Ius Gentium: Comparative Perspectives on Law and Justice 38

James R. Silkenat
James E. Hickey Jr.
Peter D. Barenboim *Editors*

The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)

Springer

The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)

IUS GENTIUM

COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE

VOLUME 38

For further volumes:
http://www.springer.com/series/7888

James R. Silkenat • James E. Hickey Jr.
Peter D. Barenboim
Editors

The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)

Springer

Editors
James R. Silkenat
Sullivan & Worcester LLP
New York, NY, USA

James E. Hickey Jr.
Hofstra University
Hempstead, NY, USA

Peter D. Barenboim
Asnis and Partners
Moscow, Russia

ISSN 1534-6781
ISSN 2214-9902 (electronic)
ISBN 978-3-319-05584-8
ISBN 978-3-319-05585-5 (eBook)
DOI 10.1007/978-3-319-05585-5
Springer Cham Heidelberg New York Dordrecht London

Library of Congress Control Number: 2014938031

Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

Thank you to the World Justice Project (WJP), which originated in 2006 as a Presidential initiative of the American Bar Association. WJP, which has evolved into an independent, non-profit organization, leads "a global multidisciplinary effort to strengthen the rule of law for the development of communities of opportunity and equity". WJP's focused and sustained efforts have provoked important academic and practical interest in the relationship between the rule of law and legal state (rechtsstaat), which is reflected in this book.

James R. Silkenat
President (2013–2014), American Bar Association, Sullivan & Worcester LLP
James E. Hickey, Jr., Maurice A. Deane School of Law, Hofstra University
Peter D. Barenboim, Asnis and Partners

Acknowledgements

We would like to acknowledge the Series Editors, Mortimer Sellers and James Maxeiner, for both their chapter contributions to the book and their support of the book from the outset. We would also like to thank Springer's Senior Editorial Assistant, Diana Nijenhuijzen, for all her valuable assistance in bringing this book into production.

We give special thanks to Anna Ovcharenko for her research and her excellent substantive and editorial review and comments on a substantial portion of the book. We also acknowledge gratefully the participation and help of Paulina Brown and Elena Pribytkova.

We would also like to acknowledge the ABA Section of International Law and its current Chair, Gabrielle Buckley, and its immediate Past Chair, Bart Legum. We also want to acknowledge the leaders of the World Justice Project, Juan Botero, Bill Neukom and William Hubbard. A special acknowledgement goes to the President of the Federal Chamber of Lawyers of Russia, Eugene Semenyko, and the President of the Constitutional Court of the Russian Federation, Valery Zorkin, for their support of the major international Rule of Law and Legal State symposium held in St. Petersburg which contributed in a substantial way to the development of this book.

Finally, we thank all our chapter authors for the substance of their contributions and for their patience and cooperation and goodwill.

New York, NY, USA — James R. Silkenat
Hempstead, NY, USA — James E. Hickey, Jr.
Moscow, Russia — Peter D. Barenboim

Introduction

For several decades, there has been a growing and robust institutional, governmental, academic and legal interest in Rule of Law issues on many fronts. Less well-explored has been a focused dialogue examining the Rule of Law doctrine together with the Legal State (Rechtsstaat) doctrine, which is widely known in Europe. A premise for this book is that a meaningful and full appreciation of the Rule of Law doctrine may be advanced by also examining in juxtaposition the doctrine of the Legal State. Both legal doctrines are aimed fundamentally at helping to provide for societies some fundamental safeguards for human dignity and legitimacy for a state and its prescriptions. However, the doctrines, of course, may have different meanings and applications depending on the legal system and the socio-economic-cultural contexts in which they are invoked.

The 25 expert authors who are brought together to produce the 21 chapters of this book analyze variously the philosophical, legal, historical and political background and operation of both legal doctrines discretely and in relation to each other. This book, in Part I, explores the development of both the civil law conception of the Legal State (Rechtsstaat) and the common law conception of the Rule of Law from general, philosophical and legal perspectives. Part II examines the doctrines from a variety of specific applications and locations. A reader should find value not only in the individual chapters standing alone, but also in the work as a whole.

Our hope is that this book contributes significantly to the Rule of Law/Legal State literature and dialogue and that it provokes further discussion and understanding of both doctrines and their interrelationship in the years ahead.

James R. Silkenat
James E. Hickey, Jr.
Peter D. Barenboim
Editors

Contents

Part I
General Perspectives on Rule of Law and the Legal State

Chapter 1
What Is the Rule of Law and Why Is It So Important?

