

SONDERDRUCK AUS
FESTSCHRIFT FÜR
ANDREAS HELDRICH

ZUM 70. GEBURTSTAG

HERAUSGEGEBEN
VON

STEPHAN LORENZ
ALEXANDER TRUNK
HORST EIDENMÜLLER
CHRISTIANE WENDEHORST
JOHANNES ADOLFF



VERLAG C. H. BECK MÜNCHEN 2005

GERHARD CASPER

Rule of Law? Whose Law?

The rule of law is a concept much in use to identify what is missing in many countries. It is a widespread and frequently repeated truism that the world in general, and the developing world in particular, needs "the rule of law." Most people do not have a very precise idea of what they mean when they invoke the rule of law. The reference is rich in historical and doctrinal connotations and therefore suggestive of meaning that is, however, hard to pin down.

Depending on who is speaking, the call for the rule of law may be fairly minimalist or fairly expansive. A minimalist view asserts that development depends on having relatively clear rules of the game that will be applied in consistent ways to citizens and foreigners alike. This view is concerned not primarily with the content of the rules but with having rules to begin with. It stresses the need for legal certainty. Even this "minimalist" view can have far-reaching implications in that it requires institutions that will enable the consistent application of law free from ad hoc influences, especially governmental and adjudicatory institutions that are free, or at least relatively free, from corruption. Sometimes the call for the rule of law seems to suggest "no more" than legal certainty, including an independent judiciary – in itself a rather tall order.

A second, much more demanding, view asserts that the rule of law must meet certain substantive requirements, in addition to legal certainty, in order to promote economic development effectively. These substantive requirements may range all the way from the recognition of private property rights and the freedom to contract to calls for sophisticated securities laws, transactional transparency, good corporate governance, stock markets, antitrust laws, and the like. From this vantage point, the rule of law thus understood is the sine qua non for setting economic forces and energies free.

A third view extends the substantive scope of the rule of law to the protection of a wide-ranging panoply of rights that are identified as human rights such as the right to speak and associate freely, the right to the free exercise of one's religious faith, the right not to be discriminated against on the basis of sex, race, nationality, ethnicity, and the right to due process.

If one includes among human rights the right to participate in governance, as is indeed the case with the Universal Declaration of Human Rights (Art. 21), then the concept of the rule of law, fourthly and most expansively, demands democracy or something approaching it. *Thomas Paine*, for whom "a Government of our own" was "our natural right," contrasted this concept of the rule of law succinctly with absolutism.

“For as in absolute Governments the King is Law, so in free countries the Law *ought* to be King; and there ought to be no other.”¹

I think it is useful to keep in mind a spectrum of views, various levels, as it were, of the rule of law, to assure that we do not get bogged down too quickly in a morass of ambiguities. Calls for the rule of law usually are quite undifferentiated and rarely specify what conditions have to be met in order to justify the conclusion that, in a given context, the rule of law is being furthered. In political speech, though, it seems increasingly the case to talk about the protection of human rights *and* the rule of law. If anything is meant by this differentiation, it suggests that the rule of law is a narrower concept.

Even if one accepts my distinctions, one remains, within each of the four categories, on very uncertain ground as soon as we descend, as is imperative, to lower levels of abstraction. What qualifies as the consistent application of rules under ever changing circumstances? How precisely do we define property and how far do we go in its protection (for instance, in the very controversial area of intellectual property)? What process is due whom in what context? What electoral arrangements guarantee a meaningful right to vote, a right to vote effectively?

Raising these questions makes two simple points. First of all, the concept of the rule of law is a fairly empty vessel whose content, depending on legal cultures and historical conditions, can differ considerably and therefore can give rise to considerable disagreements and, indeed, conflicts.

Secondly, while mostly associated with the Western world, the concept, even within the West, is not rigidly defined. While the concept *qua* concept can be traced back as far as the ancient Greeks and while the rationalization of law reached triumphs of refinement as early as Rome, the rule of law in any but rudimentary or approximating ways was not achieved in the West until rather recently and allows for different approaches even now. Not only is a fairly stringent rule of law in Western countries of relatively recent origin (let us say the 17th to the 18th century), but there have been the most serious lapses well into the 20th century. Think, for instance, of Nazi Germany. Western countries have taken their time in forming the appropriate habits. We should therefore find it easy to avoid a Western superiority complex. Indeed, to my mind, the rule of law remains a ceaseless challenge everywhere.

