be legitimate even if effective?).[10] Legitimacy may or may not follow from effectiveness, and the trade-off between the two might have a lot to do with how we balance short-term objectives and the concern for sustainability—both of domestic and global orders. It may be more effective and expedient in the short term to rewrite a country's laws as it changes its political regime, but more legitimate and sustainable in the long term to empower local actors, politicians, judges or non-governmental organisations (NGOs) to do so.

In order to begin adjudicating the tension that we see between benign universalism and illegitimate legal imperialism, we must start by spelling out what we mean by the rule of law, and put this object to the test, as it were. First, we disaggregate this object into its four core components or realms where the rule of law in any given jurisdiction may be improved, namely the legal, institutional, cultural and structural.

Second, we suggest the need for criteria in order to assess whether or to what extent the promotion of the rule of law in each of these realms is likely to echo or transcend colonial patterns. There are many options here, and what we suggest is only meant to open a debate. We find it useful to distinguish between externally and internally grounded criteria, and from there to elect universality and empowerment—or rather the potential for each to obtain—as criteria of choice. The universality criterion refers to the process of setting reform goals, specifically, the degree of common (or universal) acceptance of the rule of law objects being promoted, at least among actors that can be considered part of international society. Universality implies symmetry: that laws or understandings of the rule of law are shared and fine-tuned within a multilateral institution, or as a second best, that some parties in the recipient countries may have some reciprocal influence on the law-exporting country; or, if nothing else, that the exporting polity (here the EU) be expected to be consistent between its internal and external legal credo. Underpinning this set of parameters is the belief that the promotion of avowed cosmopolitan or universal norms by powerful states without the bedrock of true institutional multilateralism (universal or at least broad participation in the shaping of these norms) is fraught with contradictions and pitfalls which in the end can only appear to be self-interested and undermine the original claim to universalism.[11]

[10] A point made by Mark Toufayan in his comment on the original draft of this chapter at the Florence conference.

[11] For a discussion of the relationship between normative and institutional solidarity: see R Rao, 'Post-colonial Cosmopolitanism', PhD thesis, University of Oxford, 2007.

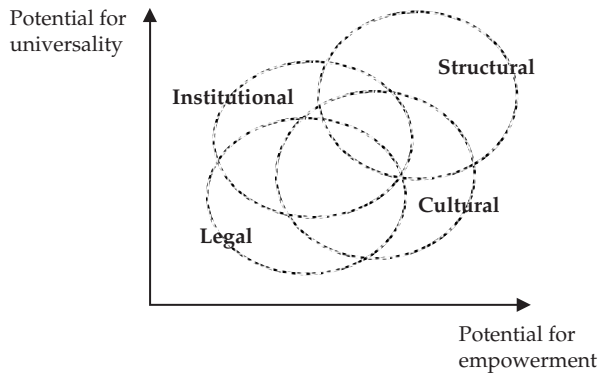
The empowerment criterion is concerned with the substantive nature of reform; it assesses the extent to which the object of promotion empowers (certain) local actors to create their own version of this universal ideal—as opposed to receiving a specific and unilateral 'transplant' from the metropolitan centre, as it were.[12] The distinction is reminiscent of the process versus substantive requirements debate in the realm of World Trade Organization legitimacy: does the outside world (be it another state or an international organisation) require specific substantive laws to be obeyed in the country in question or due processes to be followed in order to arrive at desired outcomes?[13] Another distinction could be made between systemic and targeted empowerment in a given country, where the former can be said to be more impartial if not necessarily neutral. So, for instance, a vexed question in the realm of political parties' support is whether it is more legitimate to support a given political family (for example through Socialist International) or the party system in general.[14] This dimension starts from the presumption that the more substantively specific the externally driven prescription, the more likely it is to be perceived as neo-colonial.

To start with, these two dimensions will serve as very broad parameters to provide us with presumptive standards of 'post-colonial legitimacy'. This does not mean that one realm is necessarily more legitimate than another, but rather that one may be more likely than another to satisfy criteria of universality and empowerment (which is why we draw each realm below as large circles rather than points). We will explore in Section II how the actual strategies followed to promote the rule of law may mitigate or, on the contrary, magnify the presumptions in questions. And we note already that these criteria might not necessarily deliver effectiveness, since we are after the connected but distinct goal of legitimacy. In short, we do not present a deterministic model but rather a broad framework that may help us ask some of the right questions of the new army of rule of law knights deployed around the world. Graph 1 lays out the four realms along these two dimensions.

[12] Of course, with certain reforms, such as improvements to minority rights, changes required may be specific and substantive, while empowering a minority and disempowering a majority. Such reforms may be highly desirable to external reformers, and to internal minorities facing discrimination, while still deeply subject to accusations of neo-colonial imposition. Colonialism is not the only moral measure of such reforms.

[13] For a discussion, see R Howse and K Nicolaïdis, 'Legitimacy and Global Governance: Why a Constitution for the WTO is a Step too Far?' in R Porter, P Sauve, A Subramanian and A Zampetti (eds), *Equity, Efficiency and Legitimacy: The Multilateral System at the Millennium* (Washington, DC: Brookings Institution Press, 2001).

[14] T Carothers, *Confronting the Weakest Link: Aiding Political Parties in New Democracies* (Cambridge: Cambridge University Press, 2007).



Graph 1. ***The four realms of the 'rule of law' and the post-colonial imperative***

The first and most straightforward realm in which rule of law promotion is deployed is the *legal* realm per se. Here promoting the rule of law literally means exporting laws, from ready-made constitutions (or at least constitutional toolboxes) to the whole gamut of law rule-books, from human rights laws to the laws of commercial contracts. Overall, choosing this leverage for introducing the rule of law in a given country is clearly highly interventionist, leaving potentially little room for empowerment of local actors. It may often also be a reflection of asymmetry of influence in the international system, with laws or indeed constitutions belonging to the domestic realm in the 'West' being imported in ways that owe little to the influence and craft of local actors. Nevertheless, with the growth of international law (or rather global administrative law as Benedict Kingsbury and others designate global law as applied to the domestic realm), the legal realm may be amenable to greater symmetry of influence then other realms.

It is as difficult to have a concept of law that does not appeal to concepts of justice as it is to introduce contract laws that do not encourage marketisation. And in all cases, new laws introduce new redistributive bargains within societies which empower and disempower certain actors. But in this realm of action, empowerment, though a possible end result of law promotion, is not part of its process. Charges of legal imperialism and general resentment of the imposition of an alien legal schema on an indigenous legal culture are frequently levied against rule of law reform through legal change—charges which work against country ownership of reform.[15] Detractors assert that legal exports ignore the supposition that constitutions and laws do not catalyse but merely reflect change. The

[15] J Faundez, 'Legal Reform in Developing and Transition Countries—Making Haste Slowly' in J Faundez, ME Footer and JJ Nort (eds), *Governance, Development, and Globalization* (London: Blackstone Press, 2001).

failure, or at least pitfalls, of the law reform-based 'Law and Development movement' of the 1960s and 1970s was claimed to be largely due to the fact that 'a transfer [of laws] without theory cannot succeed, and a theory which does not take into account the pre-existing social and legal structures is worthless'.[16] Possibly, the EU's inherent legal pluralism and its concurrent ability to let local actors choose from a varied legal palette has been one successful response to this line of criticism.

Does this mean we may find a more positive presumption of 'colonial innocence' for the EU in the second realm in which promotion of the rule of law operates, namely *institutional reform*? This refers to the strengthening of the actual institutions of justice (courts, police forces, law schools, magistrates' schools and bar associations, among others), where reform usually comes under specific labels such as 'judicial reform', 'access to justice', or 'police reform'.[17] The preference for reforming the institutional realm was in part due to the influence of the 'New Institutional Economists' in the early 1990s, who began suggesting that development rested on the success of a country's institutions—which North defined not as government agencies or organisations, but as 'the rules of the game in a society, or, more formally, the humanly devised constraints that shape human interaction'.[18] Interpreting this definition often excessively narrowly (and against North's own understanding), proponents of institution-based change claim that many societies have good laws but no rule of law because their institutions are poorly funded and malfunctioning. When these institutions are repaired, the rule of law will be realised. Even scholars such as Linn Hammergren, who have voiced grave doubts about institution-based change, suggest that addressing the technical, politically manageable issues in institutional reform can 'establish progress, credibility, and insights that help [reformers] tackle more fundamental obstacles to reform'.[19]

Indeed, tackling institutions that design, adjudicate, or enforce laws appears at first sight to be less directly interventionist and more empowering, in that it is about creating conditions for local actors to act. In the best of all worlds, it is about creating broadly accepted structures to empower

[16] A Hoeland, 'The Evolution of Law in Eastern and Central Europe: Are We Witnessing a Renaissance of 'Law and Development?' in V Gessner, A Hoeland and C Varga (eds) *European Legal Cultures* (Aldershot: Dartmouth, 1996) pp 482–4.

[17] See Stephen Golub's deconstruction of the rule of law orthodoxy for a listing of these types of projects and their shortcomings, 'A House Without a Foundation', in T Carothers (ed), *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006) pp 105–36.

[18] D North, *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990) p 3.

[19] L Hammergren, 'Rule of Law: Approaches to Justice Reform and What We Have Learned: A Summary of Four Papers', USAID Center for Democracy and Governance (Washington, DC: USAID, April 1998).

'actors for change' in the countries in question. But institutional reform can also (inadvertently) empower only certain actors, such as when the EU presses for judicial anti-corruption activities run by the executive that endanger judicial independence. And if we consider the universality dimension, for example how the 'promoted standards' come about in the first place, such reforms may sometimes be designed in a multilateral fashion (say, by the World Bank) but hardly escape the 'made in the EU' flavour, even in areas where the EU does not have direct competences (as in the creation of central banks or regulatory agencies). We need to consider, inter alia, the often very high degree of *institutional isomorphism* promoted by the EU, whereby EU institutions (like the Commission) seem to want to reproduce themselves and create 'worthy interlocutors' in the countries in question, a phenomenon acutely felt in accession countries.[20] On the other hand, there is, for instance, wide recognition in the EU of the many variants of, say, the federal form of government and thus recognition of the need for adaptation in the import of institutions.[21] And indeed, there is much inconsistency over time and across member states with regards to the standards upheld for rule of law institutions (consider judicial independence in France).

Most importantly, institutions may make little difference to a society whose norms do not support the rule of law. The rejection of legal or institutional 'transplants' is often blamed on cultural incompatibilities, as with Asian societies where loyalty to friends, families and co-workers trumps loyalty to some abstract notion of the rule of law or the state, and therefore to concepts such 'as considering office holding to be a public trust', or 'applying rules without fear or favour'.[22] The rule of law is about the relationship between state and society, and citizens must generally follow the law without enforcement; only a despotic state will have the power to enforce an 'alien' rule of law. For a state to enforce the laws without resorting to undue violence and repression, the majority of citizens must accept the legitimacy of the bulk of the laws, and moral codes within society must generally align with the laws. In regions characterised by what Joel Migdal calls 'strong societies, weak states', this relationship often breaks down.[23]

[20] This phenomenon is not unique to the EU: the US has also been faulted for 'institution-modelling'. See. T Carothers, 'Democracy Assistance: The Question of Strategy' (1997) 4 *Democratization* 122–4.

[21] N Bermeo, 'The Import of Institutions' (2002) 13(2) *Journal of Democracy* 96–110.

[22] R Scalapino, *The Politics of Development: Perspectives on Twentieth Century Asia* (Cambridge, MA: Harvard University Press, 1989), quoted in SR-Ackerman, *From Elections to Democracy: Building Accountable Government in Hungary and Poland* (Cambridge and New York: Cambridge University Press, 2005) p 106.

[23] JS Migdal, *Strong Societies and Weak States: State–Society Relations and State Capabilities in the Third World* (Princeton, NJ: Princeton University Press, 1998). For instance, in Ethiopia, marriage-by-kidnap-and-rape was criminalised, but few people were willing to take such cases to court, and if they did, few judges were willing to uphold laws that violated traditional practice. See E Wax, 'Ethiopian Rape Victim Pits Law Against Culture', *Washington Post*, 7 June 2004.

A culture that does not support the rule of law can take many forms: in inner-city US, informal rules against 'snitching' prevent the government from finding witnesses and arresting wrongdoers; in Indonesia, families celebrate when a family member receives a 'wet' job with chances for kickbacks (even while decrying government corruption); in rural Albania, informal laws tying land to families in perpetuity prevent banks from foreclosing and selling property. A state cannot punish lawbreakers if it has criminalised what is culturally seen as legitimate action.[24] In each case, belief structures and the informal rules governing socially acceptable behaviour undermine the rule of law regardless of laws and institutions.

Hence the importance of the third, *cultural* realm of rule of law promotion whereby efforts must target:

> the set of deeply rooted, historically conditioned attitudes about the nature of law, about the role of law in society and the polity, about the proper organization and operation of the legal system, and about the way law is or should be made, applied, studied, perfected, and taught.[25]

The cultural theory of change claims that the rule of law ultimately exists only when it is upheld as an ideal in the minds of each citizen.[26] This was Montesquieu's conclusion in his *Spirit of the Laws*, just of course as it was that of De Tocqueville:

> Europeans exaggerate the influence of geography on the lasting powers of democratic institutions. Too much importance is attached to laws and too little to mores … If in the course of this book I have not succeeded in making the reader feel the importance I attach to the practical experience of the Americas,

[24] As Alexis de Tocqueville wrote about the US, when demonstrating how culture abets law and order, 'I doubt whether in any other country crime so seldom escapes punishment. The reason is that everyone thinks he has an interest in furnishing evidence proofs of the offense and in seizing the delinquent … In Europe, the criminal is a luckless man fighting to save his head from the authorities; in a sense the populations are mere spectators of the struggle. In America, he is an enemy of the human race, and every human being is against him': *Democracy in America*, ed TP Mayer, trs G Lawrence (New York: Harper, 1988) pp 1, 5, 96.

[25] JH Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969) p 2.

[26] RC Means, *Underdevelopment and the Development of Law* (Chapel Hill: The University of North Carolina Press, 1980). The cultural theory of rule of law development has its mirror in democratisation literature in Samuel Huntington's *The Third Wave*, which emphasises the importance of ideology, culture, religion, and socio-economic structures in pushing countries towards democracy. See also H Eckstein, 'A Culturalist Theory of Political Change' (1988) 82 *American Political Science Review* 82 (September 1988) 789–804, and H Eckstein, *Regarding Politics: Essays on Political Theory, Stability, and Change* (Berkeley, CA: University of California Press, 1992); N Bermeo, *Ordinary People in Extraordinary Times: The Citizenry and the Breakdown of Democracy* (Princeton, NJ: Princeton University Press, 2003). While in democratisation, a cultural theory of change has been faulted for being unable to account for rapid revolutions, given the slow speed of cultural change (a charge itself disputed by cultural proponents), this criticism fails to function in the rule of law field, where no scholar claims that rapid change is possible.

> to their habits, opinions, and, in a word, their mores, in maintaining their laws, I have failed in the main object of my work.[27]

In Tocqueville's landscape, however, the source of cultural change is undeniably *within* the internal melting pot. Without cultural attitudes supporting the rule of law, the creation of new laws and institutions is no different than the 'cargo cult' practice of building airstrips because villagers believed that such clearings attracted aeroplanes with supplies.[28] As the Peruvian writer (and conservative activist) Mario Vargas Llosa writes, judicial reforms in Latin America cannot be brought about 'unless they are preceded or accompanied by a reform of our customs and ideas, of the whole complex system of habits, knowledge, images and forms that we understand by "culture".'[29]

Thus, cultural change may be the ultimate conduit or obstacle to Western rule of law promotion but, if targeted by outsiders, may also be that most prone to the echoes of colonialism and missionary activity—and so it may also be where the strategy employed (see Section II) may make the greatest difference. The target of intervention is the deepest and most substantive possible. But this does not necessarily rule out the empowerment imperative we singled out above. If those laws which go against informal cultural practice are hardest to enforce (attempts to ban dowry killings in India, child marriage in Nepal, or blood feud in the Middle East) it may also be precisely because they would provide the most significant source of empowerment of the weak, if not of the majority of the country's population.[30] On the universality dimension, there is generally little sense of 'merger of civilisation' *à la* Ataturk. The question of modernity is precisely whether it must reflect evolutions from within or may be imported. Hence the importance of the 2004 Arab Human Development Report, which stressed the need for civic education in human rights and political liberalism *from within the culture* to 'foster broader respect for legal tools and ideas among Arab citizens'.[31]

This brings us to the fourth realm targeted by rule of law exports, namely the realm of domestic power structures, such as judicial independence and civilian control of the military. As Carothers states, 'The

[27] Alexis De Tocqueville, *Democracy in America* (Doubleday Anchor, 1969) pp 308–9.

[28] Cargo cults began as a Melanesian religious movement in the nineteenth century, but received a huge boost during World War II, when allied planes began to appear in the South Pacific.

[29] Quoted in LE Harrison, 'Promoting Progressive Cultural Change', in LE Harrison and SP Huntington (eds), *Culture Matters* (New York: Basic Books, 2000) p 297.

[30] W Channell, 'Lessons Not Learned About Legal Reform', in T Carothers (ed), *Promoting the Rule of Law Abroad* (Washington DC: Carnegie Endowment for International Peace, 2006) pp 146–8.

[31] Nader Fergany *et al*, 'Freedom and Good Governance', Arab Human Development Report (UNDP: 2004), available at http://hdr.undp.org/reports/detail_reports.cfm?view=912.

primary obstacles to [rule of law] reform are not technical or financial, but political and human. Rule-of-law reform will succeed only if it gets at the fundamental problem of leaders who refuse to be ruled by the law'.[32] From the early Greeks to the Enlightenment philosophers shrugging off the chains of monarchy, the rule of law was primarily about forcing a ruler to bend to the dictates of the law and thus freeing citizens from arbitrary abuse and the fear of power. Short of such an understanding, legal and institutional reform can always be overturned by the powerful. If, on the contrary, power is constrained and accountable, the rest will flow. Indeed, we could argue that this is the most universally acceptable understanding of the rule of law.

The category here is, of course, both vague and broad. It may mean empowering individual or institutional reformers within the state,[33] empowering the state against alternative powers (such as oligarchic business or organised crime) or curbing the state itself.[34] And in states that are 'captured'—that is, where business and criminal interests gain political power—reformers looking to create a power structure that would support the rule of law may need to search for a counterweight in another area of (civil) society altogether. And while the changes called for by the rule of law blueprint may be radical (regime change) or more benign (assisting judges in the creation of independent courts), the question remains as to who decides and how—which will be more or less empowering for different actors within that country. Here, again, it becomes clear that the strategy employed to go about rule of law promotion is key to addressing the post-colonial dilemma, rather than the realm or target of change per se, as we explore in detail in the next section.

II. *HOW*? BETWEEN NEO-COLONIAL AND POST-COLONIAL STRATEGIES

We have indicated briefly how the 'what' that is targeted by rule of law reform may be more or less prone to perceptions of neo-colonialism, either due to the extent to which changes pursued are intrusive, specific and substantive, rather than empowering actors in a country to

[32] Carothers, 'The Rule of Law Revival', n 17 above, p 4.

[33] For an overview of how USAID and one of its foremost thinkers conceptualised this issue in the late 1990s, see L Hammergren, 'Political Will, Constituency Building, and Public Support in Rule of Law Programs', PN-ACD-023 (Washington, DC: USAID, August 1998).

[34] See S Holmes, 'Can Foreign Aid Promote the Rule of Law?' (Fall, 1999) 8 *East European Constitutional Review* 68–74; Joel Migdal also makes this point in *Strong Societies and Weak States* (Princeton, NJ: Princeton University Press, 1988).

forge domestic responses to universal goals, or due to the extent to which these changes are shaped asymmetrically rather than partaking in a process of more multilateral or universal agreement. But we can draw few conclusions on these grounds alone. Ultimately, it is the 'how' that matters: in other words, the specific strategies used to pursue changes.

As we turn to the 'how', it is useful to ask first when assessing alternative strategies whether they are direct or indirect. The first—targeted reforms imposed inside a country from outside—are likely to be more immediately effective, but also more constraining or even coercive—more prone therefore to perceptions of neo-colonialism. Along this dimension, sensitivities are particularly strong and the granting or withdrawal of rewards often perceived as paternalistic even by those who might stand to benefit. Indirect strategies, on the other hand, affect change through empowerment of local actors. This does not mean that they are less intrusive; but change is less visibly the result of external influence. Furthermore, either development or diplomatic tools may be used directly or indirectly, which again carries different connotations (see Table 1).

In a nutshell, the response we seek will have to be framed as varying according to prevailing conditions. Most rule of law activities indicated

Table 1: Strategies to Promote the Rule of Law

	INSTRUMENT	
	Development Policy	**Diplomacy**
Direct Use	*Top-down Development Policy* Aid and technical assistance towards legal and institutional reform *Lever of change:* Laws and rule of law institutions	*Coercive Diplomacy* Carrots and sticks, negative and positive conditionality, sanctions *Lever of change:* Government decision-makers
Indirect Use	*Bottom-up Development Policy* Aid and technical assistance empowering constituents of reform *Lever of change:* Local NGOs, civil society (including the press and business community), the general public	*Enmeshment Diplomacy* Conditions and socialisation associated with membership in international or regional institutions *Lever of change:* Culture of the government, bureaucracy, or citizenry; laws and institutions

here are based on the assumption that change is possible. But what is the fit between the tools for change used by the EU and the local realities that it is trying to influence? To simplify, we could argue that each strategy has a 'lever of change' that is doing the work of reforming the rule of law, and that each such lever belongs to one or more of the realms described in Section I. These different levers in turn are suited to different sorts of societies, both in terms of effectiveness and in terms of legitimacy. A country with a strongly developed civic tradition, for instance, will be more suited to a bottom-up strategy than one with a thin, foreign-funded and catalysed civil society. Yet, most of the evidence seems to show that the EU does not reflect on whether a strategy is best suited for a particular state. Rather, its use of each strategy is far more determined by its own historical past. It is fundamentally this absence of a 'logic of appropriateness' that exposes the EU as acting short of its post-colonial ambitions.

