

Springer Series on International Justice and Human Rights

George Andreopoulos
Rosemary L. Barberet · Mahesh K. Nalla
Editors

The Rule of Law in an Era of Change

Responses to Transnational Challenges
and Threats



Springer

Springer Series on International Justice and Human Rights

Series Editor

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Preface

This volume is based on papers initially presented at John Jay College's 11th Biennial International Conference on *The Rule of Law in an Era of Change: Security, Social Justice and Inclusive Governance* held in Athens, Greece, June 11–14, 2014. This conference was organized in collaboration with the Center for Security Studies (KEMEA) of the Greek Ministry of Public Order and Citizen Protection. It was funded by a generous grant from the Stavros Niarchos Foundation (SNF), whose commitment to and support of this project is gratefully acknowledged.

There are many people who made the conference and the resulting publication possible. More specifically, the Conference Organizing Committee composed of George Andreopoulos (chair), Jana Arsovska, Rosemary Barberet, Rosemarie Maldonado, Mayra Nieves, Katherine Stavrianopoulos, and Patricia Tovar worked diligently to ensure the conference's success. The Organizing Committee was very ably assisted in this task by Aferdita Hakaj, its Executive Assistant. At KEMEA, former President Michalis Tsinisizelis, Vasilis Grizis, Irene Kolevri, and Nikos Petropoulos provided invaluable support and assistance in all aspects of this undertaking. The conference proved to be a forum for very informative exchanges and insightful deliberations made possible by the very engaged presenters and participants. The contributors to this volume deserve a special note of thanks: they had to initially revise their papers and turn them into book chapters and then address the extensive comments and suggested revisions offered during the editorial process. Last, but not least, I would like to thank Katie Chabalko, Hana Nagdimov, Menas Donald Kiran, and Lavanya Venkatesan at Springer for all their assistance throughout the process of turning this manuscript into a book.

I hope that the end result will live up to the expectations of all those who were part of this project.

New York, NY, USA

George J. Andreopoulos

Acknowledgment



This volume is based on papers presented at John Jay College's 11th Biennial International Conference on *The Rule of Law in an Era of Change: Security, Social Justice and Inclusive Governance* held in Athens, Greece, June 11–14, 2014. This conference was organized in collaboration with the Center for Security Studies (KEMEA) of the Greek Ministry of Public Order and Citizen Protection. It was funded by a generous grant from the Stavros Niarchos Foundation (SNF), whose commitment to and support of this project are gratefully acknowledged.

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Chapter 1

Introduction: Rule of Law in an Era of Change – Challenges and Prospects



George J. Andreopoulos, Rosemary L. Barberet, and Mahesh K. Nalla

A Contentious Revival

The rule of law (RoL) is a concept that has undergone several transformations in its long and turbulent history.¹ With the end of the cold war, RoL has witnessed a major revival²; a revival that has proven to be a mixed blessing at best. On the one hand, it has become an indispensable component in the efforts to build well-ordered societies, particularly in the aftermath of conflict situations. It is ritualistically invoked by leaders of regimes all over the world, whether democratic, illiberal democratic, transitioning, or authoritarian, as well as by international agencies. Its alleged reach though is global and goes beyond merely assisting in broad democratization and peacebuilding efforts. Its proponents claim that it can contribute to the cure of major domestic and international societal ills that include poverty, gross, and systematic human rights violations, as well as intra- and interstate violence.³ This core belief is best reflected in the United Nations General Assembly Resolution 67/1, which reaffirmed the concept's "fundamental importance...for the further development of the three main pillars upon which the United Nations is built: international peace and security, human rights and development."⁴ In addition to such official

¹For a useful overview, see Brian Z. Tamanaha (2004).

²Thomas Carothers (1998).

³David Marshall (2014), p. xiv.

⁴United Nations General Assembly Resolution 67/1 (2012).

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pronouncements, many studies have joined the chorus of extolling the RoL's virtues.⁵ In a certain sense, the moral appeal of the RoL resembles that of human rights: everybody is in favor even – or, some may say, particularly – when they routinely violate them.