Thus, let me turn to the more specific question whose or what law is to rule? When American lawyers or newspapers or politicians refer to the rule of law, they often, and parochially, have American law and institutions in mind. However, even Americans can hardly believe that China will want to seek salvation in civil jury trials. Indeed, no country other than the United States does. As *Martin Krygier* has put it, “the rule of law is not a recipe for detailed institutional design”, it is “an interconnected cluster of values.”² The concept of the rule of law does not refer us to American law or French law, or the law of the common law countries or the law of the civil law countries. Instead, the quest for the rule of law is relatively open-ended and neither needs to be nor should be acontextual.

¹ *Paine*, *The Political and Miscellaneous Works of Thomas Paine*, 1st ed., 1819, p. 32.

² Smelser/Baltes (eds.)/*Krygier*, *International Encyclopedia of the Social & Behavioral Sciences*, 1st ed., 2001, p. 13404.

This proposition will strike those as unpersuasive who think of the rule of law as rule of *the* law, i. e., law that is universal in nature. Universal law has three major strands: divine law, natural law, and public international law. All three universalist approaches have had, and continue to have, followers all over the world.

In contradiction to universalist views, the major phenomenon that has characterized the modern world has been particularistic law. "Sovereign" nation states have been understood to constitute largely autonomous legal systems. A rule of recognition, in this model, tells us that something is recognizable as law to the extent that it is recognized as the law of a particular nation state. Law thus recognized may, of course, include international law or the law of regional interstate organizations, such as the European Union. It may also reflect legal traditions that are shared with other countries, such as Roman law in civil law countries, the common law in the countries of the former British Empire, or the adoption of foreign legal codes as was the case with the French Code Civil in Latin America, the German civil code in Japan (1898), or the Swiss civil code in Turkey (1926). However this may be, the state in its territory has been seen as the source of law recognition.

While throughout history "foreign" legal principles, legal rules, legal institutions have been voluntarily and involuntarily, adopted or "received" by other legal systems, they, of course, can and will clash with local law, local culture, local habits. This has clearly been the case during the period of colonialism. The colonial experience in this regard, though by no means all bad, has led to cynicism when demands for the rule of law are advanced in the context of globalization. They are often seen as a cover for hegemonic aspirations or colonialism by other means. I shall return to these issues following a short consideration of the universalist approaches.

First, let me focus on two examples of universal religious claims, Christianity and Islam. Both believe that there is only one God. However, in spite of origins that Christianity and Islam have in common, their belief systems seem to be mutually exclusive. Furthermore, while the Christian world has evolved a distinction between religion and the state and therefore between religious law and secular law, Islam is a religion that does not distinguish between the civil and the religious spheres as it dominates states that recognize only the Islamic faith. Islamic law is an integral part of that faith. In this context the rule of law means extending the Shari'ah.

Other, mostly secular, universal approaches are those based on various natural law theories. The very concept of "human" rights draws on millennia of philosophical and theological endeavors that attempt to derive normative propositions from understandings of human nature. Alas, in spite of their overall historical influence, natural law theories have not been able to overcome epistemological hurdles to provide a compelling basis and vision for a universal rule of law. Culture and malevolence have remained strong when juxtaposed to "oughts" derived from various interpretations of nature.

The third universal approach to the rule of law, international law, has derived most of its authority from agreement, consensus, custom among nation states. It has, at this point in history, one great practical advantage: Much international human rights law is, if not considered binding worldwide, then at least highly authoritative. Virtually all states, including many that tend to be wary of "Western" values, have acceded to the United Nations Charter, which itself commits the United Nations to

promote and encourage “respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language and religion.” As of November 2003, 151 countries are parties to the International Covenant on Civil and Political Rights, 148 to the International Covenant on Economic, Social and Cultural Rights.³ While Western in origin, these rights can claim a large measure of universal, if at times rather rhetorical, acceptance, can claim to be law that should rule, at least in principle. These human rights standards have also been incorporated into the constitutions of many states that were formed after 1945.

The view that human rights law represents “higher law” is frequently countered by the invocation of opposing cultural traditions. *Guyora Binder* has argued that the states that have resulted from colonialism and its withdrawal often have no unifying national culture as such. Instead, many different cultural structures, including local village custom, broad religious traditions, but also the global state system and global business activities influence the norms of some or indeed everybody.