A. Direct Development Aid

The most traditional, and most closely studied strategy is to use aid instruments and technical assistance to directly assist rule of law institutions. Direct development is predicated on what we could call an endowment logic—the idea that if states lack foundations in the rule of law it is because they lack the funds, skills and/or technical knowledge to undertake rule of law reform themselves. By providing these inputs, outside actors can catalyse change.

Precisely because it feared accusations of neo-colonialism when most of its aid was targeted at its member states' former colonies, the European Union labelled other states 'partners' and was slower than the US to use development aid in trying to affect their internal features.[35] The early characterisation of the EC as a civilian power, although paradoxically reminiscent of the 'civilising mission' nevertheless was used to play up a post-colonial image and reassure states receiving development aid that they were dealing with a new Europe.[36] The EU only

[35] Providing favourable terms of trade, generous aid and privileged diplomatic relations were linked from the start in the EU's development strategy. Rather than conceiving of these tools as separate, like the US, the EU remained consistent with the colonial legacy of constructing holistic relationships, be it of domination or solidarity.

[36] A typical discourse is that of the EU Commissioner Claude Cheysson, who stated in the 1970s, 'The Community is weak, it has no weapon … it is completely inept to exercise domination. Not being a State, the Community does not have a strategic vision, nor does it have a historical past. Not partaking in the political passions of the States, only the Community can elaborate a development aid policy that can be … politically neutral', in E Pisani, *La Main et l'Outil* (Paris: Lafont, 1984) p 20. For a discussion see K Nicolaïdis and R Howse, 'This is my EUtopia: Narrative as Power' (2002) 40 *Journal of Common Market Studies* 767–92.

began using direct development as a strategy to build the rule of law abroad following the Cold War, as a result of the enlargement process, and changes in the international development community's focus for aid provision. In 1989, when the European Commission assumed the task of aid coordination toward the new Eastern Europe states on behalf of the EU itself as well as its member states, the G-24, the OECD, and the international financial institutions, it populated its new aid programme (PHARE) with development professionals.[37] That epistemic community was just then beginning to consider the significance of what they called 'good governance'—a lack of corruption, strong state institutions and the rule of law—as a variable influencing the success of aid-fuelled development.

Nevertheless, development aid remained largely geared towards economic issues for several years, even though the European Parliament (which saw itself as the upholder of values within the EU) had, by early 1990, anchored PHARE to the establishment of 'the rule of law, the respect of human rights, the establishment of multi-party systems, the holding of free and fair elections and economic liberalization with a view to introducing market economies'.[38] The formalisation of the Copenhagen criteria in 1993—to be used to assess candidate countries' readiness to join—proved a turning point. To become a member-state, acceding countries would need not only to adopt the *acquis communautaire*, the total body of shared EU law (related to the single market or to justice and home affairs) but also to adhere to certain criteria and laws that may not even be under EU competence (for example, aspects of minority laws) and therefore not harmonised or mutually recognised between the member states themselves.[39]

Unsurprisingly, candidate countries submitted with differing degrees of eagerness to such European requirements, leading to variations in the

[37] U Sedelmeier and H Wallace, 'Eastern Enlargement', in H Wallace and W Wallace (eds), *Policy-making in the European Union*, 4th edn (Oxford: Oxford University Press, 2000) p 433. PHARE is a French acronym short for Poland–Hungary Assistance for Economic Reconstruction, although the programme soon expanded to include the rest of Eastern Europe. It was operated by a new service within the Directorate-General for External Relations. Short on staff and expertise, the DG for External Affairs poached staff experienced in third world development from DG-VIII, which dealt with development aid, hired people from other development agencies, and relied heavily on external consultants: J Pinder, *The European Community and Eastern Europe* (London: Pinter, 1991) p 91, Sedelmeier and Wallace, above, pp 434–5.

[38] '"Communication to the Council and the Parliament on the Development of the Community's Relations with the Countries of Central and Eastern Europe', Doc SEC (90) 196 final (Brussels: European Commission, 1 February 1990) p 3. For the Parliament as a norm-entrepreneur and values holder, see Holland, n 3 above, p 130.

[39] For instance, while family law is not part of the *acquis*, its outlines are spread through the EU's political criteria, which insists upon certain 'universal' human rights norms which are not yet universalised in many acceding states.

extent, pace and sequencing of 'convergence' among these countries.[40] Member-state building at this stage involved exporting the rule of law through various channels, including both political and economic criteria as well as conformity with the *acquis communautaire*. To enable local institutions in the weak accession states to uphold and enforce the new body of laws, EU aid was needed. Gradually, aid shifted from market economy building to governance capacity. In 1997, at the Luxembourg European Council that launched the enlargement process, PHARE was reoriented to provide aid targeted towards helping candidate countries meet the *acquis* and membership criteria. The Commission was therefore asked to undertake a highly intrusive process of building the necessary institutions and laws within candidate states, monitoring these institutions, and ensuring that they could be counted on to uphold the values and safety of Europe.[41] Many have argued that through one-size-fits-all policies of transition and enlargement, the EU accession process led to radical disempowerment of acceding states, especially their legislative branches.[42] There is much truth in this, but there was, of course, some degree of prescriptive adaptation in the enlargement process. Most importantly, since membership presumably ultimately entails at least formal equality between member states, and since candidacy for EU membership itself was assumed to be a free choice, it has been harder to frame this process as neo-colonial. Perhaps one can say that the colonial norm survived in Europe mainly through the centre–periphery paradigm applied to Europe itself.

The enlargement process in turn spilled over into the global realm. It provided a pool of trained bureaucrats within the EU aid apparatus who believed in the importance of the rule of law for development and democracy, and who were practised in the use of direct development to build the rule of law. As the EU began to assert a more global reach following the 1992 Maastricht Treaty, these norm-carriers started to expand this rule of law-building strategy to the rest of the world, following the growing conventional wisdom about the importance of good governance and the rule of law to development. The regional organisation of the EU's external relations meant that direct development as a strategy would spread region by region, not country by country.

[40] The convergence–divergence debate which dissects these patterns is at the core of the field of 'transitology'. See, for instance, L Whitehead, *Democratization: Theory and Experience* (Oxford: Oxford University Press, 2002).

[41] While frequently criticised for its intrusion into other states' sovereignty, it should be noted that, after the deepening of the Justice and Home Affairs pillar, the EU agreed to send multinational teams regularly to examine even its own member states' borders, and has also created processes for peer evaluation of member states' courts and judicial systems: see Wallace and Wallace, n 37 above, pp 511–12.

[42] See eg H Grabbe, *Europe's Transformative Power* (London: Palgrave, 2006).

Rule of law promotion has thus followed the general pattern of external EU relationships as a series of concentric circles: strongest in the immediate neighborhood—first Eastern and Central Europe, then Southeast Europe, then the newly independent states in Central Asia, more diffuse beyond. The rule of law also became a focus of development aid in ACP countries, mostly former colonies, where the EU has been most comfortable with a developmental approach. Rule of law-building programmes via direct development are weakest in Asia and Latin America, although even in these regions there are signs of incipient growth.

B. Direct Diplomacy

Direct diplomacy requires the EU to apply diplomatic muscle, carrots and sticks, threats and rewards to cajole other governments to adopt elements of the rule of law. Precisely because it involves a strong element of coercion, suasion or arm-twisting, this strategy has been very hard for the EU to apply consistently. For one thing, and unlike the US, the EU has a belief in diplomatic engagement (as opposed to balancing or containment) that is too ingrained to make threats of sanctions or withholding of diplomatic relations credible.[43] The EU will generally let geo-strategic, historical or symbolic imperatives outweigh failings in domestic reform—as the Albanian case illustrates.[44] This reduces the EU's range of diplomatic options.

Relatedly, it is fair to say that sensitivity to the EU's colonial legacy has directly reduced the scope of its diplomacy. As discussed above, from its inception the EU's complex series of external trade preferences either followed pragmatic economic lines or were based on post-colonial

[43] See R Schweller, 'Managing the Rise of Great Powers: Theory and History', in I Johnston and R Ross (eds), *Engaging China: The Management of an Emerging Power* (New York: Routledge, 1999).

[44] Albania had not made a great deal of progress in improving its domestic rule of law, or even ensuring a functioning government: the European Commission cited its 'widespread lack of capacity to implement its own laws and international obligations … the inadequacy of the judiciary and the prevalence of corruption'. Yet these concerns were balanced by the 'role it is playing as a moderating influence in ongoing conflicts in the region'. Seeking to encourage this moderating influence, the Commission could not fully enforce the diplomacy that its conditionality would otherwise have called for. Instead, the Commission devised a creative solution—recommending that negotiations for a Stabilisation and Association Agreement, or SAA (the first step towards the ante-room for accession) should begin as 'the best way of helping to maintain the momentum of recent political and economic reform, and of encouraging Albania to continue its constructive and moderating influence in the region'. By not recommending an SAA but not recommending against, the Commission has created an intermediate period of negotiations to keep Albania on the path without giving up its conditionality. See European Commission, 'Report from the Commission to the Council On the Work of the EU/Albania High Level Steering Group, in Preparation for the Negotiation of a Stabilisation and Association Agreement with Albania' (Brussels: 6 June 2001) p 8.

ties. The EC had no tradition of granting trade privileges strategically as rewards for allies.[45] Moreover, the EU's considerable development aid programme was not used as a carrot or stick to entice governments towards policy change. From its inception, the EC's aid programme had been conceived of largely as a way of expiating post-colonial guilt, and therefore followed the pre-existing relationships member states had with former colonies.[46] This restrained attitude was backed up by relative scepticism about the effectiveness of aid or trade conditionality. For instance, in a rare case in which the EU Commission linked the release of programme funds to the passage of a law, the head of its own mission to improve Albania's rule of law protested. If the law passed under conditionality, he argued, it would not be owned by the Albanians, and would not be implemented—it would be 'shit, just worthless'. The EU duly removed the conditionality.[47]

EU reluctance to use carrots and sticks to affect the rule of law has varied depending on the realm in question. It is more reluctant to employ diplomacy with regard to institutional and procedural building-blocks such as judicial independence or major political corruption, and more willing to press diplomatically in values-based areas such as human rights laws. This discrepancy is historically path-dependent, and stems from the role of the European Parliament as a normative institution within the EU.[48] The European Parliament began to find its diplomatic voice in the late 1970s, catalysed by the growing popular commitment to human rights. It was a prime mover in the EC's decision to suspend aid to Uganda and Equatorial Guinea on human rights grounds.[49] Parliament's insistence, and the emergence of new democracies in Central America in the 1980s, spurred the Commission to begin thinking of using its external relations—particularly direct diplomacy through political dialogue and economic co-operation—as a means through which it 'could help reinforce democratic principles and human rights'.[50] By the mid-1980s, the EC began adding wording to its trade treaties that made them contingent on countries following democracy, human rights and the rule of law. While rarely used in practice, the precedent was established. When Parliament

[45] See Holland, n 3 above. The idea that the rule of law was a tool to improve trade within developing countries was not conceptualised until the 1990s.

[46] This reading of the EU's aid policy is the consensus view among historians in this arena. See in particular, Grilli, Lister, and Holland, all n 3 above.

[47] R Milkaud, Head of European Assistance Mission to the Albanian Justice System (EURALIUS Mission), personal interview, October 2007.

[48] The European Parliament, as the only European body elected by direct suffrage, has seen itself as a norm entrepreneur, particularly in the field of human rights. See KE Smith, 'European Parliament and Human Rights: Norm Entrepreneur or Ineffective Talking Shop?', *Dossier El Parlamento Europeo en la Politica Exterior* (November 2004).

[49] Grilli, n 3 above, p 105.

[50] *Ibid*, p 238, quote from the European Commission, 'Europe–South Dialogue', (1984) p 91.

gained the power to veto agreements with third parties following the 1987 Single European Act, the strategy of direct diplomacy likewise gained ground.[51] From 1989 onwards, declarations on human rights, democracy and the rule of law became regular features of European Council meetings.[52]

The EC's use of direct diplomacy also grew through its increased comfort with the use of aid conditionality throughout the 1980s, as the EC's development community followed the broader trend of the international development community. Witnessing the worsening terms of trade with African countries in particular, the EC began to interpret these realities through new theories that held that aid could not sponsor growth in countries where governance institutions failed.[53] When, as discussed above, the international development community began to use conditionality in its aid agreements to force what it deemed essential governance reforms necessary for aid to be effective, Europe followed suit.[54]

In 1995, the EU turned what was to be a quick mid-term review of the Lomé IV Convention, which governed aid to the ACP, into a fundamental rethinking of its aid provisions.[55] Negotiators introduced broad political conditionality, including support for democratic and legitimate government and the protection of human rights and liberties. 'Respect for human rights, democratic principles, and the rule of law' was defined as 'an essential element' of the Lomé Convention, and 80 million ecus were reserved for new institutional and administrative reforms 'aimed at democratization, a strengthening of the rule of law, and good governance'.[56] The EU instituted a two-tranche system for delivering aid, withholding 30 per cent of promised aid to ensure that conditions would be met.[57] As a last resort, any ACP state that failed to meet what were known as the 'Article V' political criteria faced suspension from the Convention, and thus of their trade aid relationship with the EU.[58] The EU was perfectly willing to use the strategy: during the 1990s aid to Nigeria, Rwanda, Burundi, Niger, and Sierra Leone was suspended.[59]

The EU's increased readiness to use conditionality also stems from its growing sense of its legitimacy and weight as an international actor, following the 1992 Maastricht Treaty and the beginnings of the Common

[51] Holland, n 3 above, p 120.
[52] Crawford, , n 9 above, p 132.
[53] Holland and Grilli, both n 3 above.
[54] For the history of change in the development community's thinking regarding the use of conditionality, see D Kapur, JP Lewis, and R Webb, *The World Bank: It's First Half Century, Vol 1* (Washington, DC: Brookings, 1997).
[55] Holland, n 3 above, pp 44, 125–32.
[56] See Art V of the Lomé IV Convention 1995.
[57] Holland, n 3 above, pp 48–9.
[58] *Ibid*, n 50.
[59] *Ibid*, p 134.

Foreign and Security Policy (CFSP). Its extensive use of conditionality and diplomacy with the new candidate countries for enlargement, as discussed above (deemed legitimate, since the EU clearly had the right to set the terms on which new members could enter), may also have spilled over into its growing confidence with the diplomatic mode of strategic thought.[60] Naturally, the EU sought to integrate its development programmes with the new CFSP (both of which saw human rights, democracy and the rule of law as normatively and strategically essential).[61] Thus, the Cotonou Convention that replaced Lomé V in the ACP states strengthened political conditionality, while adding a policy dialogue to its external relations with these states.[62]

By the beginning of the new millennium, the EU had three diplomatic voices—Parliament, Council and Commission—all using direct diplomacy as a strategy for enhancing the rule of law abroad. Yet, as with the US, EU direct diplomacy is obviously fraught with double standards and conditioned by the overall tenor of its relationships with external states on a case-by-case basis.

In the former colonial arena of ACP states, the EU unilaterally broadened its policy dialogue to include rule of law issues, while ensuring that issues important to the EU under the general cover of good governance, democracy, human rights and the rule of law would dominate.[63] Through this political dialogue, the EU began to push internal security issues as one of the bases for its rule of law concerns. Under this imperative, it discussed not only human rights and democracy, but also sensitive issues such as the need to curb illegal immigration, drugs and the export of crime.

[60] For studies of EU enlargement and the conditionality and the diplomatic pressure the EU exerts on candidate countries, see D Ethier, 'Is Democracy Promotion Effective? Comparing Conditionality and Incentives' (2003) 10 *Democratization* 99–121; G Pridham, 'The European Union's Democratic Conditionality and Domestic Politics in Slovakia: The Meciar and Dzurdinda Governments Compared' (2002) 54 *Europe–Asia Studies* 203–27; F Schimmelfennig, S Engert and H Knobel, 'The Impact of EU Political Conditionality' in. F Schimmelfennig and U Sedelmeir (eds), *The Europeanization of Central and Eastern Europe* (Ithaca, NY: Cornell University Press, 2005), pp 29–51; F Schimmelfennig, S Engert and H Knobel, 'Costs, Commitment and Compliance. The Impact of EU Democratic Conditionality on Latvia, Slovakia, and Turkey' (2003) 41 *Journal of Common Market Studies* 495–518; A Dimitrova, 'Enlargement, Institution-building and the EU's Administrative Capacity Requirement' (2002) 25 *West European Politics* 171–90.

[61] Holland, n 3 above, p 181.

[62] T Börzel and T Risse, 'One Size Fits All! EU Policies for the Promotion of Human Rights, Democracy and the Rule of Law', unpublished paper (Stanford, 2004).

[63] Although the EU trumpets its relationship with the ACP countries as being carried out on the principles of 'the four Cs', including co-operation and equality between the partners, one commentator described this round of ACP negotiations as 'A situation of total power asymmetry, where the normative consensus of the EU leaves little room for concessions': O Elgstrom and M Smith (eds), *The European Union's Roles in International Politics: Concepts and Analysis* (London: Routledge, 2000) p 195, quoted in Holland, n 3 above, p 192.

In Asia, however, the EU has been far less able to use direct diplomacy to promote the rule of law. It has very little leverage in the region, and its desire to improve relationships in an area belonging to the US sphere of influence usually trumps rule of law concerns—especially vis-à-vis Asian states more prone than others to dismiss the legitimacy of diplomatic interference in 'internal affairs'. In the Europe–Asia Meeting (ASEM)—the main European forum for engaging diplomatically with Asia—the Asian countries blocked every EU effort to bring human rights to the table. The EU, unwilling to press the point too hard, often struck a gentleman's agreement to avoid divisive topics—although it began to breach that agreement in order to protest against Burma's elevation to the ASEAN presidency.[64] Nevertheless, the EU has used the ASEM dialogue to focus its diplomacy on rule of law issues where Europe and Asia are in agreement, such as transnational crime, drug and human trafficking.[65]

In Latin America, where the EU has long negotiated with Mercosur as well as individual countries like Chile and Mexico, it has incorporated into those treaty negotiations political dialogue on democracy, human rights and the rule of law.[66] Yet these diplomatic ties are weak, and so is the political dialogue with Latin America. The former Soviet Union has also resisted conditionality on the rule of law; while treaties include political dialogue on democracy, the rule of law, and human rights, there is no suspension clause on aid or trade for violation in these areas.[67]

In its Southern periphery, where it has relied on the Euro-Mediterranean 'Barcelona' process since 1995 as a way of strengthening economic relations with Northern African and Middle Eastern countries, the EU's political dialogue has been slow to get off the ground. Its regional approach, unlike the US's bilateral approach, forces it to enter dialogue simultaneously with a group of countries divided among themselves by multiple fissures (not least the Palestinian–Israeli conflict) in a way that precludes discussion of the rule of law.[68] The EU is trying to address the limits of its former approach through the new European Neigborhood Policy, where targeted country action plans are negotiated that include planned reform—but this approach, like much of EU diplomacy, finds its limits in the gap between long-term rewards and short-term costs.[69]

Given the difficulties in using negative conditionality as a legitimate tool while at the same time pledging allegiance to the idea of equality

[64] Holland, n 3 above, p 69.
[65] *Ibid*.
[66] Börzel and Risse, n 62 above, p 18.
[67] *Ibid*, p 15.
[68] *Ibid*.
[69] K Nicolaïdis and D Bechev, 'Integration Without Accession: The EU's Special Relationship with the Countries in its Neighborhood', Report to the European Parliament, October 2007.

and partnership, the EU is increasingly resorting to positive forms of conditionality. Whatever their guise, however, all forms of conditionality remain suspect in the eyes of non-Western countries. Ironically, criticism of the EU for failing to flex its muscles sometimes comes from its partners themselves, at least those who believe that they would be relatively well placed if this game was to be played systematically.[70] In sum, direct strategies of either kind can be used only with caution. They seem to promise short-term pay-offs, but these are often not sustainable. So the EU must assess on a case-by-case basis whether the price—in particular the accusation of neo-colonialism—is worth paying.

C. Indirect Development

Clearly indirect strategies are far less likely to be caught in such a bind. Providing funds to NGOs and other civil society actors, scholarships to individuals, and tools (such as corruption surveys) to empower local actors working towards building the rule of law locally has long been a natural strategy for the US, which has lionised its civil society since de Tocqueville's time. Indirect forms of development assistance can be provided directly by the government to foreign NGOs, or can be provided by a government to NGOs or private sector actors in their own country, which can then work directly with civil society in other countries without the heavy hand of official government interaction. Pre-colonial export of the rule of law from Europe often took place in the latter fashion, as chartered companies such as the British East India Company had to create law-based interactions between their employees and the locals in the areas they controlled.

Ironically, however, it is fair to say that today the EU is not comfortable with this strategy. While it disburses over 300 million euros to its own 'development NGOs' every year, little of this is earmarked for rule of law promotion. Its state-centric approach leads Eurocrats to prefer dealing directly with foreign state governments, even in states that Europeans themselves contributed to creating only a few decades ago. Some would argue that bypassing the state by empowering other local actors seems more like 'neo-colonial' behaviour than straightforward exercise of power from outside. More to the point, unlike the US, the EU does not have a political tradition of democratic empowerment of its own societies, a theme that has only recently emerged in the list of Commission preoccupations.[71] Without a strong internal record of the promotion of civil society across

[70] *Ibid*.

[71] See for instance, K Nicolaïdis, 'Our Democratic Atonement' in *Challenge Europe*, Issue 17 The People's Project? (Brussels: European Policy Centre, December 2007).

continental Europe, the EU finds it difficult to leap to indirect, bottom-up development as an external strategy. Bottom-up development support has largely been promoted by the European Parliament, which created a separate budget line for PHARE in 1994 known as the European Initiative for Democracy and Human Rights (EIDHR)—administered since 1999 by the Commission.[72] Unlike the rest of PHARE, which provided direct grants to the government, the Parliament's EIDHR programme was borne out of the theory of civil society-based development that was percolating through the global political classes in the early 1990s, and was designed to provide funding directly to NGOs for projects directed at improving democracy, human rights and the rule of law in all countries receiving EU aid.[73]

As civil society-building programmes have grown in importance within the international development community, the indirect development strategy may be gaining ground within the EU. For instance, the Cotonou Convention of 2000 includes civil society among the sectors of society deserving of capacity-building assistance, enabling general EU aid in the ACP countries to be used for indirect development strategies as well.[74] The country action plans negotiated under the European Neighborhood Policy contain similar language. But even there, caution often leads EU agents to seek out local actors who may be partially 'accredited' by their own states, from quasi-government NGOs to trade unions, and so on. Despite these small changes, the EU remains ambivalent about bypassing the state in promoting the rule of law, even if the creation of a base of genuinely local supporters might make more substantive, specific reforms less colonial and more locally palatable.