On the other hand, this focus on RoL's indispensability and alleged promise have elicited much critical scrutiny and skepticism, when examined in light of the record of massive RoL reform projects undertaken during the last 25 years or so. Some analysts, while sympathetic to the relevance of RoL assistance programs, do question the facile attributions of beneficial causal effects resulting from RoL interventions and reform efforts that are often unsupported by the available empirical evidence.⁶ Other analysts, writing from a critical theoretical perspective, point to a lot of wishful thinking about the RoL's achievements, primarily manifested through narratives that portray a rather “harmonious and mutually reinforcing relationship between development, human rights, and security.”⁷ Such narratives, according to these critics, are premised on the misplaced assumption that the RoL is “technical, legal, and apolitical”⁸ and fail to capture the tensions among the three main pillars of the UN system; tensions that the invocation of the RoL, regardless of definitional variations, cannot fully resolve.⁹

Notwithstanding the merit of some of these criticisms, it is important to distinguish the argument about the misplaced optimism generated by the RoL as a panacea for the world's ills, from the argument about the irrelevance of the concept's content. To be sure, there is a growing consensus among analysts that the “cure for all ills” invocation of the concept is reflective of a form of wishful thinking normally associated with fierce advocacy unconstrained by critical examination. At the same time, few would argue against the proposition that the concept's content is determinative of the way in which issues of security, development, and human rights are approached, even if the resulting policies often fall well below the expectations of their proponents and, more importantly, of their intended beneficiaries.

While debates about the content and reach of the RoL are ongoing, there is no serious dispute about the concept's central role in global conversations on critical world order issues, such as inclusive governance, sustainable development, peace/security, and human protection. Why does the RoL matter in these discussions? And what are some of the challenges facing its implementation in an era of rising expectations about its relevance?

⁵ See, among others, Jane Stromseth et al. (2006); Agnes Hurwitz and Kaysie Studdard, *RULE OF LAW PROGRAMS IN PEACE OPERATIONS*. Policy Paper, International Peace Academy, August 2005, https://www.ipinst.org/wp-content/uploads/publications/ipa_e_report_rule_of_law.pdf; and Jennifer A. Widner 2001.

⁶ On the RoL and development, see Michael Trebilcock and Ronald Daniels (2008); and James J. Heckman et al. (2010). On the sequencing between democratic transition and the development of an independent court system, see Tom Ginsburg (2010).

⁷ Balakrishnan Rajagopal (2008, p. 1375).

⁸ Rajagopal, p. 1349.

⁹ Ibid.

The Relevance of the RoL: Challenges and Prospects

Any examination of the RoL must begin by addressing contending theoretical formulations of the concept. Most analyses identify two broad categories: “formal” and “substantive” versions with a range of accounts in each version that, depending on the content requirements, span a continuum from “thin” to “thick.”¹⁰ To begin with, both versions view the RoL as a principle aimed at preventing the arbitrary exercise of governmental powers. Formal versions focus on the manner in which the law is promulgated (by proper authority) and the extent to which the law is general, clear, precise, and prospective. The latter attribute relates to the degree to which the legal rules offer guidance to those affected by it, so that they know what to expect and plan their actions accordingly; here the nonretroactive character of rules is of vital importance since it acts as a safeguard against unpredictability.

According to Hayek, one of the most prominent theorists of the formal conception of the rule of law, the three key attributes of the RoL are generality, certainty, and equality (absence of arbitrary distinctions).¹¹ In this understanding of the RoL, no allowance is made for specific requirements with respect to the content of legal rules. Any attempt to the contrary, that is, render the RoL an instrument in the service of a specific social agenda – for example, in the context of efforts to advance the cause of social justice – would promote the adoption of partial (as opposed to general) measures and privilege particular individuals and/or groups with adverse impact on the RoL and the cause of liberty.¹² In its extreme formal version, devoid of any substantive content, the RoL can accommodate very repressive regimes, as Joseph Raz has noted: “A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities and religious persecution...will be an immeasurably worse legal system, but it will excel in one respect: in its conformity to the rule of law.”¹³ History is not short of examples of formal RoL-oriented regimes that exhibited massive and systematic cruelty against those under their jurisdiction and control: Nazi Germany, South Africa during apartheid, and Southern Rhodesia come prominently to mind.

In fact, it was the Nazi regime’s blend of extreme formalism and cruelty that led to the revival of natural law on the aftermath of the World War II. This was reflected in the preamble to the Universal Declaration of Human Rights (UDHR) with its affirmation that “disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.” This reference

¹⁰Tamanaha, *On the Rule of Law*, note 1, p. 91.

¹¹F. A. Hayek (1978). Hayek discusses extensively these principles in Chapter 14, *The Safeguards of Individual Liberty*, pp. 205–219.