I quote *Binder*: “[T]he cultural relativism critique of international human rights law as an expression of western cultural imperialism depends on the related ideals of national culture and national self-determination. And both these ideals may be no less ‘foreign’ than Western ideals of human rights. Of course human rights standards are culturally relative, and of course human rights law is a Western institution. So are the states that human rights law sets out to restrain.”⁴

While this view of the matter has some rhetorical force, it does not provide a magic formula that enables us to put aside the fact that many people in the world of, let us say, Islam or parts of Asia or Africa follow ethical and legal rules that are often profoundly different from, for instance, the Western emphasis on individual autonomy, the right to develop one’s personality freely.

Furthermore, the *role* of law in many old nation states, for instance, those under the influence of Confucianism, is rather more limited than what we are used to in highly developed, and often younger, Western countries. While the basic Aristotelian proposition that it is preferable that law should rule rather than any single one of the citizens, is hardly irreconcilable with most ethical systems, disagreements over what the substance of that law should be can be stark.

I do not believe it is worth our while to attempt to establish specific content as a matter of first principles – deductively as it were. In the real world, an approach that is characterized by arguing over what follows from, let us say, the categorical imperative is likely to produce too many conflicts with revealed religion or with habits formed over millennia.

Instead, I think, we should take the nation states by their word when it comes to their basic commitment to the rule of law and to human rights. Given the overwhelming international agreement, virtual consensus, concerning fundamental rights and rule of law, we should assume that the burden of proof has shifted to those countries that would deny the rule of law in principle. We should also assume that those who would deny the rule of law will have more and more explaining to do at home. As far

³ *Office of the United Nations High Commissioner for Human Rights (UNHCR)*, Status of Ratification of the Principal International Human Rights Treaties 2003, vol. 2, 12.

⁴ *Binder*, Buffalo Human Rights Law Review 1999, vol. 5, 221.

as communications are concerned, we are not restricted any longer to nailing theses to church doors.

Of course, this does not mean that there will not be opportunities for culture clashes. We need to keep in mind that, as I stressed earlier, the basic international unit of law recognition is still the nation state, however limited the reality and theory of sovereignty may have become. Spreading the rule of law at any of the four levels that I distinguished earlier will be a long drawn-out process that must rely on teaching and preaching, on the leveraging of interests, on habit formation. The goal is, to use *Gary Becker's* and *Kevin Murphy's* metaphor, to hardwire values into preferences.⁵

There is one great historical precedent for a process of this kind: the so-called reception of Roman law in continental Europe in the course of the second millennium. While the political authority of the Holy Roman emperors and the interests of regional rulers undoubtedly played an important role in the reception of Roman law, this reception was greatly facilitated by the contribution that the exposure to Roman law made to rationalization, systematization, and calculability of law. Eventually, the preferences and habits of legal specialists trained in Roman law affected preferences and behavior more generally.

In the language of economics, what we need to do is patiently, and over the long run, build up "habit capital." While a "demand for effective norms"⁶ will be steadily increasing in a world of global interactions, the rule of law is not going to be simply imposed or rapidly acquired. It will have to rely on the force of habit and repetition.

Max Weber highlighted this point: "It cannot be overstressed that the mere habituation to a mode of action, the instinct to preserve this habituation, and, much more so, tradition, have a formidable influence in favor of a habituated legal order, even when such an order originally derives from legal enactment. This influence is more powerful than any reflection on impending means of coercion or other consequences . . ."⁷

From these general considerations let me turn to what you might call the core institution of the rule of law: independent adjudication of conflicting claims free from political influence and other forms of corruption. Looking at specifics will provide a sense of the enormity of the challenge.

I should like to begin by giving you an idea of some elements of the legal superstructure as it exists.

1. Art. 8, 10, and 11 of the 1948 Universal Declaration of Human Rights stipulate a right to independent and impartial tribunals that provide fair and public hearings, do not discriminate, and provide effective remedies.
2. The 1966 International Covenant on Civil and Political Rights reiterates and explicates these rights, in particular as to fair and public hearings before "competent, independent and impartial tribunals established by law." I repeat that there are 151 state parties to this covenant with the prime exception being major Muslim countries (until recently also the United States).

⁵ *Becker/Murphy*, *Social Economics: Market Behavior in a Social Environment*, 1st ed., 2000, p. 144, 145.

⁶ *Coleman*, *Foundations of Social Theory*, 1st ed., 1990, p. 241.