D. Indirect Diplomacy

A much deeper form of indirect promotion of the rule of law is embedded within the EU's agenda of regional integration and its attempt to promote its experience as a blueprint for the rest of the world. Many in the EU believe that the Union's unique contribution to the world is its

[72] 'Final Report: Evaluation of the PHARE and TACIS Democracy Programme, 1992–1997', (Brighton, Hamburg: ISA Consult/European Institute/GJW Europe, November 1997) p 9. Unlike PHARE programmes, EIDHR grants do not require the acquiescence of the country government—the Commission deals directly with applicants. In 1993, PHARE handed management of the programme over to the European Human Rights Foundation, although it remains a Commission project: *ibid*, p 10.

[73] European Parliament Budget Chapter B7-7. For more on this structure, see 'The European Initiative for Democracy and Human Rights', available at http://europa.eu.int/comm/europeaid/projects/eidhr/eidhr_en.htm.

[74] Cotonou Convention, Art 7.

own process of 'enmeshment', which is purported to have brought peace and prosperity to the continent. The EU's main model of change is its own integration process, whereby economic integration through trade liberalisation is pursued on a reciprocal basis and is underpinned by converging standards, harmonisation and mutual recognition.[75] The work of enmeshment is complex. As James Snyder argues regarding the role of enlargement in consolidating democracy:

> The favorable political effect comes not just from interdependence, but from the institutional structures and changes in domestic interests that may or may not accompany high levels of interdependence … The institutionalised, legal character of the relationship would make for predictability, irreversibility, and deeply penetrating effects on the domestic order of the state.[76]

The EU may remain far from extending its competence to most of the realm of governance linked to rule of law promotion. But its underlying philosophy is that the closer countries get to sharing a single economic space, the greater convergence they should seek when dealing with the negative spillover of open borders, such as trade law enforcement, immigration, border standards and policing. The same logic has applied to its external relations. While enmeshment began as a strategy for acceding countries, it has moved outward from this core as the EU sought methods for building stability in other regions, and turned to the strategy it knew best. In April 1997, the Commission created the Regional Approach to the Countries of South-Eastern Europe, which extended much of the pre-accession process of enmeshment to the Balkans, without a strong promise of eventual integration. By 1999 it had solidified this strategy into the Stability Pact, which closely followed the enmeshment project of 'combining financial incentives with trade concessions in the shadow of membership conditionality' to create stability.[77] However, for Stability Pact states such as Albania, this shadow promises to be long, indeed.

The EU's strategy of enmeshment leads to its updated version of exceptionalism or unilateral universalism—the idea that its own experience (or experiment) has been so valuable that other nations should follow suit to usher in a world of greater peace and prosperity. The EU does not just export technical assistance, or even the rule of law itself, but seeks to promote similarly enmeshed regional systems throughout the world. Other regional areas in turn are supposed to learn the lessons learned by the EU countries, *through their own experience*, as it were. Since the process of regional integration not only enhances peace (and thus human

[75] For a recent discussion see K Nicolaïdis, 'Trusting the Poles? Constructing Europe through mutual recognition' (2007) 14 *Journal of European Public Policy* 682–98.

[76] J Snyder, "Averting Anarchy in the New Europe', (1990) 14 *International Security* 5–41.

[77] Börzel and Risse, n 62 above, p 15.

rights), but is also predicated upon law-governed behaviour both internal and external, the rule of law as a normative guideline is supposed to be strengthened in the process. Yet the question remains: does enmeshment require specifically EU laws, and to the extent that it does, what kind of diplomatic instruments does the EU use to promote its laws over equally valid alternatives? In the Balkans, the Mediterranean, Africa, ASEAN, and even in Latin America, the EU encouraged regionalisation, clearly to export a law-governed process. In the event, EU laws, from product standards to procurement and intellectual property rules, were also exported, arguably to the benefit of EU firms. While the guiding concept of reciprocal benefits lingers within the EU, enabling it to see itself as a less intrusive and more co-operative partner than the US in its rule of law efforts, many reforming countries see little difference between US diplomatic conditionality and EU conditionality within the enmeshment process, while finding fault with the EU's particularly slow, bureaucratic and centralised development aid programmes.

The EU has attempted to extend enmeshment to further-flung regions such as Asia and Latin America—but without the lure of potential EU accession, the strategy has found major limits (as exemplified by the case of Mercosur). In short, while the discourse of enmeshment stresses the rule of law, its practice—guided by EU trade interests—stresses 'EU laws or regulations' as core exports. And tensions are likely to arise between the EU's concern to export the rule of law and its desire to export its products, if the former requires an internal process of empowerment which may involve some degree of discrimination precisely against the EU!

The post-colonial setting, in other words, limits the scope of enmeshment. The EU's detailed reports on the progress of other states might be accepted by a country facing the prospect of joining the EU's coveted club—but they sound paternalistic when applied to a country like Indonesia, where colonial echoes still resound strongly. Equally, the idea of enmeshment does not appeal to people who have just struggled to gain their sovereignty, for whom Europe's version of peaceful integration sounds much more like forced domination by larger and strong powers.

If no single strategy, therefore, can appear more legitimate across countries and circumstances, and if, as discussed in Section I, no object of change can be necessarily privileged, we are left with only very broad guidelines to address our main question.

III. *WHOSE*? IMPERIALISM VERSUS FUTILITY, AND THE POST-COLONIAL DILEMMA

So the question we turn to finally is that of the *reception* of the law promotion strategy as practised by today's Europe as the ultimate measure

of its legitimacy. In other words, we do not suggest here assessing actual 'effectiveness' or 'legitimacy' according to some objective measure or benchmark, but rather turn to the evaluation made by those on the receiving end—those whose rule of law we are concerned with. Such reception depends on a host of factors. These include the given country's or agent's historical relations with European powers, their relative power at the regional or global level, the extent to which they defend norms of sovereignty, the level of development of their political systems, as well as other amorphous factors connected to culture, religion or prevailing beliefs. The EU's basic post-colonial dilemma stems from a constant ambivalence on the part of its partners themselves between perceiving the EU as doing 'too little' and evading its post-colonial responsibility, and doing 'too much' and using its power in a neo-colonial manner.

On the side of doing 'too little,' we find the claim that because European countries have caused governance failure in many post-colonial states, they have a responsibility to improve the situation and help these countries develop. Having brought modernity and thus destroyed traditional power structures and adjudication mechanisms, the West has a responsibility to foster the rule of law in countries where they have in the past left a vacuum. More broadly, a solidaristic standpoint on international society connects the universal nature of goods such as the rule of law with the responsibility that actors bear in the system. Whatever their direct or indirect responsibilities, European citizens and their governments have a responsibility to use their resources to assist other people in entrenching this universal ideal. Indeed, a mainstream perception stemming from both governmental and non-governmental circles in many of the polities concerned is that EU procedures and instruments are overly bureaucratic and ineffective—both given the nature of the EU as an organisation and given the reluctance to use negative conditionality and coercive instruments. Or they are seen as useful but rather hesitant, not pushing hard enough on reluctant governments. In short, one strand of criticism is that the EU is not fully bearing the burden of responsibility which derives from its imperialist past. In order to be truly post-colonial, it should redeem itself by helping countries to truly engage with modernity for their own sake, not in order to serve EU material interests.

But the more damning criticism remains that of covert imperialism—the EU will always be doing 'too much' and is incapable of resisting its paternalistic, arrogantly intrusive demons. At its core, the anti-imperialistic argument is that coercion of any sort, embedded in any kind of process (whether through soldiers or merchants), is illegitimate, even for a progressive end. A variant of this critique is values based: that no outside power has the legitimate right to change another culture and polity. The basic issue is choice versus coercion with regard to the agents

with which the EU is interacting. To what extent is the *general* involvement of the EU (and, for that matter, the West) as well as the *specific* prescriptions and proscriptions it puts forth perceived as inevitable or negotiable? Indeed, perhaps the most fundamental measure of a non-colonial relationship is that of *voluntary* engagement, usually entailing at least some degree of equality or symmetry rather than a hierarchical relationship. In a non-coercive relationship, flows of resources and conditions may be uni-directional but are embedded in a context defined jointly by the parties. Clearly, the more coercive and constraining the EU is perceived to be (as a function of both the objects and realms it tries to influence and the strategies it uses) the more imperialistic it is perceived to be.[78]

In this regard, the accession dynamic is fascinatingly ambiguous. On one hand, it may seem less neo-colonial than most other relationships in that it is aimed at ultimately establishing membership in a club to which all have *chosen* to belong. But, of course, choice here, as in most instances of inter-state relations, involves both agency and structural constraints. Did the countries in transition in Central and Eastern Europe actually have a choice, given the lack of credible alternatives? And even if they freely chose to be candidates, did they possess choice over the means by which the route to accession would be negotiated? Obviously the question of choice warrants subtle and differentiated answers.

To be sure, the dilemma is not easy to address. In both directions, the EU is hobbled by its consciousness of its colonial past, but is hard pressed to turn this consciousness into appropriate strategies to promote the rule of law. Its awareness of its post-colonial heritage has caused it both to be overly intrusive and paternalistic, in the name of 'responsibility', while at the same time being overly statist, sovereignty-conscious, and arguably overlooking the desires of citizens within those states in assisting and curbing their corrupt or ineffective governments. Obviously, the EU must tread carefully in dealing with the inheritance of its past. Acute sensitivity to being strong-armed by Europeans lies just beneath the surface for

[78] Here, it is useful to go back to Albert Hirschman's *Rhetoric of Reaction* (Cambridge, MA: Harvard University Press, 1991), where he identifies three principal arguments invariably put forth by what he terms 'reactionary' thinkers to counter the left's 'progressive' agenda. In fact, as he demonstrates himself, these patterns of argumentation are used more generally against agendas for change. On the side of doing 'too much' Hirschman would point to the perversity thesis, whereby any action to improve some feature of a political, social or economic order is alleged to result in the exact opposite of what was intended—such as, in our case, delegitimising institutions that are being supported; and the jeopardy thesis, holding that the cost of the proposed reform is unacceptable because it will endanger previous hard-won accomplishments—such as, in our case, sovereignty, state-building, etc. On the side of doing too little, Hirschman's futility thesis predicts that reformers are too weak to make a dent in the status quo, so attempts at social transformation will produce no effects at all.

Table 2: Addressing the Post-colonial Dilemma

	INSTRUMENT	
	Development Policy	**Diplomacy**
Direct Use	*Top-down Development Policy* Are requirements too specific/disempowering? Do structures lack universality? Is the degree of coercion so great that local ownership is curtailed?	*Coercive Diplomacy* Is the EU able to exercise this strategy with any consistency, or does inconsistency alone render it illegitimate? Does straightforward coercion generate resistance in reforming states with colonial history, even if the objects of reform are desired?
Indirect Use	*Bottom-up Development Policy* Are local reformers co-opted and made suspect internally? Is working through local reformers simply a more insidious form of colonial influence?	*Enmeshment Diplomacy* Is EU membership a real choice, or an enforced necessity? In areas where membership is not an option, is enmeshment simply experienced by receiving countries as similar to direct strategies?

many post-colonial states.[79] Yet state elites may also use accusations of 'too much' intrusive EU action to betray the wishes of their disempowered people, who would conversely accuse the EU of doing 'too little'.

We summarise in Table 2 what we see as the expressions of the post-colonial dilemma in each strategy previously discussed.

In the case of top-down development policy, the core challenges have to do with ownership, particularly whether rule of law prescriptions are owned by local citizens, who have adapted them to the local context. Direct development strategies, when applied to institutions and laws, are particularly subject to a lack of empowerment and of universality. With coercive diplomacy, where partners have a smaller degree of choice, there is a greater need for consequential analysis: pressure is not applied on grounds of principle but with an eye to its likely consequence. When the

[79] In Indonesia, for example, the Dutch Minister of Development Co-operation took advantage of a donors' meeting in 1992 to loudly condemn Indonesia's military government for its human rights abuse. Angry at the perceived imperialistic overtones of criticism from Indonesia's former colonial rulers, Sohearto declared that Indonesia would no longer accept the Netherlands' donations. The Inter-Governmental Group on Indonesian Aid Programs, chaired by the Netherlands, was forced to disband and rename itself, while the Dutch (who wished to provide aid to Indonesia) had to creatively circumvent the ban on their aid by giving to multinational organisations doing work within Indonesia.

EU is unable credibly to exercise its coercive diplomacy, it is not likely to reap positive consequences; nor is it likely to find success when such coercion generates resistance in countries undergoing reform. And setting aside the complicated question of effectiveness, positive aid or trade conditionality, which offers a reward, is far more likely to be seen as legitimate and acceptable than negative conditionality. Moreover, as positive conditionality is predicated on encouraging policies which already exist in some form, it is likely to be more successful. That the EU has increasingly been exploring this route is a sign of such sensitivities. Coercive diplomacy is also subject to clear pitfalls in the rule of law arena: it can lead executives to bypass legislative activity or to pass laws that have no hope of implementation due to socio-economic obstacles, and it can reflect high politics with no broader public acceptance.

Clearly both indirect strategies are less prone to perceptions of neocolonialism, even if supporting groups fighting in Romania to decriminalise homosexuality or in Turkey to expand minority freedoms represent something of an echo of the liberal side of 'unilateral universalism'—like Britain's banning of *sati* in India.[80] Indirect development relies for its legitimacy on the measure of pre-existing local agency. Assisting the Solidarity movement in Poland has a different overtone than creating and funding an entirely foreign effort with local figureheads. However, in countries such as Romania, whose civil society tradition had been entirely crushed, Western funding and assistance may be crucial to jump-starting what can become a truly local movement. In such cases, the most vexing question is: when does empowerment become co-optation, or come to be perceived as such, making such support counter-productive?

Finally, enmeshment diplomacy is not necessarily about the paternalistic embrace of the EU but about the more general cultural learning and power-disciplining virtue of interdependence and engagement in regional communities and international structures (whether or not EU-centred). But if such interdependence is felt to be coerced rather than sought, it fails the test of post-colonial legitimacy. And for countries with the prospect of EU membership, we are brought back perhaps to the most fundamental question of all: is the EU *itself* beyond hegemony (of big member states against others)? Or does the colonial norm also continue to operate within?

IV. CONCLUSION

In sum, the EU's ambivalence today lies in the contradiction between, on the one hand, the 'will to power', or the will to use all the instruments it

[80] J Kopstein, "The Transatlantic Divide over Democracy Promotion' (2006) 29 *The Washington Quarterly* 85–98 at 96.

has at its disposal to influence other countries (where the mitigating factor is the notion of a contract with the 'partner' country), and on the other hand, 'the will to atonement', which would consist in developing a truly post-colonial strategy in promoting the rule of law. But the desire to avoid the echoes of colonialism is not just a product of the latter. Since power and purpose go hand in hand and since effectiveness is the ultimate measure of power, we all need to ask what approaches are most likely to create both desirable and sustainable reform around the world. While in some cases (such as enforcing human rights in the face of a recalcitrant public) the desire to act directly and specifically might seem to carry a normative weight that overrides the imperative of avoiding colonial overtones, external attempts to directly force change are too often unsustainable or cause backlash, harming the endogenous forces that could press more legitimately for such rule of law changes. In the long run at least, there is no doubt that illegitimacy radically undermines effectiveness.

We do not claim to have offered a fully fledged post-colonial strategy for the EU, but we do hope to have provided some elements for further discussion. An EU focused on effectiveness, but aware of the echoes of colonialism which may resonate abroad, would begin its reform effort with self-reflection and attention to consistency between its internal and external practice of the rule of law, as well as a clear separation between the promotion of the rule of law and the promotion of pre-conditions for exporting the European market. It would, to the extent possible, push within each realm of rule of law promotion (legal, institutional, cultural and structural) towards reforms that embody the need for greater universality and empowerment, rather than unilaterally creating and exporting specific substantive reforms. It would wield diplomatic strategies that leaned towards positive rather than negative conditionality, and would look more towards indirect rather than direct methods of catalysing change. And it would attempt to grant true choices and options to partner countries, consistent, of course, with its own beliefs. Such are some of the guidelines that a post-colonial effort to promote the rule of law might follow. Ultimately, the 'rule of law' banner ought to serve an ethos around the world that does not belong to one camp or another: the emancipation of all individuals from fear and oppression.

8

Has the 'Rule of Law' become a 'Rule of Lawyers'?

An Inquiry into the Use and Abuse of an Ancient *Topos* in Contemporary Debates

FRIEDRICH KRATOCHWIL

I. INTRODUCTION

THE ARGUMENT THAT a free society should be governed by laws rather than men is one of the oldest political *topoi*—one that has proven its resilience over the centuries. It was used in ancient Greece (in terms of the *nomos basileus* argument),[1] later became part of the republican tradition in Rome, played a decisive role in modernity (as exemplified by Rousseau), powerfully shaped the constitutional struggles in England[2] and the founding of the US,[3] and has survived to make an appearance in discourses on the global order. Here the UN and its subsidiary organisations such as the World Bank[4] mention the rule of law in connection with their efforts at establishing viable democracies, effective and legitimate international regimes, and universal respect for human rights.

To that extent this notion seems to have travelled well, despite the vastly changing political and social terrain that it has traversed. Thus its 'success story' could be amalgamated with the discourse of modernity and

[1] See eg Aristotle, *Politics* 1287a at 15–23: 'It follows that it is preferable that law should rule rather than any single one of the citizens. And following this same line of reasoning … these persons should be appointed as guardians of the law as its servants … Therefore he who asks law to rule is asking God and intelligence and no others to rule; while he who asks for the rule of a human being is importing a wild beast … for desire is like a wild beast and anger perverts rulers and the very best of men.'

[2] See eg the Petition of Rights of 1628.

[3] See *Marbury v Madison*, 5 US (1 Cranch) 137 at 163: 'The government of the United States has been emphatically termed a government of laws, and not of men.'

[4] World Bank, *Governance and Development* (Washington, DC: World Bank, 1992).

its idea of 'progress' and enlightenment. Such a reading of the historical record, however, which charts the course from the initial claims made by the free and equal members of a specific political association—the English gentry which 'remembers'[5] the traditional rights of an Englishman, exemplified by the Magna Carta and the *habeas corpus*—sits uneasily with the contemporary emphasis on *universal rights* accruing to individuals as part of their status as individuals and moral agents. It is my purpose in this chapter briefly to sketch out these changes in use of the *topos*, but also to analyse the implications of such a change from a key concept of the political discourse to a virtually exclusively legal conception.

The initial bewilderment caused by this brief historical reflection has some methodological implications. It casts doubt on the viability of our usual means of clarifying the meaning of concepts, that is of ascertaining to which events, objects or actions this term 'refers'. However, given the vastly differing circumstances and projects in which this argument has played a role—ranging from the efforts to preserve the integrity of the political association, to claims to legitimate resistance against state power, to the universalist aspirations enshrined in the human rights discourse—we might be hard pressed to identify a clear set of identifiable phenomena or even problems to which the rule of law consistently 'refers'. One of the likely reactions to this conundrum could therefore be to consider this formula merely to be an 'ideological' tool, employed to legitimise particular goals, or as a simple 'aspiration' or general principle. Like the moral command 'do good and avoid evil', it might not be entirely meaningless but offers little help in solving real-life questions. However, the conclusion that it can be discarded because of its imprecision or a value-taintedness that subverts attempts to provide an 'objective' analysis of its referent object[6] is far from established. What we also readily see is that the invocation of the rule of law serves as a trump card in discursive strategies to legitimise and de-legitimise particular policies and institutional arrangements.

To that extent the concept is part and parcel of our heritage and of our way of tackling certain practical issues by making claims and counterclaims. Thus, in spite of its lack of a stable reference, the term plays a decisive role in the realm of *praxis* where we try to work out our legal and political problems. Its meaning therefore consists in its *use* and in the

[5] See eg the arguments made by Sir Edward Coke and his followers in the early Stuart parliaments, who used Bracton and Littleton as their authorities. For a general discussion of the English tradition see Q Skinner, 'States and the freedoms of citizens' in Q Skinner and B Stråth (eds), *States and Citizens* (Cambridge: Cambridge University Press, 2003), ch 1.

[6] For a further discussion of the misconception of a purely referential function of political language see W Connolly, *The Terms of Political Discourse*, 2nd edn (Princeton, NJ: Princeton University Press, 1983); see also J Davis, *Terms of Inquiry* (Baltimore, MD: Johns Hopkins University Press, 2005).

connections it establishes to other concepts within a semantic field, and in the way in which certain actions and practices are thereby authorised or prohibited. Thus any analysis of this *problematique* must always be historical as well as analytical and must be alert to its 'ideological' dimension. Because it addresses practical issues, the rule of law is bound to deal with political projects,[7] and these, in turn, always transcend the world as observed from an (allegedly) 'objective' point of view.

In short, political projects can never show the social world as it 'really' is, even though the move to 'naturalise' it and treat it like the material world is a frequently used gambit of skilled debaters and social 'scientists' alike.[8] The value of such 'projects' does not consist in their descriptive accuracy, but rather in their productive power. Consequently, their appraisal cannot be reduced to some deictic procedure, or 'operationalisation', but has to be 'tested' through criticisms, both internally and externally. Here the criteria of consistency, but even more so of practicability in the light of historical experience, and comparisons with alternatives, provide the appropriate yardsticks.

In this chapter I want to examine the 'arrival' of the rule of law argument within the discourse of global order. Of course, no fully-fledged account of the historical twists and turns of its development can be attempted here. Nevertheless, a few references to some important historical shifts are in order. As already argued, the shift from the political project of safeguarding the liberties of the members of a *particular society* to one of *universal human rights* entails a significant change in meaning. Thus in contrast with the traditional use of the rule of law argument that had as its regulative ideal the notion of the free citizen, the present use emphasises a notion of 'victim' who must be protected through—among other things—the 'punishment' of the perpetrators of traditional or newly defined 'crimes'.