¹²Hayek is very emphatic on this point: “Law was meant to prevent unjust conduct. Justice referred to principles equally applicable to all and was contrasted to all specific commands or privileges referring to particular individuals and groups....Yet to break the principle of *equal treatment under the law* even for charity’s sake inevitably opened the floodgates to arbitrariness. To disguise it the pretence of the formula of ‘social justice’ was resorted to”; F.A. Hayek (1979).

¹³Joseph Raz (2009, p. 211).

constituted a repudiation of extreme formalism and an acknowledgment of the need to ground all rule-oriented action on a firm commitment to “fundamental human rights” and to “the dignity and worth of the human person.” While the relationship between human rights and the RoL was clearly undeveloped in the UDHR, the reference to the RoL in this foundational document signaled the long process of reorienting the international community’s efforts toward the advancement of substantive versions of the RoL concept.¹⁴ The aspirational nature of this foundational document notwithstanding, it demarcates a pathway that increasingly associates membership in the international community with adherence to certain fundamental norms and standards.

An emphasis on rule content firmly juxtaposes substantive with formal versions of the RoL. And while huge debates have raged around the successes and failures of the post-World War II human rights era, few would question the centrality of human rights in any conceptualization of substantive RoL versions. The widely shared view that human rights norms and rules constitute a source of legitimacy¹⁵ has firmly anchored such versions within the human rights orbit.

This conceptualization is reflected in the UN definition of the RoL. The UN Secretary-General’s Report on the RoL defines the concept as:

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹⁶

This is a hybrid definition that combines formal and substantive elements with due attention to the requirement of consistency “with international human rights norms and standards.”¹⁷ While substantive RoL versions that incorporate adherence to such norms and standards can avoid the aforementioned pitfalls of purely formal versions, they confront their own set of challenges. This volume takes the UN definition and associated narratives (declarations, resolutions) as its starting point of reference and critically examines certain key issue areas relevant to the implementation of the RoL at the national and international levels. In this vein, the remainder of this introductory chapter will briefly address, due to space limitations, two of these issue areas and the related expectations and challenges, as well as their potential impact on the RoL’s relevance.

¹⁴ The only reference to the RoL in the UDHR is in the preamble: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” For the full text of the UDHR, see http://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf. United Nations (1948).

¹⁵ Ruth W. Grant and Robert O. Keohane (2005, p. 35).

¹⁶ United Nations Security Council (2004, 23, p. 4).

¹⁷ Ibid.

The starting point for this brief enquiry can be stated as follows: the reach and relevance of the concept automatically generate a plethora of expectations which cannot be easily or fully realized. The abovementioned United Nations General Assembly Declaration on the rule of law¹⁸ is instructive here: the rule of law is nothing short of “the foundation of friendly and equitable relations between States and the basis on which just and fair societies are built.”¹⁹ At the national/domestic level, the Declaration points to the importance of “fair, stable, and predictable legal frameworks” for inclusive social orders and equitable development. At the international level, it points to “the resolution of disputes by peaceful means and in conformity with the principles of justice and international law.” Notions of predictability, justice, equality, and legitimacy are relevant to both levels and converge on the presumed necessity of adherence to human rights norms and standards: inclusive social orders can only be built on respect for human dignity and nondiscrimination; and peaceful international orders can only be built on upholding the sovereign equality/self-determination of states and advancing the quest for self-determination of those “peoples” who remain under foreign occupation and colonial domination.²⁰

In this context, we will examine two issues that underscore key narratives of the UN’s conceptualization of the RoL: the alignment of *predictability* and *legitimacy* and the relationship between the RoL and security, human rights, and development, the three main pillars of the UN system.

The sweeping language of resolution 67/1 affirms that *predictability* and *legitimacy*, two key terms associated with the hybrid UN definition, must be closely aligned. In fact, the resolution is quite categorical on this point: “respect for ...the rule of law and justice should guide all of their (i.e. States and international organizations) activities and accord predictability and legitimacy to their actions.” To be sure, there are situations in which the exigencies of predictability and the quest for legitimacy are aligned, for example, when faced with the challenge posed by the unequal distribution of power. Expectations of rule-following and the concomitant consistency and predictability in the application of the relevant rules invariably clash with power considerations. The centuries-long effort aimed at curbing the arbitrary power of rulers and other authority structures in the domestic arena, let alone the continuing challenge of subjecting them to effective human rights scrutiny, is a testament to such an alignment.