⁷ *Shils/Rheinstein*, *Max Rheinstein, Max Weber on Law in Economy and Society*, 1st ed., 1954, p. 28.

3. A United Nations Congress in 1985 formulated basic principles on the independence of the judiciary to assist member states in their task of securing and promoting the independence of the judiciary. The principles deal with such matters as independence and impartiality, qualifications, selection and training, conditions of service and tenure (including adequate remuneration), and discipline.⁸

I now turn to a more special case that takes us to a lower level of abstraction: the requirements faced by the candidate countries for admission to the European Union. All of them have acceded to, and are therefore subject to, the International Covenant on Civil and Political Rights. In addition, they must meet existing EU standards as they can be found in the present member states and in the European Convention of Human Rights, the jurisprudence of the European Union's Court of Justice in Luxembourg, and of the European Court of Human Rights in Strasbourg. Finally, the European Council meeting that took place in December 2000 in Nice proclaimed a Charter of Fundamental Rights of the European Union that, as of now, is not technically binding law, but most likely will be so in the future. The Charter is viewed as highly authoritative in any event.

One of its relevant provisions is Art. 47:

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article.

Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented.

Legal aid shall be made available to those who lack sufficient resources insofar as such aid is necessary to ensure effective access to justice.

The Open Society Institute, one of George Soros' inventions, has set up a program that monitors the EU accession process and that has recently published a 500-page volume dealing with judicial independence in each of the candidate countries.⁹ The book makes for fascinating reading because it clarifies the myriad issues that arise. These issues range from "weak commitment to a culture based on law" in many of the candidate countries to insufficient separation of powers, to administration and funding issues, to matters concerning the selection, tenure, transfer and removal of judges, to the influence of corruption and, finally, to questions concerning the enforcement of judicial decrees.

Since corruption the world over is the single greatest impediment to the rule of law, I should like to give you a taste of what is involved by quoting from the chapter dealing with Romania:

Corruption is a major obstacle to judicial independence and continues to be a widespread and systemic problem in Romania. According to a recent survey... the public believes that the courts, prosecutors' offices and the police are the most corrupt institutions in the country. The 2001 World Bank survey also found that the courts are widely perceived to be corrupt and that bribery is common. The survey concludes that this practice illustrates that "corruption should be treated in a systemic way, including the legal profession, and legal education, in addition to the courts *per se*."

Corruption in the judiciary goes largely uninvestigated and unpunished . . .

⁸ United Nations Document A/CONF.121/22/Rev.1, 1985, 59.

⁹ *EU Accession Monitoring Program of the Open Society Institute (EUMAP)*, Monitoring the EU Accession Process: Judicial Independence 2001.

Although the sources of judicial corruption are principally economic and political, a series of procedural shortcomings in the judicial system encourage corruption and prevent judges from being punished. For instance, court proceedings are not recorded verbatim. In practice, judges use their own words to summarize the parties' and witnesses' statements, and dictate these summaries to the clerk. Oral debates between the parties, as well as the questions asked during the interviews, are never recorded. . . The lack of recording applies to all cases at every level of jurisdiction . . . Finally, procedural rules allowing very long proceedings at the discretion of the courts may constitute another vehicle for corruption.¹⁰

The Romanian example makes at least two points very clearly. First of all, corruption issues are systemic and cannot be tackled in isolation. Secondly, the most basic procedural devices that have emerged in mature legal systems over centuries, such as written records of judicial proceedings, need to be introduced. The latter example provides only the tip of the iceberg of necessary procedural reforms.

Romania is lucky in that it will join the European Union and receive both financial and technical assistance from the public and the private sector. It is also lucky in that ready models exist in continental Europe that can be adapted or even adopted by invoking a shared, if mythical "European" tradition.

What about the rest of the world? First of all, we should note that the European Commission has issued a "Communication" to the Council and the European Parliament in which it emphasizes, among *European objectives in international relations*, the protection of human rights, promotion of pluralistic democracy, and effective guarantees for the rule of law. In this pursuit, the EU will be guided by the rights and principles contained in the EU Charter of Fundamental Rights though, ironically, at this stage, it is not even binding on the member states, let alone anybody else. The Commission makes it clear that it will use dialogue as well as bilateral and multilateral trade and aid agreements to achieve, to monitor, and to assess progress.¹¹

The United States has used a process of certification of progress in the human rights area for a long time as a condition for various forms of assistance. Because of unavoidable clashes with other goals of American foreign policy this has not been the most edifying of political activities. The United States will now take an EU like approach to leveraging in considering disbursements from the newly proposed Millennium Fund. President Bush has announced that three broad standards will guide U. S. decisions on whether countries receive support from the new fund: whether they are "ruling justly, investing in their people, and encouraging economic freedom."¹² According to the President, adherence to these standards will be measured by the extent to which countries have adopted policies designed to reduce corruption, protect human rights, promote the rule of law, improve education and health care, open their markets, pursue sound fiscal policies, and reduce bureaucratic obstacles to entrepreneurship.¹³

¹⁰ EUMAP, Judicial Independence, 393, 394.