While such a trend is well in tune with arguments about new threats and the crisis of the state, it is also powerfully reinforced by the discourse of modernity. After all, within this discourse 'progress' is assessed by eliminating all the particularities of politics. But it is precisely these particular social and political facts that made the law among 'persons of sovereign equality' possible, stemming from their contractual undertakings, from custom, as well as from the analogies borrowed from Roman private

[7] 'Old' realists like Carr have known that and so, in spite of Carr's denunciation of the legalist approach to international politics, which he criticises as utopian, he is well aware that all politics possesses such a 'utopian' element since it is concerned not simply with the description of an existing world but with its construction: EH Carr, *The Twenty Years Crisis 1919–1939* (New York: Harper and Row, 1964).

[8] On this point see my 'Constructivism: what it is (not) and why it matters' in M Keating and D della Porta (eds), *Competing Methodologies in the Social Sciences* (Cambridge: Cambridge University Press, forthcoming 2008).

law.[9] Nowadays, however, universal humanity has attained pride of place and the capacity to punish, always a crucial element in the constitution of a political association, has to be 'transferred' to the 'universal level'. The boundaries between constitutional law and international law thereby become increasingly permeable. Similarly, while most if not all goals in the old rule of law were entrusted to politics, they are now conceptualised as individual 'rights'. There is a subjective right to a 'clean environment',[10] to 'development'[11] or even to 'democracy'. Often these new postulates are voiced with little concern as to who the actual duty-bearers of all these new rights are and how these goals requiring collective action can be implemented.[12] Given the still-segmented character of 'world society' and scant evidence that we have been transformed from Humean beings of 'little generosity' into ones who accept and feel at home in a system of 'cosmopolitan' justice, such a conception of the rule of law does indeed require a leap of faith.[13]

But not only these openly avowed goals but also the 'silences' deserve some mention. There is, for example, little discussion in current international discourses about the property rights of the initial assignment of titles, which always presupposes a political decision. Virtually all discussions centre on the 'protection' of these rights, which are then 'justified' by some highly questionable economistic ideas about 'incentives', and by the liberal tendency to mystify power by assigning property to the 'private' sphere. The result is curious mix of statism projected on a global scale, and of professionalism,[14] which on the basis of expertise is prepared to take over the functional tasks of 'governance' previously entrusted to states and their 'governments'.

From these initial remarks, the remainder of the present chapter will be structured as follows. In the next section I examine some of the inherent tensions in the conception of the rule of law that provide—so to speak—the 'enabling' conditions for its 'ideological' use. In Section III, I analyse the implications of applying this method to problems of 'governance' in

[9] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Hamden, CT: Archon, 1970).

[10] See eg C Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford: Oxford University Press, 2003) p 49*ff*.

[11] RL Barsh, 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322–38.

[12] See the criticism by O O'Neil in 'Transnational justice' in D Held (ed), *Political Theory Today* (Cambridge: Polity, 1991) ch 11.

[13] For a further discussion see my argument in 'Global Governance and the Emergence of World Society' in N Karagannis and P Wagner (eds), *Varieties of World-Making: Beyond Globalization* (Liverpool: Liverpool University Press, 2007) ch 14.

[14] On the international 'professionals' and the underlying ideology see D Kennedy, 'The Politics of Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European Human Rights Law Review* 463–97.

the international arena. It is my contention that, following Foucault, this shift from government and from bilateral and multilateral co-operation of governments to one of governance implies a significant shift in the loci and sources of power. This new form of 'governmentality' implies not only new forms of surveillance but also of capillary control of all social sectors as well as an atrophied notion of politics.[15] The chapter concludes (in Section IV) with a brief summary of the arguments.

II. THE COMPLEX LANGUAGE GAME OF THE 'RULE OF LAW'

The above analysis suggests not only that the rule of law is not a thing-like entity brought under a concept, but also that it is a concept that bridges within its penumbra a variety of political and value concerns. The first and most obvious concern is that of combating arbitrariness, as the opposition between law and 'men' indicates. This speaks to two dangers simultaneously. One concerns a problem intrinsic to 'rule' (*dominium*), namely the distinction between the governing and the governed. It addresses the potentially coercive character of any regime that tries to overcome collective action problems. Given this structure of inequality, as indicated by the existence of a 'subject' on the one hand and the ruler, magistrate or sovereign on the other, the rule of law also addresses the potential for the abuse of power flowing from such inequality. Here the traditional remedy lies in 'generality' or 'even-handedness': the imperative that the potentially coercive power of rule is applied to all, and proportionally in similar situations, reduces the risk of idiosyncratic uses of power. The distinction between the arbitrary exercise of power and law's 'generality' has been one of the constants in the debate, as has been the issue of the 'discretion'[16] of those entrusted with official power.

Here another difficulty comes to the fore. Since general rules do not decide concrete cases, additional safeguards have to be introduced. Two further dilemmas arise. One concerns the nature of 'exceptions', the other the power of naming things. Both point beyond law to the general understandings limiting the bounds of sense and thus of interpretation. Carl Schmitt most notably addressed the first kind of 'decision dilemma' by focusing on the 'exception'.[17] For him, unfathomable extra-legal grounds are part of the sovereign's prerogatives which have to be beyond appeal. But his argument, drawing its force from the emergency situation, is too

[15] On Foucault's notion of 'governmentality' see G Burchell, C Gordon and P Miller (eds)., *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991).

[16] Here the debate started by Dworkin and his mythical judge 'Hercules' come to mind. See R Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978).

[17] C Schmitt, *The Concept of the Political* (Chicago: University of Chicago Press, 1996).

spectacular and at the same time too particular. It fails, therefore, to provide proper guidance for understanding the general *problematique* of legal discretion and interpretation.

It is too spectacular in that it forgets that emergencies and exceptions are 'special situations' only because we (perhaps mistakenly) believe that all bets are off when the situation under consideration seems to be no longer one of routines and procedures of law and of politics *as usual*. But this argument implies that the relevance of the exception for explaining the 'normal' might be severely limited. I also do not believe that the old adage that the 'exception' confirms the rule is fitting, or even helpful, even though it correctly identifies the parasitic character of exceptional reasoning upon 'normal' decisional rules. What is at stake in the 'exception' is that obviously the 'speech act' of a public authority signals that different strategies are required that might justify 'special measures' and deviations from precedents. But this does not imply that indeed all bets are off and that we have to accept a blind form of decisionism. Similarly, the Copenhagen school of security has pointed out that 'security' does not refer to existing 'objective' conditions, but that by naming specific circumstances they are thereby 'made' into threats. When successful, such a speech act justifies special measures that go beyond politics as usual.[18] But this power of 'naming' usually sets off a series of debates and challenges rather than ending up in the eerie silence that comes with universal compliance.

Such an argument, made differently by both Schmitt and the Copenhagen school, suffers from a Hobbesian myopia. Of course, in the Hobbesian universe such determinations are unequivocally binding and not subject to further scrutiny—a limitation that is justified by the belief that otherwise a return to the state of nature is unavoidable. But it is precisely because we know that such a consequence is neither inevitable nor even likely in most cases, that the contestation of such determinations is part and parcel of the political game, notwithstanding attempts of decision-makers to 'stand' on this prerogative. Even in well-ordered societies such speech acts at best establish a (more or less) powerful 'presumption'. As President Nixon found out, claiming supreme national security interests for covering up a partisan and illegal action (Watergate) cannot resolve this question either legally or politically. Similarly, while the argument of the Copenhagen school without doubt correctly characterises security issues by pointing to their genesis in a speech act, it misses the point by not emphasising the merely prima facie character of such characterisations and the subsequent intense contestation. Governments differ in their

[18] See eg B Buzan, O Weaver, M Kelstrup and P Lemaitre, *Identity, Migration and the new Security Agenda in Europe* (London: Pinter, 1993).

capacity and willingness to limit these contestations, but even dictatorial regimes basing their claims on Hobbesian premises of the non-reviewable nature of such determinations are subject to popular reactions which they ignore only at their peril.

The second reason why Schmitt's 'theory' is defective is that by focusing on the spectacular it misinterprets the decision-making process in 'normal' cases. Here too the ultimate determination does not follow strictly either from the rules or from the facts, but rather involves a decision based on a particular judgement that is not simply 'entailed' by either of them. To that extent *all* decisions involve some form of 'leap' that is not simply reducible to the 'mechanisms' of rule application or fact recognition. Thus what distinguishes an emergency situation from one of routine decision is neither their contestability nor the need to reach a closure, but the scope and seriousness of the decision in the former case. 'Routine' decisions are simply characterised by their 'isolation' from the ongoing concerns of a society and from general social interaction—having one's day in court precisely means that no 'others' are or should become involved, since the case is removed from the public agenda and entrusted to the 'appropriate' institution for resolution. However no such isolation is possible when the community as a whole is challenged (as in the case of national security) or when a 'case', even if entrusted to a 'court', becomes emblematic for some generally perceived social ill. In that case new ways of dealing with it might be required and attempts to limit its relevance by claiming that the case represents only a particular controversy could be of no avail.

While the most important concern of the rule of law *topos* is the substitution of human caprice or frailty by the objective force of law, in practice such a gambit is unavailable,[19] at least in this categorical fashion. Historically this difficulty has led to the laying of emphasis either on the actual social conditions that inform law, or on 'formalism' whereby the issue of the 'authorship' of law or its 'source' moves the question one step further back. The first strategy, that is the retreat to some substantive customary standards limiting the discretion of judges by traditional understandings specific to a particular society, is observable when, for example, arguments are made to resurrect the 'ancient freedoms' of Englishmen. The second becomes apparent when 'discretion' is limited to largely procedural notions, such as *lex posterior*, the hierarchy of norms (statutes versus laws versus constitutional provisions), *lex specialis* and so on. This sooner or later results in a notion of law as a system of norms or in a 'pure theory' which abstracts from all contingencies and limits the contact between 'reality' and law to one point, that is the *Grundnorm.* The

[19] See I Kant, *Critique of Pure Reason* (1781) 132–4.

latter is both part of law and beyond law and thus provides the hinge between the 'ought' and the 'is'.[20]

Of course it is only possible to internalise all reasons for the normative force of law and make it appear that this question is simply a question of 'validity' if we accept that 'legality' addresses all issues of legitimacy at the same time. But even if we fail to take into account the fact that judges always have to support their decisions with substantive reasons—aside from showing that they are applying 'the law'—usually via 'principles' that allow for such support to be drawn from morals, philosophy or particular customs, the construction of the *Grundnorm* or the 'rule of recognition' as the keystone of the legal edifice draws attention to the fact that a formal understanding of legality requires a broader legitimisation. Ultimately, in modernity when both God and 'nature' (in the sense of an intelligible order of being) have been marginalised, there remains only the 'sovereign people' and its law-creating declarations as a foundation.

It is not necessary, and indeed there is no space here, to trace these developments to their roots in theology, as Rousseau's remarks about the need of a civil religion clearly indicated, a problem which has been taken up by Schmitt,[21] Voegelin[22] and, more recently, Agamben.[23] What is important here is rather the recognition that it is only through the introduction of 'the people' as a source that both the formalism of law and its legitimacy can be maintained. Rather than assessing the substantive justice done in a single case—Weber's *kadi justice* orienting itself solely to a notion of 'output legitimacy'—modern 'rational' law relies largely on 'input legitimacy'. As Weber reminds us, the legitimacy of 'rational' legal order relies on a procedural notion, namely the process of norm creation. In this sense, law and politics are not only intrinsically linked through the concept of the 'state', where legislation is produced, but the state itself derives its legitimacy 'from' the people—or even understands itself as an expression of a particular people (nation state).[24] Consequently, legitimisation deficits will appear in all instances of institutionalised inter-state co-operation that go beyond the classical alliance patterns or ad hoc limited purpose arrangements. No further argument is necessary to conclude that international regimes as well as the regulatory activities of international organisations, be they the UN or even more so the EU, thereby

[20] See H Kelsen, *Principles of International Law*, ed Robert Tucker (New York: Holt, 1966).

[21] C Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (Chicago, IL: University of Chicago Press, 2005).

[22] E Voegelin, 'The Political Religions' in M Hennigsen (ed), *The Collected Works of Eric Voegelin, Vol 5: Modernity Without Restraint* (Columbia, MO: University of Missouri Press, 2000).

[23] G Agamben, *Homo Sacer: Sovereignty and the Bare Life*, trs D Heller-Roazen (Stanford, CA: Stanford University Press. 1998).

[24] See Y Tamir, *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993).

become suspect. Indeed, it is no accident that discussions over the ultra vires character of a given Security Council (SC) decision are paralleled by discussions centred on the general democratic deficit of the EU.

The responses to this dilemma range from denial to efforts at addressing these deficits through determined efforts at constitutionalisation. While for regimes the argument is often made that their 'beneficial' character and their enabling rather than merely constraining character creates some form of output legitimacy,[25] denser forms of institutionalised co-operation in areas of 'high politics' require additional legitimisation. Here, some form of judicial review of SC actions, (although it seems highly unlikely that the International Court of Justice (ICJ) would be interested in taking over this role), as well as making the SC a more representative body, has been suggested as a remedy. In the case of the EU, a more serious effort of creating a 'constitution' has recently been undertaken, despite at best lukewarm interest on the part of the European public(s).[26]

Both attempts attest, however, to the difficulty of creating such legitimising structures in the absence of a concrete, historical *demos* which is ready and willing to understand itself as the author of its legislative acts. While there is of course no dearth of speculation about a 'cosmopolitan democracy' or about a 'world (civil) society', the question still remains as to whether such characterisations are appropriate. What has to be established is whether these new social formations—whatever their characterisation might be—can act as a substitute for the historical 'peoples' which are mentioned in the UN Charter as the 'authors' of the United Nations.

III. THE USES OF THE RULE OF LAW ARGUMENT IN (INTER)NATIONAL POLITICAL DISCOURSES

The casual observer of contemporary debates in international law and politics is confronted with several discourses emphasising different elements of contemporary political and legal issues. Thus the cumulative effect of the end of the Cold War and the phenomenal increase in transnational transactions made a realist understanding of international relations based on the traditional anarchy *problematique*[27] simply incoherent. A whole new vocabulary, rather than some minor adjustments, was required. This task was accomplished in two interdependent moves. The first entailed a shift from a formal model of law to a plurality of norms

[25] See my discussion in 'On Legitimacy', (2006) 20 *International Relations* 302–8.

[26] See Neil Walker's contribution to the present volume (ch 6).

[27] For an exposition of the anarchy problematic see R Ashley, 'The Poverty of Neorealism' (1984) 38 *International Organization* 225–86.

governing actual interactions. The second move involved the substitution of the anthropocentric concept of the sovereign's 'will' by a more 'functional' notion of problem-solving in an 'issue area'. Both changes were, of course, features of the 'regimes' that provided a new research programme for international relations and international law. Within this context, attention increasingly was directed to new organisational forms, such as 'networks', where public and private stakeholders and experts co-operate. Due to their 'thick' institutionalisation, these arrangements were a far cry from the one-shot contracting that even realists had accepted in the area of high politics when alliances were forged. The new forms of co-operation also differed from patterns in the area of 'low politics', where co-ordination problems had to be resolved, and were also quite different from the 'move to institutions'[28] characteristic of the post-World War I and World War II era. At that time the new type of regulatory agencies familiar from the New Deal were transferred to the international level. It became part of the 'multilateral' realisation of 'embedded liberalism'[29] that reconfigured domestic and international institutions.

The success of regimes, of course, came at a price; namely the splitting of law into functionally differentiated areas or islands of co-operation, whether 'trade', 'the environment', 'human rights' or even 'security'. Each 'issue area' seemed to be independent and managed by a different group of experts, thus raising issues of 'fragmentation' and of 'legitimacy'. Consequently, the solution to both problems seemed to lie in a further constitutionalisation of international law.[30] Here the Charter was mentioned, as well as the World Trade Organization (WTO), because of its 'dispute settlement' mechanisms. But as the controversy over the potential ultra vires character of some SC actions had shown, in the absence of some effective means for adjudication—an arrogation of power for which the ICJ, in contrast to the US Supreme Court in *Marbury v Madison*, was clearly not prepared—there were clear limits to the constitutionalisation argument.[31] Thus, aside from the difficult issues of the 'representative' character of the UN and of the SC in particular, neither state practice nor even the 'development' of UN law provided auspicious prospects for making the Charter the basis for a future global rule of law. The case for the WTO was even weaker, even if one tried to

[28] See D Kennedy, 'The Move to Institutions ' (1987) 8 *Cardozo Law Review* 881–988.

[29] For a further discussion see my 'The Genealogy of Multilateralism: Reflections on an Organizational Form and its Crisis' in E Newman, R Thakur and J Tirman (eds), *Multilateralism under Challenge* (Tokyo: UN University Press, 2006) ch 8.

[30] See eg B Fassbender, 'The United Nations Charter as Constitution of the International Community' (1998) 36 *Columbia Journal of Transnational Law* 529–620.

[31] See eg the argument by J Alvarez, 'Constitutional Interpretation in International Organizations' in JM Coicaud and V Heiskanen, *The Legitimacy of International Organizations* (Tokyo: UN University Press, 2001) ch 4.

construe a comprehensive but rather imaginary 'right to free trade' as the basis for the rule of law.[32]

Aside from these 'practical' objections there was the equally significant theoretical question of whether or not such a step was sensible at all, given the constitutional experience with state-building. The capacity to address problems of interference through hierarchy and clearly delineated competences (separation of powers) has become under modern circumstances itself more of a problem than a solution. After all, as students of decision-making have pointed out, modern decisional processes, even within states, resemble much more complex bargaining games—akin to multi-level governance and techniques of 'muddling through'—than the clearly defined constitutional procedures of law-making, law application or execution.[33]

Thus, to some, constitutionalisation seems rather a throwback to distant times in which the illusion of a comprehensive steering of political and social processes through law seemed to provide a map for orienting oneself within social reality. But the functional differentiation of autonomous and interpenetrating systems no longer fits such a model. An alternative conceptualisation becomes necessary, which is sometimes likened to a legal Bukowina[34] characterised by multiple free-standing, even overlapping regimes without any overarching order. This might be a more adequate description, and might also allow us more successfully to locate the levers of influence for our political projects. Here adherents of Luhmann[35] find themselves strangely affiliated with some critical legal studies proponents who, like David Kennedy, have advocated a shift from structural givens to 'policies' and their potential for realising a 'progressive' agenda.[36]

It is, however, hard to understand why 'policies' should be easier to handle than rules or principles. After all, policies also come with exceptions and have different implications depending on the context. Thus puzzles reappear in a different disguise, as a choice between 'policies' and as the question of *who shall decide* in the face of deep-seated disagreements. The focus on policies, on output legitimacy and perhaps even on

[32] EU Petersmann, 'Time for a United Nations "Global Compact" for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621–50.

[33] See eg A Benz, F Scharpf and R Zintl, *Horizontale Politikverflechtung* (Frankfurt: Campus, 1992); F Scharpf (ed), *Games in Hierarchies and Networks* (Boulder, CO: Westview, 1993).

[34] See G Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G Teubner, *Global Law without a State* (Aldershot, USA: Dartmouth, 1997).

[35] See eg A Fischer-Lescano and G Teubner, 'Regime Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2003) 25 *Michigan Journal of International Law* 999–1042.

[36] See D Kennedy, *The Dark Sides of Virtue* (Princeton, NJ: Princeton University Press, 2004) pt 1.

the 'coherence' of a particular norm or policy with other elements of the legal order—as suggested by Franck[37]—cannot avoid sooner or later asking the *cui bono* question, suggesting in answer in whose name a particular law is made or applied. To raise this question is not to engage in some debunking of law, so familiar from Thrasymmachian realists and Marxists alike. It is rather to point out that part of the rule of law argument has been that even beneficial outcomes might be subversive of public order if they are the result of the benevolence of an otherwise unrestrained despot or procedure. Only in this way can we avoid the biases that come with the unreflective use of expertise, when fundamental choices between values are resolved through some 'naturalising' move. In that case we usually argue that we 'really' have no choice but must defer to the trade expert, the environmental scientist or even the peace-making 'professional' who pushes 'best practices' because this is just 'the way the ball bounces', how 'transaction costs' can be lowered and actors 'in equilibrium' are made to 'comply'.

Large-scale co-operation between governmental networks *à la* Slaughter,[38] or even among public and private actors, is certainly an important corrective to the 'anarchy' argument promulgated by political realists. By their sustained efforts, these new forms of organisation might even have attained some 'intrinsic' value—often referred to in popular economistic parlance as 'consumption good'. Nevertheless, they hide important forms of power that accrue to a hegemon or a modern form of empire. Traditionally such commanding power—sometimes only idiosyncratically exercised, sometimes hidden by *law's* empire—was originally dependent on the acquisition and physical domination of territory with a view to laying down the law (*jurisdictio*). Given the dramatic costs of such an expansion and of exercising those rights, traditional empires were, not surprisingly, often little more than associations of relatively independent political units enjoying considerable autonomy.[39] Imperial programmes were usually part of a particular 'theology' authorising the particular rule. Modern forms of the imperial project work both on the 'macro level'—via an intellectual hegemony (the way in which the bounds of sense are drawn and 'problems' and solutions are identified)—and on the micro level—via specific disciplining and surveillance regimes.

Nevertheless some significant differences exist that need to be mentioned. The old conception of law was largely based on deterrence and required an ex post authoritative finding of a transgression before

[37] See T Franck, *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1995).

[38] A-M Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004).

[39] Take, for example, the Persian Empire and the original Roman arrangements of the *foedus aequum* and the *foedus iniqum* for exercising control.

its concomitant punishment could be meted out. The imposition of a sanction served as a 'warning' to others and thus also allowed for prospective ordering. The new disciplinary modes, on the other hand, rely on near omnipresent surveillance through monitoring, (self-)reporting, transparency requirements, periodic evaluations and benchmarking exercises, of both public and private institutions. These methods of 'governmentality', as Foucault has called it, have considerably changed the ways in which compliance with one's commands can be sought and power can be mystified. Above all, no territorial expansion or physical control is necessary, as in old forms of imperialism.[40] It also does not seem to be of particular importance whether this new form of governmentality is administered by a single centre or is 'contracted out' to some other agency which acts on behalf of the centre and its 'mission'.