Needless to say, this challenge is even more pronounced once the focus shifts to the international arena where the absence of an overarching authority and extreme power differentials have often undermined consistency in the application of rules and produced outcomes inimical to rudimentary notions of legitimacy. The “international rule of law,” meaning the application of RoL principles and standards to

¹⁸ See note 4.

¹⁹ Ibid.

²⁰ In the context of our discussion, the self-determination of states in the international arena is manifested in the juridical equality of states and its corollary, noninterference by external actors in domestic affairs. For a brief discussion of these two types of sovereignty, see Stephen Krasner (1999, pp. 14–25).

interstate relations and to “other subjects and objects of international law,” undoubtedly adds another layer of complexity.²¹ The emphasis placed by international law on the maintenance of international peace and security is telling here. The traditional (and rather inadequate) definition of international law as the body of rules that “governs relations between independent states”²²/or “which are binding upon civilized states in their relations with one another”²³ invariably privileges, in its quest for compromise,²⁴ the orderly conduct of interstate relations over general rules, rules which can also be consistent with the pursuit of a legitimate social purpose, like the promotion and protection of internationally recognized human rights standards. To be sure, the universe of international law has become infinitely more complex with the growth and legal reach of international organizations and other nongovernmental entities whose actions have often sought to minimize this challenge.²⁵ However, even in issue areas such as accountability for human rights/humanitarian law violations where the rule of law is supposed to have registered great progress, we still see provisions that reinforce it. A telling example here is Article 16 of the Rome Statute of the International Criminal Court which provides for the United Nations Security Council (UNSC) to request, in a resolution adopted under Chapter VII, deferral of an investigation or a prosecution by the International Criminal Court (ICC). Presumably, the UNSC would issue such a request if it was to determine that the said investigation or prosecution could constitute a threat to international peace and security. Given the wide discretion that the UNSC has in making such determinations, it came as no surprise to see this provision invoked by the Council shortly after the entering into force of the Rome Statute.²⁶

²¹ United Nations General Assembly-Security Council (2008, p. 4).

²² Permanent Court of International Justice, *The Case of the S.S. Lotus. France v. Turkey. Judgment*; http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm para.44.

²³ J. L. Brierly (1963, p.1).

²⁴ See on this Tamanaha, *On the Rule of Law*, note 1, 132–133.

²⁵ On the contribution of international organizations to international law-making, see Jose Alvarez (2005). The growth and reach of international organizations and the concomitant expansion of transborder agreements have contributed to what some analysts have called “international regime complexity,” namely, parallel, nested, and partially overlapping international regimes in a particular issue area which affect implementation since they reduce the clarity/certainty “of legal obligation by introducing overlapping sets of legal rules and jurisdictions” governing the said issue area. On this, see Karen J. Alter and Sophie Meunier (2009). A good example of such regime complexity would be in the area of human rights for European countries. Human rights are addressed by the partially overlapping regimes of the Council of Europe and the European Union that include their respective legal instruments (the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Charter of Fundamental Rights of the European Union, and their Social Charters), as well as their corresponding judicial organs (the European Court of Human Rights and the Court of Justice of the European Union). It is beyond the scope of this introductory chapter to address this issue.

²⁶ We are referring of course to the back-to-back resolutions (1422 in 2002 and 1487 in 2003) adopted by the UNSC, at the insistence of the USA, exempting peacekeepers from countries not parties to the Rome Statute from possible ICC prosecution. After the second annual adoption in 2003, the UN Secretary-General noted that its continuation could undermine the ICC.

There are situations though in which predictability and legitimacy are in tension. A telling example is offered by the growth of international human rights law and its shift from universal rights expressed in the earlier instruments²⁷ toward targeted protections for specific groups (e.g., children, women, indigenous peoples, and persons with disabilities). This development together with the proliferation of transborder agreements and platforms from which coalitions of national, transnational, and international actors can advance these groups' claims works against the exigencies of predictability which is premised on the adoption of general rules applied across the board. In this context, the requirements of legitimacy point to the adoption of particularistic protective regimes that cannot easily be subsumed under general rules, if they are to advance their key object and purpose of overcoming discriminatory/exclusionary treatment. Some analysts have argued that the shift toward greater protections for specific groups does not mark a qualitatively different turn but is simply another manifestation of the "vocabulary" and "institutional practice of human rights promotion"²⁸ which tends to focus "on discrete and insular right-holding identities" that undermine "awareness of diversity, of the continuity of human experience, of overlapping identities."²⁹ Such a focus undermines articulations of alternative expressions reflective of a shared, communal experience informed by general, as opposed to specific, rule-making.

