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THE HISTORY AND ELEMENTS OF THE RULE OF LAW

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I. INTRODUCTION

I have written extensively about the rule of law for two basic reasons.[1] First, the notion of the rule of law is perhaps the most powerful and often repeated political ideal in contemporary global discourse. Everyone, it seems, is for the rule of law. The rule of law is a major source of legitimation for governments in the modern world. A government that abides by the rule of law is seen as good and worthy of respect. In recent decades, billions of dollars have been spent by the World Bank and other development agencies on developing the rule of law around the world—with limited success.[2]

The second reason I have put so much effort into learning and writing about the rule of law is that this universally popular notion is elusive—seemingly hard to pin down. Legal theorists have called it an 'essentially contested concept'.[3] This elusiveness might partially explain its universal appeal. The rule of law is like the notion of 'the good'. Everyone is for the good, although we hold different ideas about what the good is.

It is my goal to help bring some clarity to the notion of the rule of law because of its importance and world-wide popularity: What does it mean? What are its requirements? What are its benefits? What are its limitations and failings? The fact that it is a contested concept does not mean that it has no core meaning and implications. There is an overlapping consensus about certain aspects that virtually everyone would agree upon—although beyond this there is much controversy.

My presentation focuses on the core. I begin with a definition of the rule of law and I elaborate on what this definition entails, as well as excludes. Then, I explore

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1 See Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004).

2 See Brian Z. Tamanaha, "The Primacy of Society and the Failures of Law and Development" (2011) 44 Cornell Int'l.L.J. 209.

3 Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 Law & Phil. 137.

three themes that course through discussions of the rule of law: government limited by law, formal legality and 'the rule of law, not man'. I identify the key source of the rule of law in society. And I close with a comment about the diverse manifestations of the rule of law across different societies.

II. Definition of the Rule of Law

Here is the definition: The rule of law means that government officials and citizens are bound by and abide by the law. I repeat: government officials and citizens are bound by and abide by the law.

This is a simple and basic definition. I have selected it because it is a proposition that everyone who thinks about the topic would agree with. Many who write about the rule of law would add more than this, but no one would say that the rule of law involves less than this. It is the minimum content of the rule of law. A society in which government officials and citizens are bound by and abide by the law is a society that lives under the rule of law.

While this definition is basic, it is not empty. A number of requirements and implications immediately follow from it.

This definition requires that there must be a system of laws—and law by its nature involves rules *set forth in advance* that are *stated in general terms*. A particular decision or an order made for an occasion is not a rule. The law must be *generally known and understood*. The requirements imposed by the law *cannot be impossible* for people to meet. The laws must be *applied equally to everyone according to their terms*. There must be *mechanisms* or *institutions* that *enforce the legal rules* when they are breached.

All these are entailed by the basic definition of the rule of law I provide because if these conditions do not exist, the rule of law cannot exist. It cannot be the case that government officials and citizens will be bound by and abide by the law, for example, if the laws are not generally known, or if the laws are impossible to comply with, or if the laws are not applied according to their terms, or if there is no mechanism to enforce the law when it is breached.

The basic definition of the rule of law that I use and the requirements that follow from it, resembles what is known in the literature as the 'thin' definition of the rule of law, often identified with theorists like Lon Fuller and Joseph Raz. What I say here is consistent with the 'thin' view of the rule of law, but my starting point is a level below the formal and procedural requirements of the 'thin' definition. I focus instead on what it means to have a government and citizenry that are bound by and abide by the law. This starting point allows us to inquire into the conditions that give rise to a law-governed society, and I build from there to draw out the implications of this basic idea.

III. Why Definition does not include Democracy and Human Rights

Before addressing these implications, I will indicate what this definition does not include, and I will explain why. My definition of the rule of law focuses only on law—it does not include democracy and does not include human rights. By excluding

them, I do not mean to deny the value of democracy and human rights. I am merely asserting that they should not be included within the definition of the rule of law.

This exclusion will be controversial in many circles. Many people who write about the rule of law include democracy and human rights within its definition. The definition of the rule of law articulated by the United Nations, for instance, incorporates both human rights and democracy as necessary elements of the rule of law. For the United Nations, the rule of law refers to[4]

> 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.

There is much in this definition with which I agree, but not the inclusion of human rights and not the allusion to democracy.

There are three main reasons why I exclude them from the core meaning of the rule of law.