Thus it is hardly surprising that trade lawyers today are in favour of uniform and transparent systems of administrative law. For the implementation of liberalisation and anti-dumping commitments, foreign investors desire fair and transparent enforcement of commercial contracts. Human rights advocates favour changes in constitutional arrangements in order to safeguard civil and political rights. All these attempts—covered by the neutrally sounding term of 'best practices'—lead to standardisation and increases in the capacity of control of the 'standard setters' without involving them directly in the political or administrative system of another 'jurisdiction'. On the other hand, it should also not come as a surprise that the 'subjects' of these disciplining moves might not particularly care whether they originate in the imperial centre or in one of the multilateral organisations that have become the harbingers of 'democracy' or 'responsibility' for 'failed' states. This predicament creates considerable difficulties in implementing the 'rule of law', a problem known in the literature as the 'will to reform dilemma'.[41] Furthermore, the strategies, even if they are—against all odds—successful, might be counter-productive and defeat some of the central objectives of equity and the traditional 'rule of law'. As will become clear from the discussion below, these two problems are strangely interdependent.

The admission of 'implementation' difficulties considerably weakens the universalist appeal upon which modern 'rule of law' exports are built. After having cleansed law of all particularities and historical contingencies and having appealed to 'rational' criteria whose allure consists in being applicable at any time, anywhere and in respect of anybody, the

[40] This is a point well made by M Hardt and A Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000).

[41] See eg T Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

admission that such programmes can be successful only if the recipients are persuaded to 'co-operate' considerably undermines the claim to universality and 'innateness'. Knowing the 'locals' and their peculiar ways of thinking seems suddenly more important than getting the universal principles right (after all, the latter were supposed to do the work more or less on their own, since they posses the 'force of the better argument'). Furthermore, the shift from a concern with law and its integrity to one of 'incentives' is telling and suggests that the rule of law involves more than the reform of a country's legal system and its administration of justice. It is above all a 'disciplinary' practice aimed at 'constituting subjects willing to accept the values of Western liberal democratic values'.[42]

While the 'others' might have reasons to be suspicious of the particular political project, there is an even greater difficulty in that the 'imposition' of such a regime defeats one of the central values of the rule of law, namely autonomy. As Martti Koskenniemi has pointed out:

> The worry about new global law reflects concerns about the absence of structures of political representation, contestation and accountability, of a public sphere institutionally linked to global power … Whatever the managerial mindset has to say about the difficulties of effective governance today fails to address the sense that these difficulties are undermining freedom, in the sense of leading one's life only under the authority of one's own (good) will.[43]

Just as an individual cannot be forced to be moral, so too a community cannot be forced to respect the rule of law on its own. It might be cajoled into adopting in part or in whole regulations which have been made by others, but such a move usually lacks the 'authorship' and the concomitant obligatory force to bind citizens. This was, after all, Kant's 'free will' argument establishing the autonomy and freedom of the agent and, by analogy, the right of every people to give themselves a 'civil constitution of the kind that sees fit without the interference from other powers'.[44] Thus while Kant has little to say about the law's function in the international arena—one is indeed struck by his dismissal of such eminent international lawyers as Pufendorf, Grotius and Vattel, who are belittled as '*leidige Troester*' ('pathetic comforters')[45]—central to his conception of law is his notion of authorship of a self-determining will. It is therefore the 'moral politician' rather than the expert or 'political moralist' who is charged with the arduous task of guiding the project of the league (*foedus*

[42] J Beard, 'The Confessional Framework of Law Development: How to Offer Salvation to Willing Legal Subjects' (2005) 75 *Nordic Journal of International Law* 409–49 at 411.

[43] M Koskenniemi, 'Constitutionalism as Mindset: Reflection on Kantian Themes about International Law and Globalization' (2007) 8 *Theoretical Inquiries in Law* 9–36 at 26.

[44] I Kant, *Der Streit der Fakultaeten* A 144*ff*, in W Weischedel (ed), *Immanuel Kant: Schriften zur Anthropologie, Geschichtsphilosophie, Politik und Paedagogik* (Frankfurt: Suhrkamp, 1977) at 358.

[45] I Kant, *Zum ewigen Frieden* (1796), BA 33, 34.

pacificum) so that over time it becomes a genuine 'security community' in which the resort to force becomes unthinkable and the submission of disputes to mandatory settlement is routine.

These arguments have several implications for our rule of law argument. First, while Kant does not explicitly utilise the vocabulary of 'citizenship', casting his *Rechtslehre* in more universalistic terms, the emphasis on the 'authorship' of law clearly links him to the original rule of law arguments made by common lawyers and dissenters in the seventeenth century. They had deployed the more particularistic vocabulary of 'ancient freedoms' and of 'consent' to law-making and taxation in order to stem the tide of absolutism and establish the supremacy of Parliament against the King's prerogatives. But in doing so they also had to contest the conception of individual rights as simple grants by the sovereign to his subjects. Second, Kant more than anybody else defends the rule of law project as a *political project* and not as one of technical expertise, or of some ('right' Hegelian) notion that what exists is also reasonable and therefore legitimate, arguments about 'reality' notwithstanding.

In other words, Kant directly inveighs against the normative force of facticity, while at the same time arguing that the particular political solution can consist neither in the mere 'application' of universal principles nor in the historical singularity of a 'lucky' coincidence (as later exemplified by the 'Whig interpretation' of history). Instead, what is required is a judgement that is singular but which, as in aesthetics, goes far beyond idiosyncratic grounds of indicating personal likes and dislikes.[46] In short, what is involved here is a *validity claim* that is subject to critical reflection and evaluation in the light of shared standards. Kant's 'solution' therefore seems to be as far removed from the decisionism of Hobbes (or Schmitt) as it is from the unreflected satisfaction with decisions that somehow 'worked out'—a viewpoint characteristic of the attitudes of status quo powers. Yet it is also far removed from the universalist fantasies of 'infinite justice' promised by some imperial project.

In a way, the contrast with present conceptions of the rule of law could not be more striking. Rather than laying emphasis on citizens as the 'authors' of law we notice that the dominant figures in the contemporary project have become the 'victim' and the 'perpetrator'. The former is to be 'helped' by the proper 'professionals', whilst the latter has to be prosecuted and punished, again by a specialised cadre of 'experts'. By a strange twist the rule of law has changed from an empowering instrument of citizens taking their fate into their own hands to a construct that gives the individual pride of place as a pre-political being endowed with subjective

[46] See I Kant, *Critique of Judgement*, trs W Pluhar (Indianapolis, IN: Hackett Publishing Co, 1987).

rights. But such a shift places man's social and political existence at the mercy of those who are ministering to 'humanity' at large.

Since the 'protection' of the individual is now the *spiritus rector* of the legal enterprise, the notions of 'crime', prosecution and coercion become equally important. This is, of course, a *novum* for international law, whose classical 'countermeasures'—including acts of force (aside perhaps from war)—were only designed to bring the wayward state back into the fold.[47] Thus retaliation and reprisals were measures of self-help intended to make the opponent desist from illegal acts rather than to serve as a punishment for the transgressions committed. The closeness of the new notion with its emphasis on criminality to an imperial conception of 'law and order' (Vergil's *Tu regere imperio, memento Romane*: *parcere subjectis et debellare superbos*[48]) is not accidental. However, given the enormity of the task of providing equal and universal justice, it is hardly surprising that the aspirations of the rule of law have to be sacrificed on the altar of contingent 'reality'. The result is an ever-widening gap between aspiration and practice. Most problems in the international arena are still dealt with by 'oversight', as Rwanda, Darfur or the Congo demonstrate, and one need not be a 'realist' to see that particular interests and saliency rather than universal aspirations or a notion of duty do most of the explaining.

But even in the latter cases—which are admittedly few and far between—there are some conceptual issues worth pondering. Justice cannot be achieved through the even-handed and general application of existing rules by independent judges who are nevertheless subject to the constraints of a particular constitution. Instead, it is supposed to work in the newly opened up space of international 'universality' and through some form of 'exemplary justice' that is visited upon individuals, be they state agents or 'private' persons. Here two further questions arise: one concerns the specificity of criminal acts, and the other the issue of how deterrence connects with the prospective ordering of law. It is precisely because many international crimes, such as genocide or the use of force, are not part of normal 'individual' cost–benefit calculations but are distinctly 'political' considerations that one might seriously doubt the efficacy of deterrence. This scepticism is enhanced by the fact that enforcement is selective and thus arbitrary.

It does not lack a certain irony that 'deterrence', which has gone out of fashion among most penologists, has suddenly found some fervent adherents among international lawyers, a group not known for their familiarity with criminology. My suspicion is therefore that the persuasive force of

[47] See E Zoller, *Peacetime Unilateral Remedies* (Dobbs Ferry, NY: Transactional Publishers, 1984).

[48] 'You remember to guide the peoples with power, Roman, to impose the way of peace, to spare the conquered and to battle down the proud' (*Aeneid*, Book 6, lines 852–3).

the recent efforts at criminalisation in international law has less to do with its expected effectiveness or prospective ordering function—indeed the recent record of highly selective enforcement makes a mockery of that hope—but with the ideology of progress. Part of that ideology is the near-messianic hope in a transformative change that is supposed to result from the challenge to the state's monopoly on legitimate force. True, the right to punish was always a jealously guarded right of states or communities. But whether sporadic verdicts handed down by tribunals which stand 'above' the state determining what the law is can also instil new loyalties by speaking in the name of 'human dignity', of 'collective humanity', or at least the 'international community', seems rather doubtful.

The inability to name the 'source' which can hold individuals 'responsible' is telling. Is the relevant group the community of states, the 'domestic' order, which has incorporated certain universal principles, the 'peoples' of the world, or 'humanity' at large? These are no idle word games. It seems that having purged law of all historical peculiarities and contingencies, the identifiable thrust of the argument requires a narrative explanation of the end of the state, or even of 'history'. In this sense, 'humanity' itself and not only 'mankind' in its contingent diversity becomes the all-encompassing point of reference. Both the 'peoples' and the (concrete) people of a given order have vanished. What remains is 'human dignity' as the ultimate source from which all law emanates and to which it refers back.[49] But since 'humanity' cannot act, the question of *quis judicabit* thus becomes all the more important.

We sometimes catch a glimpse of the complexities that arise in these contexts. Thus in the *Tadic* case[50] before the International Criminal Tribunal for the former Yugoslavia (ICTY—a tribunal created by the SC), faced with a challenge to its legality, the trial chamber rejected the motion by disclaiming competence to pronounce on the legality of the court's establishment. The Appeals Chamber, on the other hand, argued that as a 'self-contained system' it did indeed possess such competence, as otherwise it would be at the mercy of the SC. Such dependence, in turn, would undermine its judicial character. But such a justification clearly goes beyond the authorising instrument. In other words, in order to advance the rule of law, something more is required than the establishment of a tribunal entrusted with the responsibility of judging according to universalist standards.[51]

[49] See also A-M Slaughter, *A New World Order* (Princeton, NJ: Princeton University Press, 2004) p 267; see also A-M Slaughter and W Burke White, 'An International Constitutional Moment' (1990) 43 *Harvard International Law Journal* 866–76.

[50] (Judgment) ICTY 94-1 (26 January 2000).

[51] See the discussion by V Popowski, 'Legality and Legitimacy of International Criminal Tribunals' in R Falk and R Thakur (eds), *Legality and Legitimacy in the International Order* (Tokyo: UN University Press, forthcoming).

Similarly, considerable uneasiness can be detected in Carla del Ponte's opening statement at the trial of the former Kosovar Prime Minister Ramush Haradinaj. He was praised by the US state department, the UN, the French Foreign Ministry and other 'representatives', while being delivered up for trial at The Hague for the murder of 40 of his countrymen. 'It is a prosecution,' Del Ponte said, 'that some did not want to see brought, and that few supported by their cooperation at both the international and local level.'[52] What she significantly omitted was that the culprits were not simply other Kosovars who stayed loyal to their leader, but also UN diplomats who had hoped to broker an agreement for which they needed Haradinaj's co-operation. Consequently—and clearly violating the rules for the detention of persons charged with war crimes—Hardinaj was released and allowed to return to Kosovo after entering a not guilty plea.

These instances not only demonstrate the 'intrusion' of politics but also the fact that the administration of justice and the effectiveness of the rule of law depend on the institutionalisation of a political process contained in a constitution to which 'the law' has to defer. It is in this way that 'the people' come to see themselves as authors of their own choices, and in this way a constitution can then claim 'loyalty' and respect for the limiting and enabling conditions of such an order. What the rhetoric of universalism simply leaves out is that the duties which flow from loyalty are quite different from those resulting from contracts or universal norms. Loyalty is owed to those people and institutions which define us as particular historical subjects—which establish who we 'are'. One might be obliged to strangers, due to the promises one has made or due to the general principles underlying their status as persons which thus deserve recognition. But one can only be 'loyal' to friends and 'others' who are or have become part of 'us'. Loyalty connects us to particular groups and invokes specific historical experiences. It cannot be tailor-made as a free-standing 'de-contextualised' structure that is imposed upon a group. The 'law' must be the repository for their particular experiences and meaning, even if the 'text' produced satisfies the criteria of justice and makes reference to universal human values. Consequently, Hirschman considers 'loyalty' as one of the fundamental social mechanisms that cannot be reduced either to 'exit' or to 'voice'.[53]

The usual tendency to explain our political obligations in terms of the 'justice' of the regime to which we are subject misses precisely the point that we, as Frenchmen, for example, have special obligations to abide by French law and not by the law of Australia or Switzerland, even if the

[52] See the article in the *Chicago Tribune*, 1 May 2007, 'US praises indicted former Kosovo PM' at www.balcanpeace.org/index.php?index=article&articleid=14323 of 26/07/2007.

[53] A Hirschman, *Exit, Voice, Loyalty* (Cambridge, MA: Harvard University Press, 1970).

latter are also 'just regimes'. These 'special obligations' therefore do not result from the benefits we receive in the pursuit of our goals, nor from the general maxim that laws are necessary to avoid conflict and regulate interference, nor even from universal values which are part of our projects. Rather, the obligations derive from the realisation of who we are as historical beings. As such we can never start from scratch, as the imagery of a market or even a 'game' suggests, both of which we might enter or exit *ad libitum*. Rather, here we become aware that we are always part of a 'drama' in which what happens today has a long past that casts its shadows and which sets the stage for our actions and their success and failure.

Strangely enough, liberal theory recognises the power of the 'shadow of the future' ('discounted' at different rates). It seems, however, entirely blind to the role of the past, except when viewed as a 'constraint' on our ability to maximise our choices. But what remains outside its view is the influence of those forces which call our attention to *who we are* and what our particular predicament is. These realisations must come before any game we enter and any maximising strategy we might choose. Benedict Anderson's curious question of why there is in virtually all states a memorial to the unknown soldier, but none to the unknown Marxist[54] (or the 'fallen liberal', or 'disappointed progressive') is perhaps no longer so puzzling if we understand the dynamics in the construction of 'meaning' and law's role in it. It is therefore no accident that the original use of the rule of law argument was couched in terms of the specific 'ancient freedoms' once allegedly enjoyed by all free Englishmen, or as an argument about the constitution of a specific public thing (*res publica*) that locates each individual within a specific context and signals to a 'people' that they are thereby enabled (and not only constrained) to work out their individual and collective destinies.

The issue here is not to rehash the mistaken idea of a 'primordial' existence of a people which 'gives' itself a constitution, or to argue that since this 'theory' is clearly problematic, any other 'multitude' can be created through contract. The point is rather to understand that law is not only a co-ordination device, regulating the interactions among 'rational' self-interested actors, but also a vehicle for the generation of meaning and that this constitutive function is deeply embedded in our historical experiences and our political imagination. To that extent it is true that 'the people' is not a pre-political fact but rather a strategy of sense-making in which 'fictions' are established and put beyond question. Hence Kant's dictum that people should not inquire into their origin 'with any practical

[54] B Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1980) p 10.

aim in view',[55] as otherwise their dogmatic force lending legitimacy to a system of laws would be undermined. It also should be borne in mind that the 'social fact' of 'a people' defining itself through a specific 'founding' is largely 'mythical', even if it is related to a concrete historical incidence.

Admittedly, such a conception of law which emphasises its role as a repository of meaning rather than as a simple instrument for avoiding collisions between 'rational' actors is difficult to grasp for a tradition that considers only individuals and their wishes to be 'real'. In this way, their (political) projects and their recollections remain simply a matter of idiosyncratic 'tastes' (*de gustibus non est disputandum*). However, such a perspective leads to a variety of conceptual and practical political impasses that are worth pondering as they create significant difficulties for both 'theory' and practice.

Consider in this context the historically contingent fact that none of the existing social arrangements can be justified in terms of universalist criteria since the historical world shows their utter contingency, and neither is the construction of common political projects in terms of individual rights able to provide a coherent account of what is happening. Both problems deserve therefore a brief discussion. On the first issue, Habermas remarks:

> Since the voluntariness of the decision to engage in law giving praxis is a fiction of the contractualist tradition, in the real world who gains power to define the boundaries of a political community is settled by historical chance and the actual course of events—normally the arbitrary outcomes of war and civil war.[56]

This, of course, is a far cry from any justification in terms of universal principles of humanity. But things are not looking up for the 'liberal' programme when due to the requirements of methodological individualism all mediating institutions are construed as an aggregation of 'subjective rights'.

This leads me to the second problem mentioned above: the reframing of collective political projects in individualist terms. Democracy then suddenly becomes an individual 'right to democracy', the environment is similarly protected by the subjective 'right to a clean environment' and 'development' is somehow wished into existence by the postulation of a 'right to development'.[57] It needs only a moment's reflection to realise

[55] I Kant, *Metaphysics of Morals*, trs M Gregor (Cambridge: Cambridge University Press, 1996) p 462.

[56] J Habermas, 'The European Nation State: On the Past and Future of Citizenship' in C Cronin and P De Greiff (eds), *Inclusion of the Other: Studies in Political Theory* (Cambridge, MA: MIT Press, 1998) p 115.

[57] BR Lawrence, 'The Right to Development as a Human Right: Results of the Global Consultation' (1991) 13 *Human Rights Quarterly* 322–38.

that the construal of these 'rights' is the result of considerable conceptual befuddlement. The last 'right' can at least arguably be understood as a manifesto claim—as addressing a recognised grievance. In the absence of a clearly defined class of correlative duty-bearers, a flaw in the existing order is identified that awaits further specific initiatives in order to address this problem.

The other two rights are simply based on faulty reasoning. To put it bluntly, the 'right' to democracy is not a human right accruing to agents as part of their natural liberty. It is at best a status assignment bestowed upon a person as member of a particular society. Thus 'democracy' is not a subjective right inherent in, or explicating the notion of, personhood or agency. It is rather a principle of organising for political purposes and failure to see the difference involves a category mistake of the first order.[58] Similar difficulties arise if the protection of the commons is 'derived' from the subjective right to a clean environment. Again, while the assignment of exclusive property rights might alleviate certain pressures that otherwise result to tragedy of the commons, this is a far cry from the notion that a part of nature should be set aside, so as to remain 'unspoilt' or become subject to severe limitations on use. A more appropriate conceptualisation would therefore be one of common ownership that explicitly prohibits individual appropriation and the exercise of individual rights. However, such a conception requires something like a notion of 'corporate' rights that cannot be reduced to the individual rights of persons forming the corporation. In consequence, such a construction has to be contrary to the notion of a universal human right.

The practical political consequences of such muddled thinking are no less deleterious. Given the impoverishment of the international legal ontology which recognises an overarching goal, such as human dignity (but little else), everything becomes dissolved in a process where strategic claims and counterclaims are advanced. The only 'relevant' question then becomes whether one is 'on the side' of universal values. The underlying imperial aspirations of such a mode of thinking are not difficult to fathom. It comes as no surprise that a special role is then claimed on the basis of the *mission civilisatrice*, the white man's burden or American exceptionalism.

In this context both the New Haven school of international law around Myres McDougal[59] and the more cynical analysis supplied by some of the

[58] See J Cohen, 'Whose Sovereignty: Empire vs. International Law' (2004) 18 *Ethics and International Affairs* 1–24.

[59] Out of the numerous publications of McDougal and his disciples see a concise outline of their project in M McDougal, 'Some Basic Concepts about International Law: A Policy Oriented Framework' in R Falk and SH Mendlovitz (eds), *The Strategy of World Order, vol* 2 (New York: World Law Fund, 1966).

lawyers of the present US administration provide some striking examples. In McDougal's case the dissolution of law into a process of 'appraisal' of political claims and counterclaims was at least not intended to impair the possibility of rendering a judgement of legitimacy, but simply that the criteria were no longer those of legal formalism but rather of 'policy analysis'. His argument was that policies can be evaluated depending on their capacity to further (or impair) 'human dignity'. Not surprisingly, the appraisal usually concluded with an approval of US policies as they were allegedly conceived and executed in the pursuit of 'human dignity'.

Compared to this fig-leaf conception of law the writings of some international lawyers presently advising the US government in its war on terror seem more cynical. For them, the 'theory of public goods', particularly in the area of security,[60] explains why the US has to act unilaterally. It also shows why any conception of legality or of the binding force of norms has no place in their 'theory'. For them, nations comply with laws to minimise transaction costs and out of fear or retaliation and reputational loss.[61] It is not quite clear why reputation should matter in such a world where there is a market with clear prices or at least a transparent system of 'incentives' that determines once and for all 'how the ball bounces'. Furthermore, why should reputation matter—even under conditions of 'market imperfections'—if one possesses all the wherewithal necessary to pursue one's goals? To that extent, any 'reputation' will be a function of the 'big stick' one carries rather than of 'speaking softly', because the latter is in any case most likely to be dismissed as 'cheap talk'.

At this point the astonished and disbelieving reader is directed to the international relations literature which is alleged to provide a more 'sophisticated analysis' (*sic*) of international law and the reasons for compliance.[62] This comes, of course, as a shock to all of us who have worked in the mines of social science over the years. Obviously we must have failed to notice the brilliance of some of the allegedly high-carat diamonds that are now being paraded in front of us, which must have hitherto been hidden in the familiar chaff. But could it be that all that the 'hired guns' of the present administration have encountered is some pieces of broken glass, the pathetic remnants of some past food-fights in the abode of the 'fraternity' of international relations specialists? Lawyers are unlikely to know or to be able to judge the rather arcane debates in political science, given the disciplinary boundaries, unless, of course, they are confirmationist ideologues who simply 'assume' that something which supports their view

[60] For a justification of the unilateral use of force due to the nature of security as a public good see J Yoo, 'Using Force' (2004) 71 *University of Chicago Law Review* 729–98 at 784–7.