Mortimer N.S. Sellers

Abstract This chapter considers the rule of law from within the rule of law tradition to clarify what the rule of law is, why it is so valuable, and how we can secure it. The rule of law in its original, best and most useful sense signifies the "*imperium legum*" of the ancients and enlightened modernity: "the empire of laws and not of men". This requires removing the arbitrary will of public officials as much as possible from the administration of justice in society. The rule of law implies constitutionalism, and all states and societies that struggle toward the rule of law are also working towards constitutional government, because well-constructed constitutions alone hold out the hope of controlling the governors as well as the citizens. Above all the rule of law requires an independent and self-confident judiciary, with power to interpret and apply the laws impartially, without fear or favor. The rule of law may be difficult to obtain, but its absence is never hard to perceive. Whenever power and naked self-interest can prevail against reason and the common good, the rule of law is not complete. The ultimate goal of every society and every legal system should be equal and impartial justice for all, free from oppression and arbitrary power.

1.1 Introduction

These reflections on the rule of law consider the rule of law from within the rule of law tradition. This chapter clarifies: (1) what the rule of law is; (2) what the rule of law requires of us; (3) where the rule of law comes from; (4) why it is so valuable; and (5) how we can secure it. Let there be no confusion about the subject matter of this inquiry. The rule of law in its original, best, and most useful sense signifies the "*imperium legum*" of the ancients, "the empire of laws and not of men" pursued by the early

M.N.S. Sellers (✉)
Center for International and Comparative Law, University of Baltimore, Baltimore, MD, USA
e-mail: msellers@ubalt.edu

J.R. Silkenat et al. (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Ius Gentium: Comparative Perspectives on Law and Justice 38,
DOI 10.1007/978-3-319-05585-5_1,

humanists, by the partisans of liberal Enlightenment, and republican revolutions across the globe. This is not the later, positivist, more limited understanding of the rule of law as "*Rechtsstaat*," which has sapped the rule of law everywhere and caused so much confusion. The rule of law in its original and most natural sense is a pure social good, in which the legalism of the *Rechtsstaat* plays only a partial and supporting role. Societies that enjoy the rule of law are vastly better situated than those that do not. This makes the real rule of law (or its absence) the central measure dividing good from bad government everywhere. All law and political institutions can and should be evaluated to determine whether it or they advance the rule of law – or do not.[1]

Five main points should be made as plainly as possible at the outset. First, the definition: "rule of law" is the English translation of the Latin phrase "*imperium legum*", more literally "the empire of laws and not of men". This goes beyond the mere legalism of a "rule *by* law" or "*Rechtsstaat*", through which one man, or a faction, or a party rules through positive law to impose his or her or their will on others. Second, the rule of law – the *imperium legum* – requires of us that we remove the will of public officials as much as possible from the administration of justice in society. No executive, legislator, judge or citizen should enjoy arbitrary power to act against the public welfare. Third, the rule of law ideal arises from human nature, because all people seek justice through law and all law and governments claim – explicitly or implicitly – that the laws they promulgate serve justice in fact. From this it follows (fourth) that only the rule of law can secure stable justice in society, which makes the rule of law vastly important. So the fifth and greatest question is how to discover, create, interpret, and enforce the rule of law in such a way that law controls and governs the various private interests, not only of ordinary citizens, but also of the public officials who administer the state. All this follows from the original, once pervasive, and still the most useful understanding of the "rule of law" as "the empire of laws and not of men" – not simply the rule of men through law.

1.2 What the Rule of Law Is

The rule of law signifies "the empire of laws and not of men": the subordination of arbitrary power and the will of public officials as much as possible to the guidance of laws made and enforced to serve their proper purpose, which is the public good ("*res publica*") of the community as a whole. When positive laws or their interpretation or enforcement serve other purposes, there is no rule of law, in its fullest sense, but rather "rule *by* law" – mere legalism – in service of arbitrary power. The vocabulary here is important, because the concept of the rule of law enjoyed its fullest elaboration in tandem with related struggles for "liberty" and "republican government" against tyranny and oppression. The liberty ("*libertas*") of the ancients, the

[1] This chapter repeats and elaborates arguments also presented in M.N.S. Sellers, "An Introduction to the Rule of Law in Comparative Perspective" in M.N.S. Sellers and Tadeusz Tomaszewski, eds, *The Rule of Law in Comparative Perspective* (2010) at 1. Springer.

Enlightenment, and the republican revolutions of emergent modernity, signified protection by the law and government of all members of society against domination by other persons, or by states, or by the governments of states (where "domination" consists in the arbitrary control by one person or faction of another, without reference to the common good). The key here is the purposes for which positive laws and state action are created, interpreted, or enforced. The law may legitimately control us, but public officials must respect law's proper purpose, which is the common good of society as a whole, and not their own private interests.

When we have and maintain a legal system that serves the common good of society as a whole, then we have the rule of law (because the laws rule and not men), we have liberty (because the law prevents oppression), and we live in a republic (because government advances the "*res publica*" or "common good of its subjects"). The rule of law, liberty, and republican government are three facets of the same substantive good, secured only where the laws rule and protect us from tyranny and oppression. When positive laws and their interpretation and enforcement serve the public good, and prevent domination by any person or group of persons, then we have the "*imperium legum*", the rule of law in its fullest and best sense: "the empire of laws and not of men".