The first reason is that the definition, on its own terms, requires only that government officials and citizens be bound by and abide by the law. Notice that this requirement says nothing about *how* those laws are made—whether through democratic means or otherwise—and it says nothing about the *standards* that those laws must satisfy—whether measured against human rights standards or any others.

The rule of law is an ideal that relates to *legality*. Democracy is a *system of governance*. Human rights are *universal norms and standards*, or at least norms that claim universal application. Since each of these notions has meaning that is well understood, it invites confusion, in my view, to insist that the latter two are part of the definition of the rule of law. Each must be understood and argued for on its own terms. They are separate elements that focus on different aspects of a political-legal system, which can exist separately or in combination.

My second reason for excluding them is that to insist that the rule of law requires human rights and democracy has the effect of defining the rule of law in terms of institutions that match liberal democracies. It suggests that only liberal democracies have the rule of law. In this line of thinking, if a society wishes to acquire the rule of law, it must then come to resemble a liberal democracy. This is unjustifiable. It smacks of stuffing the meaning of the rule of law with contestable normative presuppositions to produce a desired or presupposed outcome which is then imposed on everyone by definitional fiat.

Furthermore, this move—the insertion of democracy and human rights as aspects of the definition of rule of law—is objectionable because it is contrary to the tenets of liberalism itself. It is contrary to liberal tolerance and respect for other ways of being to insist that only liberal democracies have a claim to legitimacy. One

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[4] *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN SC, UN Doc. S/2004/616 at 4 [emphasis added].

of the most important liberal philosophers of the 20th century, John Rawls, made this very argument when he acknowledged that what he called "hierarchical societies" (which he contrasted with liberal societies) can be legitimate even when they lack democratic institutions, when people are not seen as free and equal and when they "do not have the right of free speech as in liberal societies".[5]

According to Rawls, such societies can be legitimate when they are well-ordered and people enjoy minimum rights to sustenance, security, property, formal equality and freedom from forced labor.[6] Rawls added: "The system of law [must be] sincerely and not unreasonably believed to be guided by a common good conception of justice. It takes into account people's essential interests and imposes moral duties and obligations on all members of society."[7] What he had in mind was a genuinely communitarian-oriented government and society.

This is not the place to engage in a discussion of Rawls' theory. I mention it here only to indicate that a liberal philosopher of the first rank acknowledged that societies need not implement democracy and the full panoply of liberal rights to make a claim to legitimacy. Consistent with this view, Rawls offered a minimalist definition of the rule of law that focuses on the basic elements of a legal system. By rule of law, he wrote,[8]

> I mean that its rules are public, that similar cases are treated similarly, that there are no bills of attainder, and the like. These are all features of a legal system insofar as it embodies without deviation the notion of a public system of rules addressed to rational beings for the organization of their conduct in the pursuit of their substantive interests. This concept imposes, by itself, no limits on the content of legal rules.

Rawls' definition of the rule of law is consistent with the approach I take here.

The third reason I do not include democracy and human rights as necessary aspects of the rule of law has to do with the powerful legitimating function the rule of law plays in modern global discourse. A country that has the rule of law—and virtually every country today makes this claim, some with much less credibility than others—relies on this claim to insist that it is a good government worthy of obedience from its citizens. When one reads all the rhetoric about the rule of law that now exists, it sometimes sounds like the rule of law is the essential basis of all good things.

> The 2011 World Justice Project Rule of Law Index, for example, broadly asserts:[9]
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> Without the rule of law, medicines do not reach health facilities due to corruption; women in rural areas remain unaware of their rights; people are killed in criminal violence; and firms' costs increase because of expropriation risk. The rule of law is the cornerstone to improving public health, safeguarding participation, ensuring security, and fighting poverty.

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5 See John Rawls, "The Law of Peoples" in Samuel Freeman, ed., *Collected Papers* (Cambridge: Harvard University Press, 1999) at 529.

6 *Ibid*. at 546-547.

7 *Ibid*. at 546.

8 *Ibid*. at 118.

9 Mark David Agrast, Juan Carlos Botero & Alejandro Ponce, *The World Justice Project Rule of Law Index 2011*, (Washington D.C.: The World Justice Project) at 1.

Let me emphasise that I believe that the rule of law provides essential benefits to society. That said, the problem with statements like this is that a society can have the rule of law, yet still suffer from poor public health, poverty, threats to personal security and a host of other ailments. For example, the United States is generally thought to be a rule of law country and scores relatively well on the rule of law index.[10] Yet major segments of its population have limited access to health care, suffer from poverty and live in unsafe areas.