¹¹ Communication from the European Commission to the Council and the European Parliament, The European Union's Role in Promoting Human Rights and Democratization in Third Countries, COM 2001, 252.

¹² White House Office of the Press Secretary, Remarks by President George W. Bush on Global Development, March 14, 2002.

¹³ Shapiro/Weiner, Challenge 2002, 3.

When we add mandates of other international actors, such as the World Bank or the World Trade Organization, it is becoming clear that the answer to the question "whose law?" will be greatly influenced by aid donors, both public and private, and by providers of trade concessions.

According to the European Commission, the protection of "universal" human rights, "together with the promotion of pluralistic democracy and effective guarantees for the rule of law and the fight against poverty," are "among the European Union's essential objectives."¹⁴ The United States' objectives are even more broadly formulated ("ruling justly," investing in people, encouraging economic freedom).

As praiseworthy as all of these goals are (who will do the trade-offs among these goals and the trade-offs with *Realpolitik*?), the agenda needs to be prioritized, more focused, and more modest. To my mind, it needs to reflect the assumption that the rule of law, with all appropriate cultural cautions, is the sine qua non of "human development in its richest diversity"¹⁵ or, in *Friedrich Hayek's* words, "the important point is that all coercive action of government must be unambiguously determined by a permanent legal framework which enables the individual to plan with a degree of confidence and which reduces human uncertainty as much as possible."¹⁶

The agenda also needs to be cognizant of the fact that in order to grow the appropriate "habit capital," major international powers and forces cannot just graft onto the existing systems of nation states notions that they prefer. While vines can be relatively quickly improved by grafting, legal and political systems cannot. We need to get states and people to subscribe. This can be done by carefully crafted agreements among governments or governments and international organizations. It can also be done by increasing the demand for norms and indeed the creation of norms by equally carefully drafted private agreements, contracts, and blueprints. The rule of law will never stick unless it is achieved consensually.

A good example of a blueprint is provided by a joint project of the American Law Institute in Philadelphia (a wholly private organization) and the states-sponsored International Institute for the Unification of Private Law (UNIDROIT) in Rome. The project endeavors to draft procedural rules that a country could adopt for adjudication of disputes arising from international transactions. Its *Principles and Rules of Transnational Procedure* go to the very core of how an independent judiciary should function, not only with respect to transnational transactions, but in many other respects as well. In the spirit of moderation and compromise, it represents a major effort to develop principles and rules that could be accepted by both civil law and common law jurisdictions, recognizing the fact that some differences, such as the United States institution of civil jury trials, will not be overcome.¹⁷ UNIDROIT incidentally has 59 member states from all five continents, including countries such as India, Iran, and Iraq.

An appropriate agenda also needs to be based on recognizing that the rule of law in poor countries is expensive: Investments need to be made in institutional design,

¹⁴ The European Union's Role in Promoting Human Rights, 3.

¹⁵ *Von Humboldt, The Limits of State Action*, 1st ed., 1969, p. 51.

¹⁶ *Hayek, The Constitution of Liberty*, 1st ed., 1960, p. 222.

¹⁷ *Joint American Law Institute/UNIDROIT Working Group on Principles and Rules of Transnational Civil Justice*, Study LXXVI, Doc. 10, 2003, 5.

legal education, police training, information technology, adequate numbers of personnel, physical space, salaries high enough to reduce temptation and, on the constitutional level, in modes of separation from legislative, executive, and other political (for instance party) interference.

I conclude by repeating a point that I made at the beginning. There are various levels of the rule of law. They can be attempted simultaneously. Indeed, they are to a large extent interdependent. However, unless an independent judiciary and the fight against corruption are pursued tenaciously and with appropriate priority, the rest will not amount to much more than just a lot of law on paper, probably too much such law. *That is not* the rule of law.