Persons may, of course, disagree about what serves the common good best. Nor should we forget that the "public good" ("*res publica*") also includes and protects the legitimate private goods and interests ("*res privata*") of separate individuals and groups. This raises the second-order question, how best to discover and preserve the common good through law: "What combination of powers in society, or what form of government, will compel the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefit of them, and be sure of their continuance."[2] The difficulty of answering this question should not obscure the central importance of the value that it seeks to advance. The rule of law is not simply one or a few or the most important of the techniques sometimes used to secure the "empire of laws and not of men," but rather the "*imperium legum*" itself. There is no rule of law unless the law itself rules, and regulates the private interests of those with power, so that they cannot act against the common good of society as a whole.

1.3 What the Rule of Law Requires of Us

The rule of law requires that we remove the private will of public officials as much as possible from the administration of justice in society. Private as well as public power should be regulated by law, to advance the common good. When acting in a public capacity our only concern should be the public good. When acting in a private capacity, the law should also limit our self-interest to protect the community as a whole. The concept of law embodied in the rule of law tradition therefore

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

includes an element of impartiality that regulates the scope of public power. Legislators should legislate for the common good. To do otherwise would be "corrupt" (a term of art) and undermine the rule of law. Public officials should execute the laws in the light of the common good. To do otherwise would be "tyranny" (another term of art) and violate the rule of law. Judges should interpret the law to advance the common good. To do otherwise would be "arbitrary" (a third term of art) and violate their duty to society. The rule of law constrains the guardians of the law to serve the interests of the law, which is the interest of the whole, rather than any particular party or faction.

The rule of law requires fidelity to one overarching value, sometimes called "liberty," the state that obtains when law prevents domination by powerful interests, public or private. Note the limits of this requirement. The rule of law does not require that citizens always act in the public interest, but rather, that they do so when the law determines such deference to be necessary, in the light of the common good. Citizens may and properly should have and pursue private interests, but not at the expense of their public duties (which increase as they gain more authority). There can be a significant gap between the requirements of law and morality. The law determines what is *necessary* and therefore required to prevent domination and promote the public good. Morality reflects what is *useful* in advancing the good of society as a whole, but may not be required. Law has much the narrower jurisdiction.

The rule of law requires that laws be made and enforced only to serve their proper purpose, which is the common good or *res publica* of society as a whole. From this many other requirements follow, but always limited by the central purpose of the enterprise. For example, legal certainty is a great friend of liberty. Well-known and easily understood laws can be significant constraints on self-serving power. But legal certainty at the expense of the common good would defeat the purpose of law. Advocates of rule *by* law sometimes undermine the rule *of* law by legitimating the enactments of tyrants. Positive laws promulgated in the private interest do not satisfy the rule of law – although they may sometimes be an advance on otherwise unregulated tyranny. Promulgation and the other virtues of legal formalism often advance the empire of laws. But they are only secondary and contingent requirements of the rule of law, and not the thing itself.

1.4 Where the Rule of Law Comes From

The rule of law ideal arises in the first instance from human nature, because all people and all nations seek – or claim to seek – the rule of justice through law. All legal systems claim to be actually and normatively "legitimate," in the sense that they have the moral right to rule. This does not suggest that all such claims are true or sincere, but rather that they are made – implicitly or explicitly – by every existing system of law. The law's universal claim to obedience is dependent upon a prior claim to serve justice. Note the vagueness and procedural ambiguity of the first-order claim to legitimacy. Rulers may claim to find the law through sortition, or by

virtue of their own infallibility, or (as Numa did) by direct consultation with God. The veracity (or not) of such claims is less significant than their unanimity. All legal systems depend on the assertion (explicit or implicit) that the laws do and should rule, and not men. All claim to implement the rule of law.

The law's claim to serve justice, rather than the interests of those in authority, arises from human nature and the realities of social power. People more readily submit to laws they perceive to be just, therefore all legal systems claim to realize justice in fact. These natural and universal origins of the rule of law explain the concept's latent appeal, but not its actual success. Beside the universal human desire for the rule of law is the historical rule of law tradition, through which lawyers, governments, and nations have sought to specify, implement, and ultimately to realize the rule of law in practice. This gives the world a basis for evaluating existing legal systems. It is not enough simply to assert the primacy of law. States must actually advance it. If "law" in practice were reduced to the simple self-interested commands of those in power, then the "*Rechtsstaat*" would be an instrument of oppression, and law itself no more than a weapon, to be wielded for good or ill by whosoever holds the sword of the state.[3]

The American John Adams,[4] followed the Englishman James Harrington,[5] in quoting the Florentine Donato Giannotti,[6] who divided the whole history of law and politics into a battle between two parties: those fighting for the rule of law (or government "*de jure*") and those fighting for the rule of certain particular men (or government "*de facto*").[7] This descent of authority, back from America and France to England, Venice, Florence, and ultimately Rome, illustrates the high points of the modern rule of law tradition, which sought to work out in practice what the rule of law requires in principle. The conflict between the "*de facto*" theory of law as the instrument of power, and the "*de jure*" conception of law as the product of reason and justice, has been the driving force of legal modernity, and the development of constitutional government throughout the world.[8]

1.5 Why the Rule of Law Is So Valuable

The rule of law is of vast and permanent value to any society, because only the rule of law can secure justice, by preventing tyranny and oppression. The Universal Declaration of Human Rights, approved by the General Assembly of the United Nations

[3] *See* Joseph Raz, "Authority, Law and Morality", 68 *The Monist* (1985) 285, 299.