[61] J Goldsmith and EA Posner, *The Limits of International Law* (Princeton, NJ: Princeton University Press, 2005) p 90.

[62] *Ibid*, p 15.

has been established as 'truth' somewhere else.[63] Thus the 'arguments' advanced by Yoo,[64] Goldsmith *et al* turn out to be little more than a cheap debating trick. We all know that 'over there' the grass is always greener, the girls are always more beautiful and so on …

The tragedy, however, is not that we end up with some problematic 'theory'. The tragedy consists rather in providing incredibly bad policy advice. Inquiring only into the ends and 'testing' them in terms of their universalisability or 'progressive' nature, while dismissing all mediating structures and considerations of particularity, leads not only to imperial aspirations, but ultimately to *hubris*. It is precisely because the exclusive focus on instrumental 'rationality' prevents us from distinguishing between irrational wish-fulfilment and legitimate modes of pursuing one's goals that such a tunnel vision of law makes us forget that law is a structure of meaning. It is not only about issues of regulating strategic interaction, but also equally about the legitimacy of the *means employed* and also about '*who we are*'.[65] It is in this way that the notion of the rule of law attains its importance. If the messianic mission of spreading democracy abroad is possible only by subverting both legal and political processes at home—by threatening the constitutional separation of powers and civil liberties, not to speak for the moment of the victims created abroad—such a 'mission' does not amount to a 'tragic' bargain but rather to a pathetic delusional goal.[66]

As we all know, one of the fastest ways to nowhere is to get caught in misplaced dichotomies; for example, arguing that given the challenges of terrorism and existential threats we will either have to 'adjust' (that is, practically abolish the traditional safeguards of the rule of law) or face disaster. Another equally problematic argument is that any change or infringement of a given regime can only eliminate the rule of law. But, as we have seen, both positions are untenable because they subvert the very notion of a 'balance' that is an intrinsic part of this *topos*. In other words, the problem of the rule of law is thus neither one of efficiency nor one of simply protecting the law's purity. It entails attending to the task of preserving the integrity of law, which can only be safeguarded if the institutional arrangements are capable of dealing reasonably well with the *twin dangers* of anarchy

[63] On the danger of engaging in confirmatory research see K Popper, *The Logic of Scientific Discovery* (New York: Harper and Row, 1970).

[64] See eg J Yoo, *The Powers of War and Peace: The Constitution and Foreign Affairs after 9/11* (Chicago, IL: University of Chicago Press, 2005).

[65] This point is persuasively argued by Ulrich Haltern in 'Internationales Verfassungsrecht? Anmerkungen zu einer kopernikanischen Wende?' (2003) 128 *Archiv des oeffentlichen Rechts* 511–57.

[66] As a useful corrective to Yoo's argument that the new circumstances require 'imperial' solutions, see the discussions in nineteenth-century England which came to the conclusion that only a strengthening of the position of Parliament could prevent an abuse of power and the subversion of the rule of law: see eg RW Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (New York: Oxford University Press, 2005).

and unrestrained power. It necessarily becomes part and parcel of a larger 'security' theory that transcends the purely military dimension. As Daniel Deudney has shown, this awareness figures in a 'republican'[67] security theory that addresses four dangers simultaneously:

> As its most elemental level, republican security theory holds that insecurity results from the extremes of both anarchy and hierarchy, both of which can manifest themselves internally and externally, thus producing four situations of gross insecurity: the internal anarchy of civil war (stasis), the external anarchy of total or annihilative war, the internal full hierarchy of tyranny, despotism, and totalitarianism, and the full external hierarchy of imperial rule.[68]

While it was formerly the common lawyers who re-discovered and used the rule of law argument to impose limits on the political projects of a centralising and more 'universal' (statist) political order, the new use of the rule of law *topos* as part of a messianic 'universalist' project of human rights suggests that this concept has not travelled well over the years. But then again this is not unusual and there are good reasons to be sceptical of attempts to press such concepts into the service of new projects, even if this is done by 'experts' in the field. We know that war is too serious a matter to be left to the military, and the rule of law might be too important to be left to the lawyers. Its function is certainly neither to bring about the 'end of history' nor to provide a strategy for the propagation of some technical expertise to 'underdeveloped' societies. Rather, its purpose is to make us aware of the need for critical appraisal of our political projects in the light of our condition as finite 'historical' beings. This seems to me the core meaning of this concept. Only in this way can we avoid the rule of law becoming the nightmare of messianic politics or an equally frightening prospect of a rule of lawyers who function as 'experts' by emasculating politics.

IV. CONCLUSION

This chapter has analysed the rule of law, not by attempting to 'define' it according to the usual taxonomic criteria and then see how the various

[67] For a discussion of the tradition of 'republican' thought which focuses on the 'separation' of powers and disabling as much as it does on its enabling functions see JGA Pocock, *The Machiavellian Moment: Florentine Political Theory and the Atlantic Republican Tradition* (Princeton, NJ: Princeton University Press, 1975); Q Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press 1998); N Onuf, *The Republican Legacy in International Thought* (Cambridge: Cambridge University Press, 1998); M Viroli, *Republicanism* (New York: Hill and Wand, 1999); J Appelby, *Liberalism and Republicanism in the Historical Imagination* (Cambridge, MA: Harvard University Press, 1992). See also P Onuf and N Onuf, *Federal Union, Modern World: The Law of Nations in an Age of Revolutions 1776–1814* (Madison, WI: Madison House, 1993).

[68] D Deudney, *Bounding Power: Republican Security Theory from the Polis to the Global Village* (Princeton, NJ: Princeton University Press, 2007) p 46.

policies and practice instantiate this concept. Rather, it began from a Wittgensteinian notion that the meaning of a concept—particularly in the social world, which is not natural but entirely constructed by shared meanings—is not its reference but its 'use'. Consequently, the inquiry had to be historical and analytical at the same time, seeking to sketch instances and contexts in which the rule of law argument was used. It also examined the historical links to other concepts and practices which were thereby authorised or prohibited. This allowed us to see its trajectory throughout various epochs and also served as a useful reminder that the narrative in which the rule of law argument is usually embedded is one of 'progress' and increasing enlightenment.

While we cannot judge the narratives by comparing them directly with the historical world telling us how things 'really were'—an illusion Leopold von Ranke still had at the birth of modern historiography but which any critical reflection on historiography clearly shows to be mistaken[69]—analysing the changes and seeing what 'work' the arguments did in different periods is a useful first step. It insures against the dangers of a totalising perspective, certain hidden teleologies or the well-known tendency to project our present meanings back onto the historical record. The realisation that the *topos* was for long periods part of the *political discourse* rather than jurisprudence, or a theory of law, provides a useful corrective, particularly when a concept is taken from the 'limited' context of domestic politics and projected onto the global sphere.

As we have seen, such shifts result in a de-emphasis of the importance of the state, sovereignty and most of the traditional 'sources' of law. Instead, a new form of 'naturalism' has emerged whereby it is no longer particular individuals but rather 'humanity', or even more abstractly, 'human dignity' which becomes the exclusive legitimising source. It foregrounds different problems, such as those of the 'victim' who has to be rescued, suggesting different strategies for implementing the rule of law, such as the punishment of criminal perpetrators. Thus, not only is any form of legal 'formalism' devalued as we shift from government to governance, but even the status of the 'person' is increasingly less that of an agent and more that of one who is in need of help by 'others'. Significantly, these 'others' are not necessarily those who have particular duties derived from the social and political arrangements in which they and the victim participate. The authorisation for action does not flow directly from 'membership' of a specific historical society but from a pre- (or a-)political notion of human existence.

Both foci lead to an entirely new *problematique* which the rule of law *topos* has to address. It has to raise the question of authorisation that potentially engenders imperial pretensions on the one hand and cynicism

[69] In this context see my 'History, Action, Identity' (2006) 12 *European Journal of International Relations* 5–29.

on the other hand. The latter consequence results from the widening gap between universalist aspirations and the inevitable unevenness and controversial nature of enforcement 'above' the state. The other big issue concerns the interface between constitutional law and international law. In contrast to the contemporary debate that sees in the further strengthening of the 'commander in chief' powers of the US President the only solution to the problems of new security challenges, British experiences of Empire pointed exactly in the opposite direction. This resulted in the ascendance of Parliament (after the Glorious Revolution) or at least in a strengthening of the rule of law in terms of civil liberties (as in the nineteenth century). The reason for these two different outcomes seems to lie in a conception of law that, as of late, has been successfully emptied of all traces of any concrete society and that stresses solely the instrumental functions of law. Not even a constitution is any longer treated as a text in which the historical experiences of 'a people' are inscribed, whereby they can understand themselves as the 'authors' of their laws. Instead, almost any arrangement seems to be sufficient as long as it is competently drafted and makes reference to 'universal' values. The result is a rather strange debate on the 'constitutionalisation' of international law, which is supposed to ban the dangers of 'fragmentation' but in which nearly any halfway 'effective' regime will do. Thus 'professionals' working in the field of the WTO have suggested that this organisation might serve as a constitutional framework due to its effective dispute-settlement mechanism and due to the individual 'right to free trade' which, in one way or another, also nicely entails and links in with the 'right to democracy' and other human rights.[70] Here the world has, for all intents and purposes, become a 'shop', and 'persons' are not only ahistorical and prepolitical entities but little more than 'consumers'.[71]

Against this instrumentalisation of law a notion of law as a system of meanings has been emphasised. It transcends the notions of 'facilitating' strategic interactions or arguments of utility. It is in this context that the *topos* of the rule of law has played a particularly important role. It would be a misunderstanding to treat it as a shorthand for best legal practices, ready prepared for export, or to dismiss it as an outmoded concept of constitutional politics in an era of globalisation and universal human rights.

[70] See EU Petersmann, 'Time for a United Nations "Global Compact" for integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 *European Journal of International Law* 621–50.

[71] See the criticism by P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law' (2002) 13 *European Journal of International Law* 815–44; see also R Howse, 'Whose Rights, What Humanity, Comment on Petersmann', and Petersmann's rejoinder: EU Petersmann, 'Taking Human Dignity, Poverty and Empowerment of Individuals More Seriously: Rejoinder to Alston' (2002) 13 *European Journal of International Law* 645–51.

9

The Rule of Law in International Law Today

STÉPHANE BEAULAC

I. INTRODUCTION

THE 'RULE OF law' is undoubtedly one of the most powerful expressions in the modern world.[1] In a sense, it has become an activity in itself, a mental-social phenomenon which exists within human consciousness and acts independently within physical social reality,[2] like a pat on the back or a slap in the face. Or, to put it differently, through the cognitive process of the human mind, the language of the rule of law has not only represented reality, but has also played a leading role in the creation and transformation of reality; accordingly, it has contributed to the modelling of the shared consciousness of society,[3] including that of international society.

While the various ideas associated with the expression are undoubtedly very old[4]—going as far back as Plato and Aristotle—the emergence of the rule of law as a potent discursive tool within political and legal circles has been relatively recent.[5] The phrase itself was actually coined by nineteenth-century British author Albert Venn Dicey,[6] in his masterpiece

[1] On the role of language, especially in the context of international law, see S Beaulac, *The Power of Language in the Making of International Law—The Word Sovereignty in Bodin and Vattel and the Myth of Westphalia* (Leiden: Martinus Nijhoff, 2004).

[2] This borrows from the speech-act theory of JL Austin, *How to do Things with Words* (Oxford: Clarendon Press, 1962).

[3] On the creation and transformation of human-constructed reality through the use of language, see L Wittgenstein, *Tractatus Logico-Philosophicus* (London: Routledge, 1961); and L Wittgenstein, *Philosophical Investigations* (Oxford: Blackwell, 1958).

[4] See JN Shklar, 'Political Theory and the Rule of Law' in AC Hutchinson and P Monahan (eds), *The Rule of Law: Ideal or Ideology* (Toronto: Carswell, 1987) p 1.

[5] See J Rose, 'The Rule of Law in the Western World: An Overview' (2004) 35 *Journal of Social Philosophy* 457 at 457.

[6] See HW Arendt, 'The Origins of Dicey's Concept of the "Rule of Law"' (1957) 31 *Australian Law Journal* 117.

Introduction to the Study of the Law of the Constitution.[7] It is from this point in time that this chapter takes up the rule of law, originally developed at the domestic level, with a view to seeing how an externalised version of the concept may be projected onto the international plane.

Writing at the turn of the millennium, Paul Johnson referred to the establishment of the rule of law within nation states as 'the most important political development of the second millennium'; he ventured to predict, in his optimistic conclusion, that the development of a global or international rule of law 'is likely to be among the achievements of the third millennium'.[8] Adopting a more prudent tone, in his book *On the Rule of Law*, Brian Tamanaha argued that the first project, the rule of law on a national level, 'remains a work in progress', while the second one, the rule of law internationally, 'has only just begun'.[9] But it has indeed begun, and not only at the normative level, but also at the functional level and, to a lesser degree, at the institutional level.

The following discussion starts, in Section II, with a survey of how the rule of law has developed in domestic law, focusing on the contributions of legal (as well as political) scholars. Section III then sets out the main goal of the chapter, which is to externalise the core values of the rule of law onto the international plane in order to examine how they can be found in the essential features of the international legal system. Two variables are examined for the purpose of this study, namely the version of the rule of law (limited to a formal level) and the definition of international law (limited to its traditional understanding). The conclusion then briefly revisits the theme of language as social power in relation to the international rule of law.

II. THE RULE OF LAW DEFINED

Although admittedly a convenient shortcut, starting our discussion of the meaning of the rule of law with its modern articulation by Albert Venn Dicey has little risk of running into strong opposition.[10] His conception is well known and largely accepted; it has also been analysed and criticised from a variety of angles,[11] thus adding to the credibility of his formulation.

[7] AV Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan, 1885).

[8] P Johnson, 'Laying Down the Law: Britain and America Led the Way in Establishing Legal Regimes Based on Universal Principles', *Wall Street Journal*, 10 March 1999, A22.

[9] BZ Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) p 127.

[10] See NB Reynolds, 'Grounding the Rule of Law' (1989) 2 *Ratio Juris* 1.

[11] See I Stewart, 'Men of Class: Aristotle, Montesquieu and Dicey on "Separation of Powers" and "The Rule of Law"' (2004) 4 *Macquarie Law Journal* 187; and BJ Hibbitts, 'The Politics of Principle: Albert Venn Dicey and the Rule of Law' (1994) 23 *Anglo-American Law Review* 1.

A. Dicey's Theory of the Rule of Law

Dicey wrote that the rule of law had 'three meanings, or may be regarded from three different points of view'.[12] First, the expression means 'the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power'.[13] He further opined:

> We mean, in the first place, that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.[14]

The second prong of Dicey's rule of law means 'equality before the law, or the equal subjection of all classes to the ordinary law of the law administered by the ordinary law courts'.[15] He explained this as follows:

> We mean, in the second place, when we speak of the 'rule of law' as a characteristic of our country, not only that with us no man is above the law, but (what is a different thing) that here every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals.[16]

Third, according to Dicey, the rule of law entails that 'the laws of the constitution … are not the source but the consequence of the rights of individuals, as defined and enforced by the courts'.[17] This last element is really a 'special attribute of English institutions', that is, of British constitutionalism. He also wrote:

> We may say that the constitution is pervaded by the rule of law on the ground that the general principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts; whereas under many foreign constitutions the security (such as it is) given to the rights of individuals results, or appears to result, from the general principles of the constitution.[18]

A common misreading of the last element in Dicey's theory holds that the rule of law requires the recognition of some minimal substantive rights and freedoms for individuals. As Paul Craig pointed out, however, this

[12] AV Dicey, *Introduction to the Study of the Law of the Constitution*, 10th edn (London: Macmillan, 1961) p 202.
[13] *Ibid*.
[14] *Ibid*, p 188.
[15] *Ibid*, p 202.
[16] *Ibid*, p 193 [footnotes omitted].
[17] *Ibid*, p 203.
[18] *Ibid*, pp 195–6 [footnotes omitted].

'is not what Dicey actually said'.[19] Rather, Dicey simply suggested that, provided a society wishes to give protection to individual rights, that is, if and only if there has been a political will to provide such legal guarantees, then, one way of doing it is better than another way as far as the rule of law is concerned. Namely, the British common law technique ought to be favoured over the Continental written constitutional document technique. This point is important because 'Dicey's third limb of the rule of law is no more substantive than the previous two', as Craig put it: 'It no more demands the existence of certain specific substantive rights than do the earlier limbs of his formulation'.[20]

B. The Critics of the Rule of Law

To summarise, for Dicey, the constitutional principle of the rule of law involves: (1) being ruled by law and not by discretionary power; (2) equality before the law, for private individuals as well as government officials; and (3) being subject to the general jurisdiction of ordinary courts, which is the best source of legal protection. These core ideas, in one form of another, can be found in the scholarship of most modern authors who have written on the question, whether in the legal studies or the political science literature.[21]

This does not mean, however, that there is any kind of consensus or agreement on the meaning and scope of the rule of law; in fact, the opposite seems to prevail. Some criticisms have been voiced over the years on the vagueness and uncertainty of the concept, with Joseph Raz famously calling the rule of law a mere slogan;[22] borrowing from Walter Gallie,[23] one author suggested it was an 'essentially contested concept.'[24] Witness also the harsh assessment given by Judith Shklar:

> It would not be very difficult to show that the phrase 'the Rule of Law' has become meaningless thanks to ideological abuse and general over-use. It may well have become just another one of those self-congratulatory rhetorical devices that grace the public utterances of Anglo-American politicians. No intellectual effort need therefore be wasted on this bit of ruling-class chatter.[25]

[19] P Craig, 'Formal and Substantive Conception of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467 at 473.

[20] *Ibid*, p 474.

[21] See J Stapleton, 'Dicey and his Legacy' (1995) 16 *History of Political Thought* 234; and J Rose, n 5 above, p 458.

[22] J Raz, 'The Rule of Law and its Virtue', in J Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979)) p 210.

[23] WB Gallie, 'Essentially Contested Concepts' (1955–56) 56 *Proceedings of the Aristotelian Society* 167.

[24] See J Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137.

[25] Shklar, n 4 above, p 1.

Similarly, George Fletcher famously referred to the rule of law as the most puzzling 'of all the dreams that drive men and women into the streets'.[26]

C. Categorising the Rule of Law

In an attempt to introduce some semblance of order into the discourse on the rule of law, some scholars have put the different versions or formulations of the concept into categories or models. Paul Craig suggested drawing a distinction between the formal conceptions of the rule of law, concerned with how the law is made and its essential attributes (clear, prospective), and the substantive conceptions of the rule of law, concerned not only with the formal precepts but also with some basic content of the law (justice, morality).[27] Brian Tamanaha picked up this classification and further divided up the formal and substantive models, making the alternative versions go progressively from 'thinner' to 'thicker' accounts, that is, moving from versions with fewer requirements to ones with more requirements, with each subsequent version including the components of the previous ones. Thus, starting with the formal conceptions of the rule of law, the thinnest is (1) the 'rule-by-law' (law as instrument of government), then (2) 'formal legality' (law that is general, prospective, clear, certain), with the thickest of the formal versions adding (3) 'democracy' to legality (consent determines content of law); this is then followed by the substantive conceptions of the rule of law, which all encompass the formal elements but also refer to other legal features such as (4) 'individual rights' (property, contract, privacy, autonomy), as well as a thicker-still version, which includes (5) 'rights of dignity and/or justice' and, finally, the thickest of the models of the substantive rule of law, and indeed of all versions, entailing a dimension of (6) 'social welfare' (substantive equality, welfare, preservation of community).[28]

For the purposes of the present chapter, which concerns the externalisation of the rule of law, the formal understanding of the concept suffices. In fact, to address legality per se at the international level is already a monumental task, not to speak of an inquiry into whether the legal rules in question amount to good law or bad law. Joseph Raz's comments are of relevance here:

> If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to

[26] GP Fletcher, *Basic Concepts of Legal Thought* (New York: Oxford University Press, 1996) p 11.
[27] Craig, n 19 above.
[28] Tamanaha, n 9 above, pp 91*ff*.