It is necessary to maintain a sharp analytical separation between the rule of law, democracy and human rights, as well as other good things we might want, like health and security, because mixing all of these together tends to obscure the essential reality that a society and government may comply with the rule of law, yet still be seriously flawed or wanting in various respects.

Or to put the crucial point another way, the rule of law may be a necessary element of good governance and a decent society, but it is certainly not sufficient. And a society that possesses the rule of law, while better off in certain ways that I will identify, is not, on that basis alone, necessarily a good society worthy of praise.

The rule of law is just one aspect of a larger social-political complex and what matters is not any one piece on its own but how it all comes together.

IV. Three Themes of the Rule of Law

Thus far I have presented a basic definition of the rule of law and I specified a handful of implications that follow from this basic definition. I have also explained why democracy and human rights should not be seen as necessary aspects of the rule of law.

Now I will shift the focus to address three interconnected themes at the center of the rule of law.

The first theme is the notion that government is limited by law.

The second theme involves the notion of formal legality.

The third theme is the classic expression: "The rule of law, not man".

With respect to each theme I will describe the basic idea and offer a few comments about its implications. While these themes do not exhaust everything there is to say about the rule of law, much of what the notion involves is picked up through this focus.

A. *Government Limited by Law*

The broadest understanding of the rule of law, a thread that has run for over two thousand years, is that the sovereign, the state and its officials, are limited by the law. This notion long predates liberalism. At its origins, it was not about protecting personal liberty or autonomy. It was an essential idea long before the modern understanding of individual liberty had developed. This is about government tyranny. Restraining the sovereign's awesome power has been a perennial struggle for societies as long as they have existed.

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[10] *Ibid*. at 103.

The effort to impose legal limits on the sovereign raises an ancient dilemma: The sovereign creates the law. How can the creator of law be bound by the law?

This tension shows up in the famous Justinian Code, written in the 6th century. One provision in the Code reads: "What has pleased the prince has the force of law".[11] Another provision reads: "The prince is not bound by the laws".[12] However, yet another provision of the Code states: "It is a statement worthy of the majesty of a ruler for the Prince to profess himself bound by the laws".[13] Notwithstanding the assertion that the Prince is not bound by the laws, it was generally understood in practice that the Emperor was subject to existing rules within the legal tradition, although he undoubtedly had the power to modify the law if he desired. But even when the Emperor exercised his law-making powers, as leading medieval commentator Ulpian remarked, "if law which had been regarded as just for a long time was to be reformulated, there had better be good reason for the change".[14]

There are two distinct senses of the notion that the sovereign and government officials must operate within a limiting framework of law. The first sense is that officials must abide by the positive laws currently in force. The law may be changed by authorised officials following appropriate procedures, but it must be complied with until it is changed.

The second sense is that even when government officials wish to change the law, they are not entirely free to change it in any way they desire. There are restraints on their law-making power. There are certain things they cannot do with it or in the name of law. During the Middle Ages, these restraints were understood in terms of the dictates of natural or divine law or of long-standing customary law of the community. In contemporary society, these restraints are understood in terms of human rights or constitutional rights or limitations. The fundamental import of this second sense is that the sovereign's power over the positive law is itself subject to higher legal restrictions.

To repeat, this fundamental idea poses a deep problem: How can the very power that creates and enforces the law be limited by law? Theorists as diverse as Aquinas and Hobbes thought that the rule of law in this sense was impossible, at least conceptually. If the law is declared by the sovereign, the sovereign cannot be limited by law, for that would mean the sovereign limits itself. Hobbes observed in the Leviathan: "He that is bound to himself only, is not bound".[15]

The pre-modern solution to this dilemma was different from the modern solution. Both deserve mention because both continue to operate.

In the pre-modern period, monarchs and government officials were restrained by law in three basic ways. The *first way* was that the monarch explicitly *accepted* or *affirmed* that the law was binding on his conduct. The prime example of this is that during the Middle Ages, monarchs ascending to office would swear an oath or affirm their commitment to abide by divine, positive and customary law.

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[11] Digest 1.4.1, cited in Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999) at 59.

[12] Digest 1.3.1, *ibid*.

[13] " "The Prince is Not Bound by the Laws." Accursius and the Origins of the Modern State" (1963) 5(4) Comparative Studies in Society and History 378 at 392.

[14] Jill Harries, *Law and Empire in Late Antiquity* (Cambridge: Cambridge University Press, 1999) at 21.