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

[5] James Harrington, *The Commonwealth of Oceana* (1659), ed. J.G.A. Pocock (1992) at 6.

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

[7] *Cf.* Cornelius Tacitus, *Annalium ab excessu divi Augusti libri* at I.2.

[8] *See* M.N.S. Sellers, *The Sacred Fire of Liberty: Republicanism, Liberalism, and the Law* (1998). Macmillan.

without dissent, recognized that "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the Rule of Law."[9] More recently, the General Assembly identified "human rights, the rule of law and democracy" as "universal and indivisible core principles of the United Nations."[10] These ringing assertions, repeated or paraphrased by the European Convention on Human Rights,[11] the American Convention on Human Rights,[12] the African Charter on Human and Peoples Rights,[13] and numerous other regional agreements and national constitutions[14] illustrate the substantive moral component always present in appeals to the "rule of law". The "rule of law" in its best and usual sense implies the fulfillment of justice through law and the negation of arbitrary government.

The battle of the rule of law against arbitrary government takes place in every human society when those with power seek to expand their discretion, and their subjects resist. Nor are the advocates of unfettered power without arguments in their favor. The most learned apostle of despotism, Thomas Hobbes, denied any distinction between "right and wrong," "good and evil," "justice and injustice," beyond our separate and conflicting desires.[15] Hobbes had seen in the horrors of England's Civil War the indiscriminate misery of anarchy, "which is the greatest evil that can happen in this life."[16] From this it follows (he suggested) that we need an absolute and uncontested sovereign power to rule us and keep us safe.[17] The fear of anarchy is a powerful and compelling argument for despotism, and as a result the struggle for freedom usually begins with small and incremental advances, beginning with the simple call for written laws, to contain the discretion of those in authority, and only later even attempting to secure just and impartial laws, a much more difficult undertaking.[18]

The rule of law is so valuable precisely because it limits the arbitrary power of those in authority. Public authority is necessary, as Thomas Hobbes rightly observed, to protect against private power, but the rule of law keeps public authorities honest. The rule of law implies constitutionalism, and all states or societies that struggle

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

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

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

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

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

[14] *See*, for example, *Constitution of Russia* (12 December, 1993), Article 1; *Constitution of the Peoples Republic of China* (4 December, 1982), Article 5.

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

[16] *Id.* at II.xxx.175.

[17] *Id.* at II.xviii.90.

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

toward the rule of law are also working toward constitutional government, to control power with reason, or (more prosaically) make "ambition counteract ambition",[19] with the constant aim to "divide and arrange the offices in such a manner as that each may be a check upon the other – that the private interest of every individual may be a sentinel over the public rights."[20] The rule of law is valuable, because only the rule of law compels "the formation of good and equal laws, an impartial execution, and faithful interpretation of them, so that citizens may constantly enjoy the benefits of them, and be sure of their continuance."[21]

1.6 How to Secure the Rule of Law

The fundamental principle of the rule of law is so widely and universally accepted as to be almost a truism. The laws should rule, and not arbitrary power. The real difficulty arises in securing the rule of law in practice. The great constitutionalist, John Adams, observed that "in establishing a government which is to be administered by men over men", the greatest difficulty "lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself." This requires a "well-ordered constitution" so that justice could prevail "even among highwaymen," by "setting one rogue to watch another," so that "the knaves themselves may in time, be made honest men by the struggle."[22] Many of these necessary legal and political controls were as well-known (as John Adams expressed it) "at the time of the neighing of the horse of Darius" as they are today.[23] The basic guarantors of the rule of law include representative government, a divided legislature, an elected executive, and above all, an independent judiciary serving for extremely long and non-renewable terms in office.[24]

To recognize the necessary connection between the rule of law as an ideal and well-constructed constitutional government does not and should not be taken to imply that all states can or should maintain the same constitutional structures in practice. The social, historical, geographical and other circumstances in different societies will never be entirely the same necessarily, limiting what is appropriate, prudent and possible. Certain practices will never be justified, however, and certain standards and basic institutions will be shared by every society that aspires to attain "the government of laws and not of men." This brief investigation cannot and should not presume to offer a detailed formula for securing the real rule of law, but it can

[19] "Publius" [James Madison], *The Federalist* LI (February 6, 1788).

[20] *Id.*

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

[22] John Adams, *A Defence of the Constitutions of Government of the United States of America*, volume III (1788) at 505 (Letter VII, December 26, 1787).

[23] *Id.*, Preface, at I.ii.