> discover that to believe in it is to believe that good should triumph. The rule of law is a political ideal which a legal system may lack or possess to a greater or lesser degree. That much is common ground. It is also to be insisted that the rule of law is just one of the virtues by which a legal system may be judged and by which it is to be judged.[29]

These remarks apply a fortiori to the present study, which identifies the core features of the rule of law with a view to analysing the situation on the international plane. In this context, Robert Summers is right to note that insofar as formal conceptions of the rule of law are content-independent, political neutrality makes them preferable to substantive versions,[30] which, it should be added, is especially the case outside the national realm. But having said that, the formal features of the rule of law must be understood broadly, as the classical notion of 'formalism' allows us to do, namely as including all the attributes of a thing—here, law—that are of such significance as to define it.[31]

D. Formal Versions of the Rule of Law

When focusing on the formal conceptions of the rule of law, it is useful to examine the work of Friedrich Hayek, who elaborated on the core ideas expressed by Dicey. Hayek's definition of the rule of law, taken from *The Road to Serfdom*, has undoubtedly over the years become one of the most influential:

> [S]tripped of all technicalities this [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.[32]

As he argued in another book, *The Political Idea of the Rule of Law*, legal systems adhering to the rule of law have three necessary attributes: 'the laws must be general, equal and certain'.[33]

A number of scholars in legal studies and social and political sciences have followed this modest, largely positivist version of the rule of law, advocating limited models that emphasise the formalistic or process-oriented aspects. Lon Fuller, for instance, argues in favour of a system of general rules, which are created and applied consistently with

[29] Raz, n 22 above, p 211.
[30] See R Summers 'A Formal Theory of the Rule of Law' (1993) 6 *Ratio Juris* 12.
[31] See M Stone, 'Formalism' in J Coleman and S Shapiro (eds), *The Oxford Handbook of Jurisprudence* (Oxford: Oxford University Press, 2002) p 166.
[32] FA Hayek, *The Road to Serfdom* (London: Routledge, 1944) p 54.
[33] FA Hayek, *The Political Idea of the Rule of Law* (Cairo: National Bank of Egypt, 1955) p 34.

procedural justice and fairness.[34] Accordingly, eight conditions must be met: (1) a system of rules; (2) promulgation and publication of the rules; (3) avoidance of retroactive application; (4) clear and intelligible rules; (5) avoidance of contradictory rules; (6) practicable rules; (7) consistency of rules over time and (8) congruence between official actions and declared rules.[35] To borrow Jeremy Waldron's image, this is 'a sort of laundry list of features that a healthy legal system should have'.[36] A similar enumeration of eight factors essential to the rule of law is given by John Finnis, which all relate to formal aspects of law; that is, to attributes of law that are so significant to law as to define what law is.[37]

Joseph Raz, too, proposes a list of, yet again, eight elements that ought to be found in a rule of law system. However, they are slightly differently formulated than Fuller's and Finnis's, although there is considerable overlap with the latter's list: (1) all law should be prospective, open and clear; (2) law should be relatively stable; (3) the making of particular laws (particular legal orders) should be guided by open, stable, clear and general rules; (4) the independence of the judiciary must be guaranteed; (5) the principles of natural justice must be observed; (6) the courts should have review powers over the implementation of the other principles; (7) the courts should be easily accessible and (8) the discretion of the crime-preventing agencies should not be allowed to pervert the law.[38] This list, Raz continues, is merely illustrative and is not meant to be exhaustive. In fact, he opines that all of these factors boil down to one proposition: 'in the final analysis the doctrine [of the rule of law] rests on its basic idea that the law should be capable of providing effective guidance'.[39] In his more recent writings on the subject, in *Ethics in the Public Domain*, Raz spoke of the rule of law quite singularly in terms of the 'principled faithful application of the law'.[40]

At this stage of the discussion, it feels as though we have come full circle, back to Dicey's core idea that the rule of law 'connotes a climate of legality and of legal order'.[41] With a little more meat on the bones, the three limbs remain: (1) the existence of principled normative rules, (2) adequately created and equally applicable to all legal subjects and

[34] L Fuller, *The Morality of Law*, 2nd edn (New Haven, CT: Yale University Press, 1969).
[35] *Ibid*, pp 38–9.
[36] Waldron, n 24 above, p 154.
[37] J Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980) p 270.
[38] Raz, n 22 above, pp 214–18.
[39] *Ibid*, p 218.
[40] J Raz, *Ethics in the Public Domain: Essays on the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) p 373.
[41] ECS Wade (ed), in his introduction to the 10th edition of Dicey's *Introduction to the Study of the Law of the Constitution*, n 12 above, p cx.

(3) enforced by accessible courts of general jurisdiction. These characteristics shall now be externalised, as the discussion moves to whether or not they are reflected onto the international plane.

III. THE RULE OF LAW EXTERNALISED

It is first important to clarify what is meant by externalisation. It is the process by which a feature or characteristic that exists within the inside set is projected or attributed to circumstances or causes that are present in the outside space according to an internal–external dichotomous structure. To give an example, let us take the terminology of 'sovereignty', a concept that was articulated in modern terms during the sixteenth century by Frenchman Jean Bodin.[42] The history of the word 'sovereignty' shows that, in the eighteenth century, the Swiss author Emer de Vattel externalised the main ideas associated with this internal (domestic) notion and made sovereignty relevant for the discourse of international law; in fact, it became one of its core foundational principles.[43] My goal with the rule of law is more modest, of course, but the task at hand is to pick up the essential elements of the concept, understood in its formal versions, and examine in what ways they may be found in international law. Accordingly, this section will assess: (1) the existence of principled legal normativity on the international plane; (2) how these norms are made and are applicable equally to all legal subjects and (3) the way in which normativity is enforced through adjudication.

A word of caution is in order at this point. Just as sovereignty could only be externalised *mutatis mutandis*[44] by Vattel, the present project requires some material adjustments to the features of the rule of law in order to take into account the different nature of the international legal order. What are these distinctions between domestic legal systems and the international legal system? Drawing an exhaustive list is both extremely difficult and somewhat futile, but the following categories of distinctions may be offered and should be borne in mind during the process of externalising the rule of law. They relate to the sources of law, to legal subjects and to compliance. In summary, there is no one formal norm-creating authority on the international level; states (not individuals) remain the principal legal actors and there is no enforcement mechanism (such as a police force).

[42] See S Beaulac, 'The Social Power of Bodin's "Sovereignty" and International Law' (2003) 4 *Melbourne Journal of International Law* 1.

[43] See S Beaulac, 'Emer de Vattel and the Externalization of Sovereignty' (2003) 5 *Journal of the History of International Law* 237.

[44] That is, with respective differences taken into consideration.

A. Principled Legal Normativity

In a recent article on the relationship between international law and domestic law, Mattias Kumm uses a form of externalised rule of law.[45] He too discards the substantive versions of the concept and concentrates on the narrower understanding, that is, what he suggests is the literal meaning of the expression, namely to rule 'by law'.[46] It has already been explained above why, like Kumm, I believe that it is the formal rule of law that ought to be externalised on the international plane, bearing in mind that 'formalism' refers to the attributes of law that are so significant to it as to define what law is.[47] To be *ruled by law* (that is, government by law, not by men) at the international level means, according to Kumm, the following: 'The addressees of international law, states in particular, should obey the law. They should treat it as authoritative and let it guide and constrain their actions.'[48] The international rule of law requires at the very least some basic legal ordering of affairs within a society, which international society no doubt enjoys.

Today, indeed few people would seriously doubt that there is a body of norms that enjoy the characteristics and pedigree of law on the international plane.[49] International law is regarded as true *positive law*, which forms part of a real legal system, in which 'every international situation is capable of being determined as a matter of law',[50] as Robert Jennings and Arthur Watts have put it. These two British authors also argue that the legal determination of such issues occurs 'either by the application of specific legal rules where they already exist, or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles'.[51] Whilst framed in positivist legal terms, and thus open to possible strong objections,[52] the following discussion favours a concept of law that is broad enough to include international law.

i. Certainty, Predictability and Stability

Borrowing from Dicey, but also from Hayek and Raz, the rule of law requires that normativity reach a degree of development sufficient to

[45] M Kumm, 'International Law in National Courts: The International Rule of Law and the Limits of the Internationalist Model' (2003–04) 44 *Virginia Journal of International Law* 19.
[46] *Ibid*, p 22.
[47] See nn 30–31 above and accompanying text.
[48] Kumm, n 45 above, p 22.
[49] See TM Franck, *Fairness in International Law and Institutions* (New York: Oxford University Press, 1995), who speaks of the post-ontological era of international law.
[50] R Jennings and A Watts, *Oppenheim's International Law, Vol 1*, 9th edn (London: Longman, 1992) pp 12–13.
[51] *Ibid*.
[52] See the classic piece by GL Williams, 'International Law and the Controversy Concerning the Word "Law"' (1945) 22 *British Yearbook of International Law* 146.

provide for *certainty*, *predictability* and *stability*. These values are not absolute, however, and some degree of vagueness and uncertainty in law is inevitable in any legal system, be it national or international. At the national level, both the US and Canada, for instance, have developed so-called 'void for vagueness' doctrines that address the need for certainty and predictability in domestic statutes, with intelligibility standards that allow for a good dose of 'open texture' in legislative language, to quote from Hart.[53]

At the international level, the sources of international law are set out in the Statute of the International Court of Justice (ICJ Statute),[54] at Article 38(1), the principal ones being treaties, customs and general principles of law. Here, a fundamental difference between international and domestic legal systems ought to be mentioned at the outset, thus justifying a slight adjustment in the required level of certainty in the law. Arthur Watts explained it thus:

> [I]nternational law has no central legislator, nor any legislative process in the normal (municipal) sense of the term; its norm-creating process is essentially decentralised, and so far as international conferences or meetings within international organisations may produce quasi-legislative texts the outcome represents 'legislation' by negotiation and compromise, which is not a process calculated to produce precision and clarity.[55]

This being so, the level of certainty, predictability and stability shown by international legal norms, assessed according to a somewhat reduced standard justified under the international rule of law, are no doubt adequate in a number of different substantive areas. They include international human rights law, international economic law, international labour law, international humanitarian law, the international law of the sea, the international law of state responsibility and international criminal law.

ii. Limiting Discretionary (Arbitrary) Power

The argument for a minimal rule of law at the international level finds further support when one recalls that the ideal of the rule of law with regard to the existence of principled legal normativity relates to the need to circumscribe sovereignty which, in its absolute form, may lead to *arbitrary power*. The issue boils down to how a system can limit or curtail the discretionary power of those who hold authority in a given society. When transposed onto the international plane, it is sovereignty understood

[53] HLA Hart, 'Positivism and the Separation of Law and Morals' (1957–58) 71 *Harvard Law Review* 593.

[54] 1 UNTS xvi.

[55] A Watts, 'The International Rule of Law' (1993) 36 *German Yearbook of International Law* 15 at 28.

externally that must be addressed through the international rule of law. The definition of external sovereignty given by Arbitrator Huber in the *Island of Palmas* case thus remains very relevant indeed for the present discussion: 'Sovereignty in the relations between states signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State.'[56]

However, external sovereignty also means that, vis-à-vis the outside world, states have absolute power that is unrestricted but for the first ideal of the (international) rule of law, namely the existence of a system of positive law. Judge Anzilotti, writing a separate opinion in the *Austro-German Customs Union* case, encapsulated this feature well when he spoke of '*sovereignty* (*suprema potestas*), or *external sovereignty*, by which is meant that the State has over it no other authority than that of international law'.[57] The sovereign independence of states, allowing for unrestricted assertions of power, must be balanced—and indeed is balanced—by the ideal of the international rule of law relating to principled legal normativity. Arthur Watts put it as follows:

> It is, of course, the case that States on occasion act in breach of the law, and perhaps even sometimes in complete and wilful disregard of the law … What the rule of law requires is that in their international relations States conduct themselves within an essentially legal framework; it is action which is despotic, capricious, or otherwise unresponsive to legal regulation which is incompatible with the international rule of law.[58]

Although a detailed empirical demonstration of the argument will have to wait for another day, it may nevertheless be suggested with confidence that the *extensive body of international legal rules* in many substantive areas, referred to above, does limit and curtail the exercise of discretionary power, as well as arbitrary power, by states in their relations with others.[59]

B. Adequate Creation and Equal Application of Legal Norms

Many international legal scholars, including perhaps Mattias Kumm,[60] would stop here and acknowledge the 'international rule of law' because its one principal ingredient has been found. At the *normative level*, the conduct of states in their relations is 'ruled by law', that is, by international

[56] *Island of Palmas* case (1928) 2 RIAA 829, at 838.
[57] *Austro-German Customs Union* case (1931), PCIJ Series A/B, no 41, p 57.
[58] Watts, n 55 above, p 33.
[59] *Ibid*, p 23.
[60] Note 45 above.

normativity that is sufficiently certain, predictable and stable. The minimum exists on the international plane; the first leg of Dicey's rule of law theory. But what about the international rule of law in its *functional dimensions*? More specifically, how are norms created in the international realm and do they apply equally to all legal subjects?

i. Promulgation and Publication

The first part of the inquiry essentially pertains to the *promulgation* and *publication* of written legal norms. To borrow from Raz, this rule of law value concerns the making of laws, which should be guided by open, stable, clear and general principles.[61] In the context of domestic law, the activity studied under this heading is legislation, the main source of written legal norms, with the analysis scrutinising the parliamentary process of legislative enactment. In the context of international law, the (imperfect) parallel is with treaties, one of the three formal sources of law under Article 38(1) of the Statute of the International Court of Justice and the source of written legal norms on the international plane, as opposed to customs that constitute the source of international non-written rules.[62] The general principles of law are also of less interest because, by definition, they are extracted from domestic legal systems (*in foro domestico*) and, accordingly, should be deemed to pursue rule of law values.

When focusing on the process by which written normativity is *promulgated* by means of treaties on the international plane, one is struck by the level of sophistication in the relevant rules found in the 1969 Vienna Convention on the Law of Treaties.[63] Some 108 states have ratified the Vienna Convention,[64] which has been in force since January 1980; even those states that are not conventionally bound by it recognise that, for the most part, the rules contained in it do nevertheless apply to them because they also reflect customary international law.[65] In short, it is one of the most universal international instruments, second perhaps only to the Charter of the United Nations.[66] In any event, for our purposes, it is sufficient to say that the Vienna Convention provides for all essential aspects

[61] J Raz, n 22 above , p 215.

[62] On the judge-made-law/customary international law parallel, see S Beaulac, 'Customary International Law in Domestic Courts: Imbroglio, Lord Denning, *Stare Decisis*' in CPM Waters (ed), *British and Canadian Perspectives on International Law* (Leiden: Martinus Nijhoff, 2006) p 379 at p 392.

[63] 1155 UNTS 331 (1969).

[64] As of 1 January 2007.

[65] See MN Shaw, *International Law*, 5th edn (Cambridge, Cambridge University Press, 2003) p 633.

[66] *Charter of the United Nations* (not published in the UNTS), Can TS 1945 No 7 (1945).

of international treaties: conclusion, ratification, reservations application, interpretation, validity, termination, and so on.

With respect to the *publication* of conventional international law, it should be pointed out that transparency has been formally laid down as a guiding principle since 1945 with the signing of the Charter of the United Nations, Article 102 of which provides that only treaties registered with the Secretariat can be invoked within the UN system. This essential requirement is also found in Article 80(1) of the Vienna Convention on the Law of Treaties. They are all published, updated and, nowadays, readily available in electronic form;[67] in fact, not only the UN but also domestic legal agencies in many states make treaties easily accessible to the public.[68] Accessibility has become markedly less problematic following the advent of the internet.

ii. Universality and Sovereign Equality

Does the existing system of legal norms based on treaties, as well as on other sources of law such as custom and general principles of law, apply equally to all legal subjects? *Equality* is indeed the other functional dimension of the rule of law that must be examined. It is important to recall one of the distinctive features of the international legal order, namely that states continue to be the principal actors on the international plane by virtue of the fact that they have inherent and unrestricted legal personalities (something, of course, that international organisations, corporations and individuals do not have). At risk of being branded overly traditionalist, I shall limit the discussion to the situation of states and how international law treats them; equality as it relates to non-state actors (although, intuitively, leading to similar conclusions) is a question for another occasion.

One angle to the issue of equality concerns *universality*; that is, whether or not international law applies to all the states in the world. Not too long ago, international law was, to a very large extent, the public law of Europe, relevant to the states of that continent;[69] everywhere else was basically *terra nullius*, available for colonisation or other forms of territorial exploitation.[70] This situation has, of course, drastically changed, with the different phases of decolonisation in Latin America and in Africa up until the early 1970s, and the latest episodes of liberation from Soviet

[67] See the following website: http://untreaty.un.org/.

[68] See, for example, in Canada, the following website: http://www.treaty-accord.gc.ca/.

[69] See A Orakhelashvili, 'The Idea of European International Law' (2006) 17 *European Journal of International Law* 315 at 336–8.

[70] See AP Rubin, 'International Law in the Age of Columbus' (1992) 29 *Netherlands International Law Review* 5; and MF Lindley, *The Acquisition and Government of Backward Territories in International Law* (London: Longmans, Green, 1926).

imperialism in Eastern Europe and in many parts of Asia during the 1990s.[71] Membership of the international community is now truly global, therefore making international law fully universal both in scope and in reach. There are, of course, some international legal scholars who love to remind us that international law was born in Europe and that there are, no doubt, continuing biases in favour of Western interests and ideologies.[72] But none of these authors would dare question the universality of international law, or dispute that its normativity is applicable to all members of the international community.

One primordial value of the rule of law—found in Dicey, Hayek and Raz, as well as others—relates to the need for all legal subjects to enjoy *equality* before the law. In international law, there is a long-standing principle, dating back to the classical legal scholarship on the subject, that all states of the international community, although (like human beings) not at all equal in absolute terms,[73] stand equally within the normative system.[74] Already in the eighteenth century, Emer de Vattel wrote the following on the legal equality of states:

> Since men are naturally equal, and a perfect equality prevails in their rights and obligations, as equally proceeding from nature—Nations composed of men, and considered as so many free persons living together in a state of nature, are naturally equal, and inherit from nature the same obligations and rights. Power or weakness does not in this respect produce any difference. A dwarf is as much a man as a giant; a small republic is no less a sovereign state than the most powerful kingdom.[75]

Accordingly, equality of states in international law means that 'whatever is lawful for one nation is equally lawful for any other; and whatever is unjustifiable in the one is equally so in the other'.[76]

Since the signing of the Charter of the United Nations, we speak of the *sovereign equality* of states,[77] which constitutes one of the seven principles of the organisation as set out in Article 2. With the Declaration on Principles of International Law Concerning Friendly Relations and

[71] See, generally, M Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2002).

[72] See M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 *European Journal of International Law* 113.

[73] See RW Tucker, *The Inequality of Nations* (New York: Basic Books, 1977).

[74] See B Kingsbury, 'Sovereignty and Inequality' (1998) 9 *European Journal of International Law* 599 at 599.

[75] E de Vattel, *The Law of Nations; or, Principles of the Law of Nature, applied to the Conduct and Affairs of Nations and Sovereigns*, trs J Chitty (Philadelphia, PA: Johnson Law Booksellers, 1863) p lxii.

[76] *Ibid*.

[77] On the origin and the development of the expression 'sovereign equality' in international law, see RA Klein, *Sovereign Equality Among States: The History of an Idea* (Toronto: Toronto University Press, 1974).

Co-operation Among States in Accordance with the Charter of the United Nations,[78] a General Assembly resolution adopted by the United Nations in 1970, sovereign equality became one of the basic principles of international law. 'All States enjoy sovereign equality,' it reads. 'They have equal rights and duties and are equal members of the international community, notwithstanding differences of an economic, social, political or other nature.' In particular, it provides that sovereign equality entails that states are 'juridically equal', that is to say, all members of the international community are equal in the eyes of the law.

The meaning of sovereign equality in international law for the purpose of the international rule of law must be explained further. Of course, it cannot mean that all legal norms apply to every state in the same way; some of them may only apply to certain states because of their situations.[79] For instance, landlocked states are not submitted to most of the regime of the 1982 United Nations Convention of the Law of the Sea,[80] without thereby prejudicing whatsoever any equality value. What matters, really, is that no discrimination occurs in the way in which international normativity applies to states. If you are a coastal state, the legal regime will apply to you just as it applies to all the other coastal states around the world, whether large or small, whether powerful or weak, whether militarily expansionist or pacifist. Arthur Watts explicated thus:

> [A]ll States which come within the scope of a rule of law [i.e. international legal norm] must be treated equally in the application of that rule to them. There must, in other words, be uniformity of application of international law and no discrimination between States in their subjection to rules of law [i.e. international legal norms] which in principle apply to them.[81]

Put in those terms, there is little doubt that the normativity on the international plane applies equally to all states, which are the main legal subjects. In practice, there may be cases where one might wonder whether, for instance, the prohibition on the use of force applies in the same way to a superpower like the US, an obvious question in relation to the illegal invasion and occupation of Iraq. The theory remains clear, however, in that sovereign equality entails similarly situated states being treated in the same way by international law, with no discriminatory treatment tolerated by the system.

There is another aspect of the sovereign equality of states that should be noted for the present purposes, namely that states are not only equal in how legal norms apply to them, but are also equal in how they

[78] GA Res 2625 (XXV), UN Doc A/8028 (1970).
[79] Watts, n 55 above, p 31.
[80] 1833 UNTS 396 (1982).
[81] Watts, n 55 above, p 31.

participate in the creation of international normativity.[82] In relation to treaties, Article 6 of the Vienna Convention on the Law of Treaties provides: 'Every State possesses the capacity to conclude treaties.' It is also significant that treaty-making conferences generally favour an egalitarian procedure of one state, one vote for the negotiation and adoption of treaty texts. Moreover, the systems of reservations, entry into force, modification and termination of treaties, found in the Vienna Convention, assume that states participate equally in conventional regimes. As regards customary international law, a similar reasoning based on the ideal of sovereign equality is adopted.[83] Indeed, the practice of every state with an interest in the legal issue (see the example of the law of the sea, above) as well as their *opinion juris* are both significant in the process of determining whether a custom has formed.[84] This equal role in the formulation of international normativity provides further strength to the claim that the value of the rule of law relating to equality is projected onto the international plane.

C. Adjudicative Enforcement of Normativity

We now turn to what is without doubt the most difficult set of formal values associated with the rule of law in terms of externalisation onto the international plane, namely the presence of courts of general jurisdiction which are easily accessible to legal subjects for the adjudication of disputes ruled by international normativity. A few distinguishing aspects of the international legal system must be taken into account, with a view to adjusting the terms of inquiry into how these elements are reflected internationally. Here, too, the fact that states are the main (though no longer exclusive) subjects of international law is again relevant, which explains why the following discussion considers international judicial enforcement in the traditional sense, that is to say in cases involving disputes between states. In fact, the focus is on the International Court of Justice, 'the principal judicial organ of the United Nations', according to Article 92 of the Charter of the United Nations, and by far the most important in the international legal system. It is also useful to recall yet another distinctive feature of the international

[82] See N Krisch, 'More Equal than the Rest? Hierarchy, Equality and US Predominance in International Law' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) p 135.

[83] See SJ Toope, 'Powerful but Unpersuasive? The Role of the USA in the Evolution of Customary International Law' in M Byers and G Nolte (eds), *United States Hegemony and the Foundations of International Law* (Cambridge: Cambridge University Press, 2003) p 135.

[84] See, generally, MH Mendelson, 'The Formation of Customary International Law' (1998) 272 *Recueil des Cours* 155.

legal system, namely that there is no system for guaranteeing ultimate compliance if states refuse to follow judicial decisions.[85] This characteristic, however, must not be overstated with the suggestion that judgments in international law are not binding. On the contrary, they are indeed binding on the parties to the case pursuant to Article 94 of the Charter of the United Nations, an aspect that will be explored in greater detail below.[86]

i. Court of General Jurisdiction

Having now made these preliminary points, the analysis will proceed first with the issue of whether international normative adjudication falls within a *general jurisdiction*. There is no doubt that there is a judicial structure on the international plane, at the centre (though not the apex) of which is the International Court of Justice, which can deal with all legal disputes between states. The so-called 'fragmentation' of international law due to the multiplicity of international adjudicative bodies has recently caused much ink to flow in international legal circles, the report by the International Law Commission (led by Martti Koskenniemi) being the latest manifestation.[87] For present purposes, the risk that the many adjudicative bodies might apply international law differently, and so create 'boxes'[88] of normativity and 'self-contained regimes',[89] can be dismissed. The intuition is that, under the leadership of the International Court of Justice, the dangers of fragmentation are manageable.