[15] Thomas Hobbes, *Leviathan* (New York: Oxford University Press, 1996) at 176-177.

Pepin, for example, said, "Inasmuch as we shall observe law toward everybody, we wish everybody to observe it toward us"; Charles the Bold swore, "I shall keep the law and justice"; Louis the Stammerer asserted, "I shall keep the customs and the laws of the nation".[16] Even Louis XIV, the exemplar of absolutist monarchy, stated in an ordinance in 1667, "Let it be not said that the sovereign is not subjected to the laws of his State; the contrary proposition is a truth of natural law…; what brings perfect felicity to a kingdom is the fact that the king is obeyed by his subjects and that he himself obeys the law".[17]

These oath-ceremonies and sovereign statements carried a strong message that one of the chief duties of the monarch was to uphold the law of the community, and entailed within this duty was that the king must himself conform to the law.

Perhaps the most famous example of a monarch agreeing to be bound by the law is King John's signing of the *Magna Carta*. This was under duress—the threat of rebellion by the Barons—and he soon repudiated it. But future English monarchs thereafter consistently reaffirmed their commitment to the document and their obligation to abide by the law of the land.

The *second way* legal restraints came to hold was that it was widely *understood* or *assumed* that the monarch, and government officials, operated within a framework of laws that applied to everyone. The supreme example of this was Germanic customary law. It was widely understood that this ancient law of the community applied to everyone, including leaders. During the Medieval period, furthermore, it was understood that everyone, king included, operated within divine and natural law restraints.

The *third way* legal restraints came to bind officials was that, as a matter of *routine conduct*, monarchs and government officials operated within legal restraints like everyone else—though often on more favorable terms. This third way complements and overlaps with the preceding two, but it bears separate mention to emphasise the weight of mundane day-to-day conformity. A king or nobleman who had rights to fees or services from feudal holdings also had duties and obligations that had to be satisfied. Kings or government officials who wanted to borrow money would have to live up to the agreement if they hoped to obtain future loans (although many debts were repudiated). Nobles could be held to answer in court proceedings for breach of obligations. This all meant that kings and government officials operated on a daily basis within a legal framework, regardless of their status.

These three ways—that monarchs affirmed their obligation to abide by law, the existence of a widely shared cultural understanding that the sovereign and officials are bound by law and the fact that they carried on routine affairs within a legal framework—produced a powerful combination of ideals and practice. Over time, owing to this combination, it came to be an accepted measure of legitimacy that the sovereign, nobles and government officials must operate within legal restraints.

Critics, political opponents and revolutionaries would often cite breaches of law—of natural law or divine law, customary law, the common law, or the law of the state—to justify their challenges to authority. The American Declaration of Independence, to cite a historic example, reads like a legal indictment against the King of England.

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[16] Andre Tunc, "The Royal Will and the Rule of Law" in Arthur E. Sutherland, ed., *Government Under Law* (Cambridge: Harvard University Press, 1956) 404 at 404.

[17] *Ibid*. at 408.

What I say should not be understood as naïve. Frequently, no doubt, monarchs and government officials *did not in fact abide by the law*, regardless of oaths, affirmations and common understandings. When an objective was important enough to a sovereign or official, a law standing in the way was little more than an inconvenience to be circumvented. History is filled with examples in which the law served a weapon in the hands of the sovereign or officials, wielded in a draconian fashion to achieve their objectives, facilitated by judges beholden to or afraid of them. My words do not deny any of this reality.

Nonetheless, the sovereign and government officials regularly did operate within the law. When they disregarded the law, it at least gave them pause, and they made strenuous efforts to persuade the public that their actions were consistent with the law. The fact that rulers often submitted to the restraints of the law for mainly self-interested reasons—to make their actions appear legitimate—does not detract from the reality that legal restrictions did matter, even when not fully honored.[18]

Although sovereigns and officials regularly operated within the law, it must be underscored that there were many instances in the past, where there were no effective *legal* remedies for violation. When the law was repudiated or violated by the sovereign or government officials, there were *political* consequences to be paid. The threat of excommunication by the church (which had political implications) was the means by which Popes enforced divine law against kings. The threat of revolt was the mode of enforcement for Germanic customary law. For some monarchs, it was the looming threat of being deposed or beheaded. Allegations about violations of the law were a rhetorical resource that helped rally support for those who opposed regal actions. In these situations, the sanction that served to enforce the law against the sovereign was not a legal sanction but a political one.