[24] *Id.*

help to establish a basic outline of the common elements necessary to any rule-of-law polity, including some of the exceptions and allowances that may be needed to establish the rule of law in fact, when history and governments are deeply set against it.

The rule of law will be best secured by stable constitutional government, because well-constructed constitutions alone hold out the hope of controlling the governors themselves. If the only legitimate purpose of government is to advance the common good, and to establish justice (which follows from the common good), then procedures will be needed to determine what the common good requires in practice, and adjudicate between rival conceptions of the public welfare. A rule of law constitution does this by so structuring public institutions and civic debate that private interests cannot usurp public power. This civic architecture of law and government has two main purposes: first, to secure good public officials, second, to make them rule well. The two are related, but one does not always follow from the other. Constitutionalism and the rule of law tradition recognize the inevitable fallibility of human judgment. No person is so well-placed or well-intentioned that she or he will not benefit from the checks and balances of a stable and constitutional rule of law.

1.7 Some Practical Requirements

The first necessary and inescapable desideratum of the rule of law is an independent judiciary. Judges must be secure and well-paid, so that they can apply the law without fear or favor. The great breakthrough in securing the rule of law in most societies occurs when judges attain tenure "*quam diu se bene gesserint*" (or during good behavior) rather than "*durante bene placito*" (at the whim of those in authority). This transition took place in England with the "Glorious Revolution" of 1688, confirmed by the Act of Settlement in 1701, which also prevented the executive from diminishing judicial salaries, once they had been established by law.[25] The Act of Settlement was a turning point in the progress of the rule of law, which made Britain the envy of other European nations.[26] Wherever judges do not enjoy secure tenure in their offices, their rulings are subject to improper influence and coercion.[27]

Judges secure in their salaries and tenure in office, who believe the law to be just, will do their best to uphold law's empire, not least because their own status and prestige depends upon the legal system's standing in society. This confirms the second great basis of the rule of law, which is that laws themselves should seek justice. Not only must judges apply the laws fairly, but the process of legislation must also attempt to advance justice, for its products properly to attain the status of "law."

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

[26] *See*, for example, Voltaire [François-Marie Arouet], *Lettres Philosophiques* (1734), *Lettre* 8, *Lettre* 9.

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

This is a complicated point. The concepts of law and fidelity to law imply a claim to justice.[28] The rule of law assumes a theory of law that separates law from the volition of those who serve it. Thus, pursuit of the rule of law also requires the maintenance of legislative procedures that will generate legislation for the public good, and not simply promote the private interests of those with power.

This link between the rule of law and a "common good" theory of justice is profound and essential. The "empire of laws and not of men" seeks a world of "equal" laws that serve all those subject to their control.[29] This absence of partiality is what sets government "*de jure*" apart from government "*de facto*" (to use the old terminology) and distinguishes "the empire of laws" from "the government of men."[30] But the question remains how to find "good and equal laws."[31] "Representative government" and "checks and balances" in the legislature (and the separation of both from the actual administration of justice) seem necessary precursors to "good and equal laws"[32] – and here we begin to reach the limits of the "essential" or "necessary" rule of law.[33]

1.8 Exceptions to the Rule of Law

John Stuart Mill advanced a theory of liberty and government, still extremely popular among statesmen, according to which some societies may not yet be sufficiently developed in their institutions and culture to support even such simple requirements of just government as the separation of powers between the executive and legislative powers, checks and balances in the legislature and administration of justice, or representative institutions in any branch of the government.[34] In circumstances such as these, perhaps "a ruler full of the spirit of improvement" may be "warranted in the use of any expedients that will attain an end perhaps otherwise unattainable."[35] But, there are offensive implications in making the judgment that certain peoples or nations are not yet capable of being trusted with political freedom and equality.[36]

---

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

[29] *See* the citations to John Adams and Voltaire above; *Cf.* John Rawls, *The Law of Peoples with, The Idea of Public Reason Revisited* (1999), 71. Harvard University Press.

[30] *Supra*, notes 25–28.

[31] To use John Adams' felicitous description., *supra* note 2.

[32] *Id.* at I.1.

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

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

[35] *Id.*

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

Despotism in the common interest, even when pursued with a view to developing the higher faculties of those subject to its rule, is still despotism, and vulnerable to abuse.[37]

The dependence of the rule of law upon the institutions of representative government arises from the observation that government *by* any subgroup within the larger society will inevitably become government *for* the interests of that subgroup, above the others.[38] And even were the natural effects of self-interest somehow avoided, the laws of a benevolent despot would suffer from a very incomplete knowledge of the actual needs and circumstances of the citizens that all laws must actually serve, to be worthy of the name.[39] So, the concept of the rule of law implies an attempt to establish just laws, which, in turn, implies representative government, in order to achieve the degree of general knowledge and commitment to the common good necessary for an impartial legal system.[40] The rule of law entails the impartial pursuit of justice, which requires an equal concern for the welfare of all members of society.