Likewise, a more complex picture emerges once the connections between the RoL and the three pillars of the UN system are subjected to closer examination.³⁰ Resolution 67/1 not only reaffirmed the centrality of the RoL in the UN system but also emphasized the collective decision "to develop further the linkages between the rule of law and the three main pillars of the United Nations." To be sure, no one expected the inclusion of a critical perspective in a celebratory document adopted at the conclusion of a UN General Assembly High-Level Meeting. Yet, it is precisely the mantra-style invocation of seemingly unproblematic compatibilities that invites scrutiny.

The main problem with this image of harmonious convergence is that *human rights* have invariably followed quite a distinct trajectory as a discourse of resistance and social emancipation, a path that did not easily fit within the "technocratic ambience" surrounding traditional/formal RoL initiatives. This does not mean that human rights have been immune to the embrace of technocratic expertise in the service of power-wielders. On the contrary, the growing corpus of international human rights law, one of the seminal developments in the international legal order, is a key indicator of both the professionalization of human rights advocacy and the

²⁷ Namely, the UDHR, the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR), collectively known as the International Bill of Rights (IBR) United Nations (1948, 1966a, b).

²⁸ Terms used by David Kennedy (2004, p. 13).

²⁹ Ibid, pp. 15–16.

³⁰ Space does not allow for an exhaustive treatment of these linkages. Our introduction seeks to identify some key problematic aspects of these linkages so as to set the stage for the chapters that follow.

co-optation of the human rights discourse by actors that focus on the consequences, as opposed to the causes of human rights violations.³¹ A key manifestation of this development is the privileging of political and civil rights whose protection can be achieved by judicial means, as opposed to socioeconomic rights whose protection can be primarily advanced in the context of challenging dominant political and socioeconomic structures and forces. The fact that, for several advocates, justiciability remains a key criterion for the distinction between “rights” and “aspirations,”³² is an indication of the extent of the human rights predicament. Yet, human rights have constituted in the past, and continue to this very day, a discourse for mobilizing the vulnerable, the persecuted, and the marginal, irrespective of the nature of the cause of the violation. While success in the quest for socioeconomic justice has often proved to be elusive, human rights have tended to monopolize the emancipation narrative at the expense of competing discourses.³³ Grassroots mobilizations and resistance around issues of corporate accountability, environmental protection, and indigenous peoples’ rights to their lands are indicative of the continuing appeal of and belief in the human rights discourse’s transformative potential. To phrase it in another way, human rights have maintained, despite their co-optation by power-wielders, an interactive dualism: a discourse of accommodation and resistance.

The same could not be said about *development* or *security*, which have been invariably amenable to pragmatic narratives of cost/benefit calculations that often belie the “established” political premises underscoring their policy prescriptions. More specifically, in the case of development, the RoL emphasis on formal rules has reinforced, especially in the post-Cold War era, the emphasis on institutions and procedures that ensured the smooth functioning of the free market at the exclusion of considerations about the distributional outcomes of free market policies.³⁴ To be sure, the “formalization of legal entitlements”³⁵ as a precondition for development is not a new notion; it dates back at least to the nineteenth century.³⁶ What ties together different perceptions on the relation between formal rules and development is not the particular outcome – which in its most recent incarnation is associated with the neoliberal paradigm – but the belief that hard political choices can be kept out of policy making. This approach presents a picture of the RoL as manifested in

³¹ For more on this, see Tony Evans (2005), especially pp. 1066–1068.

³² Aryeh Neier is a typical advocate of this approach: ...“the justiciability of questions involving rights and their judicial enforcement seems crucial to making rights a reality. It is hard to imagine how rights could be upheld in practice without a body that is insulated from the regular political process playing a decisive role.” *The International Human Rights Movement. A History*. Princeton University Press, 2012, p. 68. Other analysts are critical of this view: “...the human rights movement fetishizes the judge as someone who functions as an instrument of the law rather than as a political actor. This is simply not possible ...given the porous legal vocabulary with which judges must work and the likely political context within which judges are asked to act”; Kennedy, *The Dark Sides of Virtue*, note 28, p. 22.

³³ For example, discourses drawn from religious traditions and local social resistance practices.

³⁴ Rajagopal, note 7, pp. 1363–1364.

³⁵ Expression used by Kennedy, note 28, p. 158.

³⁶ Ibid; and Rajagopal, note 7, p. 1363.