While various manifestations of these types of non-legal constraints continue to operate today, in the contemporary world we have created a different solution to the problem of holding the sovereign to the law. This solution involves the creation of separate institutions within the government with specific law-related functions. This is the institutionalised differentiation of the sovereign and the government itself. This is commonly thought of as the separation of powers, but the differentiation I mean is more refined than dividing the government into three branches.

In many societies today, there is the office of the Attorney General or the prosecutor, which may be under the authority of the Executive, yet with an institutional separation and an independent obligation to abide by and enforce the law. In the Watergate Affair in the United States, for example, officials within the Department of Justice conducted an investigation into whether President Nixon had violated the law. Although he used his authority as head of the Executive Branch to fire those conducting the investigation into his conduct, President Nixon was forced to resign his position owing to the political backlash that followed in the end.

In addition to an independent prosecuting branch within the government, an independent judicial branch exists in many societies, in which judges have the duty to apply the law. In Dicey's famous account, he identified as a mainstay of the rule of law in England, that government officials could be brought before ordinary common

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[18] See Stephen Holmes, "Lineages of the Rule of Law" in Jose Maria Maravall & Adam Przeworski, eds., *Democracy and the Rule of Law* (New York: Cambridge University Press, 2003) 19 at 19-61.

law courts by private citizens to answer for violations of the law.[19] For this restraint to exist, the essential prerequisite is that the judiciary must possess a degree of independence from the rest of the governmental apparatus. This involves a structural partitioning of the government, giving one part, the judiciary, the capacity to hold the other parts answerable on legal grounds.

This, then, is the modern answer to Hobbes's objection that the sovereign who is bound to himself is not bound. We have divided up the sovereign into different component parts. In the modern system, certain parts of the government, those offices charged with the enforcement and application of the law, bind other parts of the government to the law. It works through the differentiation of institutions and the commitment of officeholders within government to comply with their obligations to uphold the law.

B. *Formal Legality*

The second theme common within discussions of the rule of law is formal legality. The requirements of formal legality all derive from the nature of rules—what rules *are* and how they operate. These requirements are the ones I mentioned earlier: that laws must be set forth in advance, they must be general, they must be publicly stated, they must be applied to everyone according to their terms, and they cannot demand the impossible. A legal system that lacks these qualities cannot constitute a system of rules that bind officials and citizens.

Formal legality is the dominant notion of the rule of law within liberalism and within capitalism. Above all else, formal legality provides predictability through law. As Hayek put it, the rule of law makes "it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge".[20] This allows people to know in advance which actions will expose them to the risk of sanction by the government apparatus.

Viewed in terms of liberalism, formal legality enhances liberty of action or individual autonomy because people are advised of their permissible range of free action. There can be no criminal punishment without a pre-existing law that specifies a given action as prohibited. Thus, citizens are free to do whatever they like as long as the stated rules are not violated.

In relation to a capitalist economic system, public, prospective laws, with the qualities of generality, equality of application and certainty, help facilitate market transactions because predictability allows merchants to calculate the likely costs and benefits of anticipated transactions. Laws of contract encourage more transactions between people because they have assurances that a sanction would follow should a party breach the contract. Laws protecting property encourage productive efforts because people know the law will secure their right to enjoy the fruits of their hard work. A growing body of evidence indicates a positive correlation between

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[19] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund Inc., 1982) at 110-115.

[20] Friedrich A. Hayek, *The Road to Serfdom* (Chicago: University of Chicago Press, 1994) at 80.

economic development and formal legality, which is attributed to the enhancement of predictability, certainty and security.[21]

That is all good. Now I will identify three limitations of formal legality.

The first limitation is that all rules suffer from the problem of *over-inclusiveness* and *under-inclusiveness*. Rules are general directives stated in advance to achieve particular purposes or to maintain normative order. The problem is that situations arise that do not conform to the purposes of the rule or the normative assumptions behind the rule. Rules by their nature are over-inclusive and under-inclusive. By over-inclusive, I mean that rules will sometimes produce results that are *not consistent* with the aim of the rule; by under-inclusive, I mean that sometimes, rules will fail to extend to situations that *would* advance the purpose of the rule.

Let me offer an example of a single rule that can be over and under-inclusive. Let's say that under the law, citizens cannot obtain a driver's license until they reach the age of 16. The law-makers picked that age limit because they were trying to identify people who are physically and mentally mature enough to drive an automobile safely. However, there are some 15 year olds who are mature enough to drive automobiles safely and there are some 17 year olds who are not. According to the law, the mature 15 year old will be denied a license, while the immature 17 year old will be granted a license. In both cases, the application of the rule in accordance with its terms will have consequences that are inconsistent with the purpose behind the rule.