While the rule of law without representative government may be a near impossibility, due to the fallibility of human nature, representative government by itself does not assure the rule of law, and may sometimes impede it. The earliest recorded musings about law and justice already distinguish "tyranny" from the rule of law, and contemplate the dangers of the tyranny of the majority, as well as by smaller factions.[41] The word "democracy" implied a sort of popular despotism for most of its history,[42] and the concept of "representative" government was developed to distinguish elected deliberative assemblies from more narrowly "democratic" governments.[43] Representative legislatures must be constructed to respect the rights of minorities, and will require the checks and balances of divided power to guide them away from populism and oppression.[44]

---

[37] *See* Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1997). Oxford University Press.

[38] John Stuart Mill, *Considerations on Representative Government* (1861), chapter III.

[39] *See* James Bohman, *Public Deliberation: Pluralism, Complexity, and Democracy* (1996). MIT Press.

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

[41] *See*, for example, Aristoteles, *Politika* IV.2.1 (1289 a 26 ff).

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

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

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

1.9 Conclusion

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

The greatest threats to the rule of law differ at different times and places, but the underlying principle remains the same: to separate the law from arbitrary power. In many societies, custom and public opinion are the best and only constraints against despotism. More developed polities create written statutes to constrain those in authority. The single greatest advance towards the rule of law occurs when judges secure their independence from executive and legislative power. "Rule of law" states finally come into being with the emergence of constitutional government, provided that the constitution seeks justice and the common good through the checks and balances of divided governmental power, under the ultimate review of independent judges. These fundamental preconditions of an impartial legal system can be vastly improved upon and infinitely refined – but they are hard enough to achieve in themselves and do not entirely prevail under any existing polity.[45]

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

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

Chapter 2
On the Foundations of the Rule of Law and the Principle of the Legal State/Rechtsstaat

Dietmar von der Pfordten

Abstract This chapter inquires into the foundations of the rule of law and the principle of the legal state/Rechtsstaat. This will be done in four steps: Firstly, it will be asked: What is involved in the obligation to use the specific means of law for political and administrative decisions? Secondly, an ethical grounding will be searched for both principles. After these two parts in which the common foundations of both principles are sought, a third step will consider more concrete applications, in which the two principles coincide. Finally, the fourth step inquires where the two concepts divide due to cultural particularities of the different national legal orders.

2.1 Introduction

The rule of law and the principle of the legal state/Rechtsstaat (État de droit, Stato di diritto, Estado de Derecho) are today widely accepted, both nationally and internationally.[1] The former is, for example, a core element of the British and American legal tradition, the latter is a fundamental principle of the German Constitution (Art. 20, 23 I 1, 28 I, 79 III Grundgesetz). The French and the Italian Constitutions only embody some main elements, but not the concept as such explicitly.[2] In international law, we find the rule of law and the principle of the legal state in the

[1] *See* in general: *The Rule of Law. History, Theory and Criticism*, Pietro Costa and Danilo Zelo eds (2007). Springer, Dordrecht. For a comprehensive survey on the literature on the legal state/Rechtsstaat, *see* also Grzeszick, in: *Maunz-Dürig*, *Grundgesetzkommentar* (2013), Art. 20, VII. C. H. Beck, München and Katharina Sobota, *Das Prinzip Rechtsstaat: verfassungs- und verwaltungsrechtliche Aspekte* (1997). Mohr Siebeck, Tübingen.

[2] *See* Preamble, Art. 1 I, 5 I, 34, 64 I of the French Constitution. Art 1 II of the Italian Constitution says: "La sovranità appartiene al popolo, che la esercita nelle forme e nei limiti della Costituzione."

D. von der Pfordten (✉)
Philosophy of Law and Social Philosophy, University of Göttingen, Göttingen, Germany
e-mail: dpfordt@gwdg.de

J.R. Silkenat et al. (eds.), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, Ius Gentium: Comparative Perspectives on Law and Justice 38,
DOI 10.1007/978-3-319-05585-5_2,

Preamble and Art. 2 of the Treaty on the European Union, in the Preamble of the Charter of the United Nations and in the Preamble of the Declaration of Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.

Acceptance does not always mean realization, however. Because of ideological abuse and general overuse, the concepts/principles need some readjustment.[3] In order to help widen the acceptance and to shape the core meaning of these concepts and principles, this chapter inquires into the foundations of these principles. This will be done in four steps: Firstly, it will be asked: What is involved in the obligation to use the specific means of law for political and administrative decisions? Secondly, an ethical grounding will be searched for both principles. After these two parts in which the common foundations of both principles are sought, a third step will consider more concrete applications, in which the two principles coincide. Finally, the fourth step inquires where the two concepts divide due to cultural peculiarities of the different national legal orders.

2.2 The Form of Law

Both the rule of law and the principle of the legal state/Rechtsstaat demand that political and administrative decisions should – at least in serious cases – be made in the form of law.[4] But what is the implication of this requirement? What does the form of law add to the pure political or administrative decision? The answer depends on the philosophical question of what distinguishes law from pure politics and administration.