In theory, the jurisdiction of the International Court of Justice over contentious matters is plenary, as far as states are concerned.[90] With respect to *ratione personae* jurisdiction, Article 34(1) of the ICJ Statute is clear: 'Only states may be parties in cases before the Court.' In regard to *ratione materiae* jurisdiction, Article 36(1) provides: 'The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and

[85] See, generally, B Kingsbury, 'The Concept of Compliance as a Function of Competing Conceptions of International Law' (1998) 19 *Michigan Journal of International Law* 345.

[86] See nn 116–20 below and accompanying text.

[87] International Law Commission, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law', Report of the Study Group, 58th Session (2006), Doc A/CN/.4/L.682.

[88] On the theory of 'boxes', see M Koskenniemi, 'International Law: Constitutionalism, Managerialism and the Ethos of Legal Education' (2007) 1 *European Journal of Legal Studies*, availanle at www.ejls.eu/.

[89] See B Simma and D Pulkowski, 'Of Planets and the Universe: Self-contained Regimes in International Law' (2006) 17 *European Journal of International Law* 483.

[90] See RY Jennings, 'The Role of the International Court of Justice' (1997) 68 *British Yearbook of International Law* 1.

conventions in force.' Under Article 65(1) of the ICJ Statute, the Court also has jurisdiction to give advisory opinions in non-contentious matters,[91] a procedure that can be initiated not only by states, but also by 'whatever body [that] may be authorized by or in accordance with the Charter of the United Nations to make such a request'. At first glance, therefore, the jurisdiction of the International Court of Justice seems to be comprehensive; one may even be tempted to draw an analogy with the inherent jurisdiction of domestic courts.

Of course, this picture is a mere illusion, as the jurisdiction of the International Court of Justice is anything but comprehensive, let alone inherent. Indeed, it is well known that the contentious jurisdiction of the Court depends in all cases on whether or not the states involved have consented to the judicial proceedings.[92] This feature is usually referred to as the lack of compulsory jurisdiction of the International Court of Justice—or any international adjudicative body for that matter[93]—over contentious matters. To put it another way, states cannot be forced to appear before a court or tribunal in order to settle a legal dispute by means of adjudication. This position is explained by the traditional notion of state sovereignty and by the voluntary (that is, consensual) normative theory of international law.[94] At this point of the inquiry, I would agree with Arthur Watts that: 'Such a purely consensual basis for the judicial settlement of legal disputes cannot be satisfactory in terms of the rule of law.'[95]

However, the situation proves to be not so bad given that, in reality, states do not have to consent on a case-by-case basis each time they are involved in a legal dispute. States can give their consent in advance to the jurisdiction of an adjudicative body in regard to future disputes; with respect to the ICJ, as Article 36(2) of the ICJ Statute provides that states

> may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:(a) the interpretation of a treaty; (b) any question of international law; (c) the existence of any fact which, if established, would constitute a breach of an international obligation; (d) the nature of extent of the reparation to be made for the breach of an international obligation.

[91] See P-O Savoie, 'La CIJ, l'avis consultative et la fonction judiciaire: entre décision et consultation' (2005) 42 *Canadian Yearbook of International Law* 35.

[92] See S Rosenne, *The Law and Practice of the International Court, 1920–2005, Vol II, Jurisdiction* (Leiden: Martinus Nijhoff, 2006) p 549.

[93] See, generally, J Allain, *A Century of International Adjudication—The Rule of Law and its Limits* (The Hague: TMC Asser Press, 2000).

[94] See Rosenne, n 92 above, pp 549–50.

[95] Watts, n 55 above, p 37.

This is known as the 'optional clause' to the contentious jurisdiction of the International Court of Justice.[96]

There are commitments to the same effect found in a number of other treaties, by which states consent in advance to the jurisdiction of an international court to settle legal disputes covered by the conventional regime. These dispute settlement provisions may be optional, leaving states the option to accept the jurisdiction as cases arise, or they may be mandatory for parties to the treaty, thus leaving no choice as to whether to submit to the adjudicative body in a particular dispute. This latter situation, as well as those involving the ICJ 'optional clause', is the closest one gets to a *general jurisdiction* on the international plane. Although not a perfect scenario, it goes in the right direction in pursuing the value of the rule of law pertaining to the enforcement of normativity, especially given the reality of state sovereignty in the international realm.[97]

ii. Judicial Review

An issue related to that of general jurisdiction is whether or not the International Court of Justice has competence to exercise *judicial review* of the decisions and actions of the other organs of the United Nations system,[98] including the Security Council. The power to review the acts of the latter is the most difficult—and controversial—question; in a sense, however, an affirmative answer would lay the ground for recognising a general competence of international judicial review for the ICJ. This would be a clear gain for the rule of law concerning the legality of decisions on the international plane, in particular with respect to the matters falling within the competence of what is considered the 'executive' of the United Nations, the Security Council.

It is instructive to go back to 1945, at the time of the adoption of the Charter of the United Nations in San Francisco,[99] where Belgium suggested establishing a procedure by which disputes between UN organs over the interpretation of the UN Charter would be referred to the International Court of Justice, thus giving it a sort of supervisory judicial

[96] See F Orrego Vicuña, 'The Legal Nature of the Optional Clause and the Right of a State to Withdraw a Declaration Accepting the Compulsory Jurisdiction of the International Court of Justice' in N Ando, E McWhinney and R Wolfrum (eds), *Liber amicorum Judge Shigeru Oda* (The Hague: Kluwer Law International, 2002) p 463.

[97] See S Oda, 'The Compulsory Jurisdiction of the ICJ: A Myth? A Statistical Analysis of Contentious Cases' (2000) 49 *International and Comparative Law Quarterly* 251.

[98] See HK Hubbard, 'Separation of Powers within the United Nations: A Revised Role for the International Court of Justice' (1985) 38 *Stanford Law Review* 165.

[99] See, generally, S Rosenne, *The Law and Practice of the International Court, 1920–2005, Vol I, The Court and the United Nations* (Leiden: Martinus Nijhoff, 2006) pp 57–60.

role.[100] The proposal was, however, rejected. In the *Certain Expenses* case, the ICJ gave effect to the intention of the constituting authority not to empower it with a judicial review function:

> In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted.[101]

In the *Namibia* case in 1971, the Court once again held that it 'does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned'.[102] In fact, the ICJ has always adopted a sort of presumption of legality in favour of UN organs, which translates into a high degree of judicial deference shown for their decisions. Therefore, save the most fundamental irregularities, there is little (in fact, no) chance of the Court exercising a power of judicial review, especially with respect to the Security Council.

This position represents the traditional thinking on the issue which, however, seems to be in the process of reconsideration. In a recent speech given at the London School of Economics and Political Science, for instance, Judge Rosalyn Higgins, President of the International Court of Justice, asked:

> Are these [Security Council's] decisions judicially reviewable for non-arbitrariness and for constitutionality? This is one of the great unanswered questions: The International Court of Justice is a main organ of the UN and its principal judicial organ. Whether it may judicially review the decisions of other organs, taken within the field of their allocated competence, is not yet fully determined.[103]

The *Lockerbie* case[104] would have provided the opportunity for the Court to address questions of judicial review insofar as Libya challenged decisions by the Security Council on sanctions in relation to the Pan Am Flight 103 affair. However, the case was withdrawn, leaving these issues to be

[100] United Nations, *Documents of the United Nations Conference on International Organization (San Francisco Conference, 1945), Vol 13* (New York, United Nations Information Organizations, 1946) pp 645 and 668.

[101] *Certain Expenses of the United Nations (Art 17, paragraph 2, of the Charter)* (1962) *ICJ Reports* 151 at 168.

[102] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (1971) *ICJ Reports* 16 at 45.

[103] R Higgins, 'The ICJ, the United Nations System, and the Rule of Law', London School of Economics and Political Science, 13 November 2006, p 2, available at www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061113_Higgins.pdf.

[104] *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie*, Provisional Measures, (1992) *ICJ Reports* 1. The *Lockerbie* case was discontinued on 10 September 2003 by Order of the Court, (2003) *ICJ Reports* 325.

reconsidered at a later date. There are more signs now, however, that the International Court of Justice is getting ready to embrace a judicial review function, with some even suggesting that it is an emerging general principle of law,[105] which would be excellent news for the international rule of law.

iii. Independence and Impartiality

This part of the inquiry, on judicial independence and impartiality, is straightforward because virtually nobody questions these attributes with regard to the International Court of Justice.[106] In Article 2 of the ICJ Statute the first provision under the heading 'Organization of the Court', provides as follows:

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

Judges are elected jointly by the General Assembly and the Security Council of the United Nations, from a list provided by national authorities. Pursuant to Article 33 of the ICJ Statute, the budget of the Court is voted by the General Assembly, although there is obviously no financial accountability between the two.

Impartiality, for its part, is addressed in Article 20 of the ICJ Statute, which provides that: 'Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously'. The issues of incompatibility with outside activities and of previous involvement in other cases are regulated in Articles 16 and 17, respectively. With regard to the situation of ad hoc judges and their previous or subsequent work as legal agents, the Court has adopted practice statements. One feature of independence and impartiality is the judge's freedom from dismissal, putting barriers in the way of the removal of judges from office; Article 18(1) of the ICJ Statute provides for the rule: 'No member of the Court can be dismissed unless, in the unanimous opinion of the other members, he has ceased to fulfil the required conditions.'

Beyond these formal elements found in its constituting documents, the Court and its judges do enjoy a high degree of independence

[105] See E de Wet, 'Judicial Review as an Emerging General Principle of Law and its Implications for the ICJ' (2000) 47 *Netherlands International Law Review* 181.

[106] See G Guillaume, *La Cour internationale de Justice à l'aube du XXIème siècle: Le regard d'un juge* (Paris: Pedone, 2003) p 120.

and have demonstrated great impartiality in practice. As the current President of the International Court of Justice, Judge Rosalyn Higgins, recently said:

> Judges [are] nominated nationally but elected by the General Assembly and the Security Council, under terms whereby their conditions of service may not be altered during their tenure. Although the Court reports annually to the General Assembly on its year's work, the judicial decisions are subject to no comment (still less rebuke) by the Assembly or its Members. There is a proper separation of powers, and the Judges of the ICJ are mercifully free of any pressures from their national governments. That the Court applies the law consistently and impartially is doubted nowhere.[107]

Though obviously not a disinterested opinion, it certainly represents the view of the very large majority of states involved in, and of people associated with, the international justice system.

iv. Accessibility

The courts and tribunals in a legal system must be easily *accessible* to all its legal subjects, something that is now examined with respect to the International Court of Justice. We saw earlier that, with the exception of the possibility of lodging a request for an advisory opinion,[108] there is no role for legal actors other than states in ICJ procedures; its contentious jurisdiction is indeed strictly limited to inter-state disputes.[109] According to Article 35(1) of the ICJ Statute, the Court is open to the states that are parties to this instrument which, in fact, include all the states that are members of the United Nations,[110] as well as non-member states 'on conditions to be determined in each case by the General Assembly upon the recommendation of the Security Council'.[111] Pursuant to Article 35(2) of the ICJ Statute, the Court is even open to states that are not parties to this instrument, on conditions laid down again by the Security Council, although 'in no case shall such conditions place the parties in a position of inequality before the Court'. There is an obvious effort to assure equal access and equal status to all states that may appear before of the International Court of Justice, which is indeed in agreement with the spirit of the rule of law as reflected onto the international plane.

[107] Higgins, n 103 above, at 3.
[108] Note 91 above and accompanying text.
[109] Note 90 above and accompanying text.
[110] See Art 93(1) of the Charter of the United Nations, which reads: 'All Members of the United Nations are *ipso facto* parties to the Statute of the International Court of Justice.'
[111] *Ibid*, Art 93(2).

v. Effectiveness

Do states follow international law and, in particular, do they submit to the decisions of international adjudicators? In other words, is the international normativity as applied by the international judiciary *effective*? One recalls what Louis Henkin famously wrote about general compliance with international law: 'It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.'[112] Although less catchy, Arthur Watts' view is to the same effect: 'In practice, the overwhelming tendency of States in their day-to-day dealings with other States is to apply and abide by international law as a normal part of the regular pattern of international affairs.'[113]

The more important question, insofar as the rule of law value concerning the enforcement of legal norms, is whether or not the decisions by the ICJ, after the full involvement of the international justice system in contentious cases, are followed through by the (losing) states. Put differently, when push comes to shove, and a state must really choose between ultimate compliance with international normativity as decided through adjudication, does it honour the international rule of law? On this issue, remarks made by Judge Rosalyn Higgins, President of the ICJ, are again apposite:

> Contrary to a widespread misconception, the Court's Judgments are both binding and almost invariably complied with. Out of the 91 contentious cases that the Court has dealt with since 1946, only 4 have in fact presented problems of compliance and, of these, most problems have turned out to be temporary.[114]

Indeed, there is a perturbing myth among people interested in the international justice system to the effect that states not only retain a discretionary power to comply with international judicial decisions, but actually use it to reject them. Empirically, this is simply not true.[115]

Article 94(1) of the Charter of the United Nations sets out in clear terms the legal obligation to comply with ICJ judgments: 'Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.' As Shabtai Rosenne noted, however, the broad language is deceptive in its simplicity: 'The undertaking to comply with the decisions of the Court does not indicate in whose favour the undertaking is given',[116] for instance.

[112] L Henkin, *How Nations Behave*, 2nd edn (New York: Columbia University Press, 1979) p 47.
[113] Watts, n 55 above, p 41.
[114] Higgins, n 103 above, p 3.
[115] See C Paulson, 'Compliance with Final Judgments of the International Court of Justice since 1987' (2004) 98 *American Journal of International Law* 434.
[116] Rosenne, n 99 above, p 205.

The vagueness of the relevant terms might explain the suggestion that the International Court of Justice is 'a toothless bulldog'.[117] But this underestimates the complex dynamics between the different organs of the United Nations when it comes to the enforcement of judicial decisions.[118] Most importantly, Article 94(2) of the Charter of the United Nations provides that:

> If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment.

Of course, it must be acknowledged that the Security Council has discretion in this process of enforcement, which makes some say that Article 94(2) 'should not be overestimated as a means for executing judgments of the ICJ, in particular if "veto-powers" [that is, of the five permanent members of the Security Council] are concerned'.[119] It is also true, however, that the full potential of the judicial enforcement provision of the UN Charter has not been really tested just because, on the ground, judgments of the International Court of Justice are complied with unreservedly in almost all instances.[120] De facto, therefore, this last element of the rule of law value relating to the enforcement of legal norms is undoubtedly reflected in a satisfactory fashion onto the international plane, at least as regards the principal judicial organ of the UN system.

IV. CONCLUSION

To summarise, the above discussion has shown that the formal core values of the rule of law are indeed reflected, to a large extent, in the essential features of the international legal system. One may even be tempted to speak of an *emerging* 'international rule of law', in terms of the externalisation of rule of law values. The strongest claim is at the level of normativity

[117] GA Ajibola, 'Compliance with Judgments of the International Court of Justice' in MK Bulterman and M Kuijer (eds), *Compliance with Judgments of International Court: Proceedings of the Symposium Organised in Honour of Professor Henry G Schermers by Mordenate College and the Department of International Public Law* (The Hague: Martinus Nijhoff, 1996) p 9 at p 11.

[118] See M Al-Qahtani, 'The Role of the International Court of Justice in the Enforcement of Its Judicial Decisions' (2002) 15 *Leiden Journal of International Law* 781.

[119] K Oellers-Frahm, 'Article 94 UN Charter' in A Zimmermann, C Tomuschat and K Oellers-Frahm (eds), *The Statute of the International Court of Justice: A Commentary* (Oxford: Oxford University Press, 2006) p 159 at p 175.

[120] See SM Schwebel, 'Commentary: Compliance with Judgments of the International Court of Justice,' in MK Bulterman and M Kuijer (eds), *Compliance with Judgments of International Court:Proceedings of the Symposium Organised in Honour of Professor Henry G Schermers by Mordenate College and the Department of International Public Law* (The Hague: Martinus Nijhoff, 1996) p 39 at p 40.

per se, where nobody nowadays would doubt that the conduct of states is ruled by law, that is to say by legal norms providing for certainty, predictability and stability. The verdict as regards the functional dimension of the rule of law, concerning the creation and application of international law, is also relatively positive. International written legal norms found in treaties are promulgated satisfactorily and their publication is adequate; furthermore, international law is now universal in its reach and the fundamental principle of sovereign equality ensures that, in most cases (or with respect to most issues), similarly situated legal subjects (states) are treated in the same way; that is, without discrimination.

However, the institutional level remains problematic for the international rule of law, in spite of improvements in recent years. The continuing lack of compulsory jurisdiction for the International Court of Justice cannot be ignored, even if most states have committed to international adjudication through the optional clause. There is also a will to open the door to a power of judicial review for the ICJ, which could rule on the legality of the decisions of other UN organs, such as the Security Council. No one seriously contests the independence and impartiality of the International Court of Justice, and the judicial process is truly accessible to all states, the principal international legal subjects. In terms of effectiveness, the record of compliance is outstanding, but the Security Council's discretion over the ultimate enforcement of judgments still offends the international rule of law.

This picture of the situation of the rule of law on the international plane is, of course, flawed. I acknowledge that, in conducting the present analysis, many choices had to be made in order to limit the scope of the inquiry. For instance, treaties were the only source of normativity examined in regard to the first set of rule of law values, with adjustments made to take into account the absence of a central norm-creating authority on the international plane. Similar limits applied for the discussion of the creation of legal norms, where international customary law was neglected. The ideal of equality was assessed in relation to states only, although the modern trend is to recognise an international role for other legal actors, such as individuals. Finally, I looked only at the International Court of Justice to see whether the rule of law values relating to the existence of a judicial system were reflected onto the international plane. In truth, the present discussion on the international rule of law is not meant to be comprehensive. But it is a start. In fact, it is a serious effort to examine the situation of international law today, understood in traditional terms—with treaties as the main source, states as the principal actors, and the ICJ as the leading court.

By way of concluding remarks, it is opportune to bring back the theme of the social power of the 'rule of law,' that is of the 'international rule of law'. The great success of this social–mental phenomenon has been noted

in both legal studies and political science.[121] One may gain a sense of the popularity of the international rule of law language from the final document of the 2005 World Summit, where some 170 heads of state and government met for a high-level plenary meeting at the sixtieth session of the United Nations General Assembly.[122] The expression 'rule of law' is found no less than 12 times, including in the first section on 'values and principles', as well as under the headings of development, human rights and investments. There is even a specific section on the rule of law, where the states recognise 'the need for universal adherence to and implementation of the rule of law at both the national and international level'. Furthermore, it advocates the creation of a Rule of Law Assistance Unit within the Secretariat, 'so as to strengthen United Nations activities to promote the rule of law, including through technical assistance and capacity-building'.

The language of the rule of law has fallen victim to its own success.[123] In a sense, it has become the new 'buzzword' (or 'buzz-phrase') at both the domestic and the international level, in terms of which political and justice enterprises are examined and explained.[124] The modern vernacular of political science (mainly international relations theorists) and of legal studies (mainly constitutional theorists) has also adopted the terminology of the rule of law with great enthusiasm, using it in relation to practically every aspect of the organising structure-system in society;[125] from regional criminal justice, to national transitional justice, to transnational social justice; from domestic democratic reforms, to supranational institutional reforms, to international development reforms. I borrow from Ogden and Richard's philosophy of language to suggest that the 'rule of law' is a formulation of 'Hurrah!' words;[126] that is to say, words

[121] See, for instance, D Jacobs, 'The Rule of International Law' (2006–07) 30 *Harvard Journal of Law and Public Policy* 15; and B Zangl, 'Is there an Emerging International Rule of Law?' (2005) 13 (suppl 1) *European Review* 73.

[122] United Nations, *World Summit Outcome*, GA Res 60/1 (2005), available at www.un.org/summit2005/.

[123] For a taste of the far-reaching success of the rule of law language, see BZ Tamanaha, 'The Rule of Law for Everyone?' (2002) 55 *Current Legal Problems* 97 at 98–100.

[124] See K Samuels, 'Rule of Law Reform in Post-conflict Countries: Operational Initiatives and Lessons Learnt' (2006) *World Bank Social Development Papers, Conflict Prevention & Reconstruction* 2006/37.

[125] See the different contributions to the present volume, as well as in D Dyzenhaus (ed), *Recrafting the Rule of Law* (Oxford: Hart Publishing, 1999). See also, at the purely domestic level, S Coyle, 'Positivism, Idealism and the Rule of Law' (2006) 26 *Oxford Journal of Legal Studies* 257; and DM Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press, 2004).

[126] See CK Ogden and IA Richards, *The Meaning of Meaning: A Study of the Influence of Language upon Thought and of the Science of Symbolism*, 2nd edn (London: Kegan Paul, 1927) pp 149–50, where the authors suggest dividing the functions that language can fulfil into two categories, namely the *symbolic* use of words and the *emotive* use of them. In the latter function, language is used to express or excite feelings and attitudes; the language thus used can be referred to as 'Hurrah!' words and 'Boo!' words, because of the feelings, good or bad, that they bring to the speakers and/or listeners.

that provoke a positive effect—that generate a good feeling in those who hear them.

Unfortunately, this is also true when the rule of law language is utilised by the Robert Mugabe and other tyrants of the world,[127] or by economically aggressive state governments like that in Beijing.[128] In short, there are reasons to be both happy and to be concerned about the externalisation of the concept,[129] reasons to be simultaneously for and against the international rule of law.[130]

[127] See statements reported in Tamanaha, n 123 above, pp 99–100.

[128] See the Chinese Government's statement on the rule of law at the national and international levels, reported by Duan J in (2007) 6 *Chinese Journal of International Law* 185.

[129] Every virtuous thing has a dark side, David Kennedy would say: see D Kennedy, *The Dark Side of Virtue: Reassessing International Humanitarianism* (Princeton, NJ: Princeton University Press, 2004).

[130] I owe this formulation to Brian Tamanaha, who expressed a similar view with respect to the rule of law in general during a discussion at the Florence conference. See more generally, his contribution to the present volume (ch 1).

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