2.2.1 What Do Politics, Administrative Decisions and Law Have in Common?

To inquire into this distinction, it is necessary to first understand what politics, administrative decisions and law have in common. All three are not only natural but social facts, more precisely human actions and decisions in a wide sense which include individual and collective decisions and some intended consequences of

[3] Tom Bingham, *The Rule of Law* (2011), at 5ff. Allen Lane, London.

[4] Already Plato's shift from the wise but unbound philosopherking in the *Politeia* to the ruling of the laws in the *Nomoi* can be seen as an acknowledgement of the rule of law/legal state. See for a formulation of this demand also: Aristotle, *Politics* 1300b12ff.; John Locke, *Two Treatises of Government* II, § 3, at 137. *See* for a history of the rule of law and the Rechtsstaat: Pietro Costa, "The Rule of Law: A Historical Introduction", *in The Rule of Law. History, Theory and Criticism*, Pietro Costa and Danilo Zelo eds. (2007) at 73ff. Springer, Dordrecht. On p. 87 he shows that the concept of the Rechtsstaat emerged in Germany at the end of eighteenth century. France and Italy followed much later.

these decisions.[5] All three are human actions in two respects: as a general phenomenon and in all their singular manifestations. When a judge decides, he always performs a human action. When a public official issues an administrative act, he performs a human action. When a parliament votes for a statute, it performs a collective human action. If politics, administrative decisions and law, by conceptual necessity, are a form of human actions, they can only be understood if one takes into consideration the necessary qualities of human actions. What are the necessary qualities of human actions? Human actions are comprised of at least two necessary elements[6]: an aim or an intention, and some means (broadly conceived) to realize this aim.

2.2.2 *What Is the Aim of Politics, Administrative Decisions and Law?*

From the beginning of philosophy in ancient times up to the late Middle Ages, great emphasis was laid on quite specific and demanding aims in order to distinguish politics, and especially law, from other phenomena. For Plato and Aristotle, the aim of law and politics was the good, explained as justice, and, specifically for Aristotle, eudaimonia and the common good.[7] The means played no great role. Cicero, too, stressed justice as the aim of the law.[8] Thomas Aquinas then defined law as "an ordinance of reason for the common good, made by him who has care of the community, and promulgated".[9] So the necessary aim is the common good. Aquinas still mentions justice though, especially in respect of the positive law.[10]

In the seventeenth century, this emphasis on the specific aim of law and politics vanished. The good, justice, eudaimonia and common welfare were no longer considered to be the main aim of law and politics. The means became a primary consideration. Thomas Hobbes proposed a reduced but still quite specific aim of law and politics: self-preservation.[11] Furthermore, he stated that law in general consists

[5] Gustav Radbruch, *Rechtsphilosophie*, ed. Ralf Dreier and Stanley Paulson, (2nd edn. 2003): "Recht ist Menschenwerk." at 11, C. F. Müller, Heidelberg. See for the following: Dietmar von der Pfordten, "What is Law? Aims and Means" in: Archives for Philosophy of Law and Social Philosophy (ARSP) (2011) 97, at 151–168.

[6] For the necessity of an aim in every action *see* e.g. Aristoteles, Nicomachean Ethics 1094a1; John Searle, *Intentionality. An Essay in the Philosophy of Mind* (1983), at 107. Cambridge University Press, Cambridge, New York. Not all actions have the same aim, but specific types of actions like law can be specified by one uniform, albeit for obvious reasons quite abstract aim.

[7] Plato, *Politeia* 327a1, 433a; Aristotle, *Nicomachean Ethics* I 1, 1094a; V 1, 1129a; *Politics* 1328a36.

[8] Cicero, *De Legibus*, I, 29.

[9] Thomas Aquinas, *Summa Theologiae*, II-I, qu. 90. questioning the course of the queastio, these four elements are developed. The final definition is at the end in the answer to article 4.

[10] Thomas Aquinas, *Summa Theologiae*, II-II, qu. 57ff.

[11] Thomas Hobbes, *Leviathan* (1991), chap. 17, 1. Cambridge University Press, Cambridge.

of commands,[12] which were later interpreted by Austin as orders accompanied by sanctions for lack of compliance.[13] Locke assumed the preservation of property – understood in a wide sense to include life, liberty and ownership in material goods – as the main aim of law and politics.[14] The utilitarians still proposed a specific aim, but in a reduced form: maximizing happiness, understood as a collective effort to promote the individual and contingent states of pleasure and pain.[15] Kant defined law with respect to a liberal and very limited aim: Law comprehends the whole of the conditions under which the voluntary actions of any one person can be harmonized with the voluntary action of every other person, according to a universal law of freedom.[16] For Hegel, too, the aim of law is freedom.[17]

In the nineteenth and twentieth century, scepticism concerning necessary aims, value relativism, and a general positivism in the philosophy of science led to a nearly total dismissal of specific aims of law and politics and an almost exclusive reference to the means as the fundamental aspect of law. In England, John Austin characterized law as "sanctioned commands".[18] In Germany, Rudolf v. Jhering defined law in a purely formal way, namely, as the valid coercive norms of the state.[19] For him, norms and coercion are the crucial means of law. However, Jhering also proposes an aim of law, if only a relative and rather unspecific one: securing the fundamental conditions for the existence of a society.[20]

Hans Kelsen did not identify any specific aim of the law and the state. In his theory, law is distinguished from other social facts only by forming a hierarchical and dynamic system of coercive norms which confer validity on other inferior norms with a basic norm as the last necessary assumption and unifying ground of validity.[21] Law is differentiated from other similar social systems like morals only by its specific means: by the necessary use of coercion to guarantee obedience, and by its quality of being a dynamic system, that is, by the fact that the hierarchy of validity is based not upon correspondence in content but upon formal authorization.[22]

---

[12] Thomas Hobbes, *Leviathan*, chap 26, 1.

[13] John Austin, *The Province of Jurisprudence Determined* (1995), at 12, 21–37. Cambridge University Press, Cambridge.

[14] John Locke, *Second Treatise on Government* (1991), §§ 3, 6, 7, 123, 124. Cambridge University Press, Cambridge.

[15] Jeremy Bentham, *The Principles of Morals and Legislation* (1988), chap. 1, I at 1.

[16] Immanuel Kant, *Metaphysik der Sitten, Metaphyische Anfangsgründe der Rechtslehre*, § B.

[17] Georg Wilhelm Friedrich Hegel, *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* (1970), works 7, § 40, p. 98, § 4, at 46. Suhrkamp, Frankfurt am Main.

[18] John Austin, *The Province of Jurisprudence Determined* (1995), at 12, 21–37. Cambridge University Press, Cambridge.

[19] Rudolf v. Jhering, *Der Zweck im Recht* (3rd ed. 1893), vol. 1, at 320.

[20] *Id*. at. 443. At 446, Jhering stresses the relativity of aims. At 511, both conditions are put together.

[21] Hans Kelsen, *Reine Rechtslehre* (1967), at 3, 196. Deuticke, Wien.

[22] Hans Kelsen, *Reine Rechtslehre* (1967), at 34. Deuticke, Wien.

H. L. A. Hart, too, finds the distinguishing feature of modern, developed law, "the heart of a legal system", only in means, namely, in a system of primary and secondary rules.[23] He identifies three forms of secondary rules: rules of change, rules of adjudication and a rule of recognition. The rule of recognition is in particular the necessary means to identify the other rules of law.[24] An aim of law is mentioned by him only in passing, and it is only a very unspecific aim, which holds for many other social facts. Hart says: "I think it quite vain to seek any more specific purpose which law as such serves beyond providing guides to human conduct and standards of criticisms of such conduct."[25] Joseph Raz, in his definition of law, omits the two-level requirement and adds "authority" as the decisive feature.[26] But "authority" is still another means – like norms, sanctions, and second-order rules. No one accepts authority as a final aim of law.

One of the few philosophers of law in the twentieth century who identified a specific and decisive aim of law (and, because of this, deserves of careful attention) was Gustav Radbruch. In a return to pre-modern roots, Radbruch proposed justice as the necessary aim or "idea" of law.[27] For him, justice (in a wider sense) encompasses three sub-aims[28]: justice as formal equality (formale Gleichheit), expediency (Zweckmäßigkeit), and the certainty of law (Rechtssicherheit).

What is the outcome of this brief history of attempts to identify a specific aim of politics and law? We have to look for aims of law and politics which satisfy two requirements: they must not be too abstract, for otherwise they would be worthless to distinguish politics and law from other human actions. Hart's proposal that law "governs human conduct" may be true, but it is much too abstract to serve as a specific aim of politics and law. Human conduct is governed by all kinds of things, including age, location, friendship, and the weather. At the same time, the proposed aims of politics and law must not be too specific if they are to hold for all kinds of politics and law, that is, if they are to serve as necessary conditions of the concepts of politics and law. For that reason, the good, justice, or equality, understood in a substantial way, could not be the conceptually necessary aim of politics and law. For, on the one hand, the good, justice, and equality have been, and still are, understood in very different ways. On the other hand, we assume that bad or unjust politics or law is still politics and law.

[23] H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 98. Oxford University Press, Oxford.

[24] H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 79. Oxford University Press, Oxford.

[25] H. L. A. Hart, *The Concept of Law* (2nd ed. 1997), at 249. Oxford University Press, Oxford.

[26] Joseph Raz, "Legal Positivism and the Sources of Law", in Raz, *The Authority of Law. Essays on Law and Morality* (1979). Oxford University Press, Oxford.

[27] Gustav Radbruch, *Rechtsphilosophie* (2nd ed. 2003), at 34. C. F. Müller, Heidelbereg.

[28] Gustav Radbruch, *Rechtsphilosophie* (2nd ed. 2003), at 54, 73. C. F. Müller, Heidelbereg.