Formal legality, which requires making decisions in accordance with rules, will in this manner occasionally produce non-optimal or undesirable results. We might *amend* the rule to add two exceptions: (1) that mature people less than 16 can get a license; and (2) that immature people over 16 can be denied a license; and the civil servant at the licensing bureau will decide whether the applicant meets the maturity requirement.

But notice that this amendment destroys the rule-based nature of the law. That is because the determination of whether a person is sufficiently 'mature' is not a rule of general application. Rather, it calls for an individualised judgment to be made on a case-by-case basis. Notice also that the addition of this clause diminishes the predictability of the law. Prior to the amendment, everyone under 16 knew they could not get the license and everyone over 16 knew that they could (assuming they passed the driving test). With the amendment, these results no longer automatically follow.

This example nicely demonstrates the strengths of a rule-bound system (enhanced predictability), as well as its limitations (occasionally bad results). This is the down-side of formal legality. Many legal systems manage the problem of over-inclusiveness by allowing judges to consider fairness, equity or justice to avoid bad results that follow from a rule (under-inclusiveness cannot be solved this way). But this cannot be done too often, for it would reduce the overall rule-bound quality of the system and increase the level of uncertainty.

Another limitation of the rule of law understood in terms of formal legality is that it is compatible with a *regime of laws with inequitable or evil content*. It is consistent with legally imposed segregation and apartheid, as confirmed by the examples of the

[21] See Robert J. Barro, *Determinants of Economic Growth: A Cross Country Empirical Study* (Cambridge, MA: MIT Press, 1997).

United States and South Africa, respectively. It is also consistent with authoritarian or non-democratic regimes.

An unjust set of laws is not made just by adherence to formal requirements. On the contrary, when the laws are unjust, formal legality can actually bring about greater evil because the system is dedicated to carrying out these unjust laws. An effective system of the rule of law may strengthen the grip of an authoritarian regime by enhancing its efficiency and by providing it with the appearance of legitimacy.

A final limitation is that there are many circumstances under which *formal legality is not appropriate or socially beneficial*. Many areas of government policy, especially when uncertainties or complexity exists, will be undermined by attempts at restricting government decision-making in advance by legal rules. There are situations in which officials must gather information, apply expertise, exercise discretion, and make judgments. The main example of this in the modern state involves administrative agencies that exist to advance social policies, like enhance education or protect the environment.

Dicey and Hayek expressed great concern that the expansion of administrative decision-making by government officials was antithetical to the rule of law because these kinds of decisions are not strictly determined by rules and because final decisions in the administrative context were not made by ordinary courts. After Dicey's and Hayek's writing, the United States developed procedural rules to govern the actions of administrative agencies and agency decisions could be appealed to federal courts. But it remains true that much of the core decision-making made by government agencies aimed at achieving social policies is not strictly rule-governed.

Formal legality does not work in complex situations when particular judgments must be made.

Another context that is not always suited to formal legal decision-making involves small-scale communities with a communitarian orientation—to be ruled in strict accordance with rules might be harmful when the results dictated by the rules would leave the community unsettled. Or in situations that threaten an eruption of violence within or between communities—peace might better be achieved through political efforts. When responding to disputes of this sort, the primary concern often is to come to a solution that everyone can live with; long term relationships and shared histories matter more than what the rules might dictate. Coming to a compromise may better achieve this goal than strict rule application.

These observations also apply to commercial transactions, which formal legality is closely identified with. Locally as well as internationally, business partners have regularly demonstrated a desire to resort to mediation or other forms of resolution over court proceedings.[22] This is in part owing to the expense, delay and sometimes, to the unreliability of local, national or international courts. But it is also owing to the fact that business partners desire to continue profitable relationships and to maintain good reputations in the business community by demonstrating a willingness to come to a mutually acceptable resolution. Rules frequently have an all or nothing consequence, resulting in winners and losers, but communities, whether social, political

[22] See Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: The University of Chicago Press, 1996); Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study" (1963) 28 American Sociological Review 55.

or commercial, are often better served by a compromise that allows both sides in a dispute to walk away satisfied.

The statement that merchants can under certain circumstances function without resorting to legality, I must emphasise, does not suggest that legality is irrelevant to commercial enterprise and markets. On the contrary, the establishment of a background framework of reliable legality is an important ingredient to capitalism as currently constituted.[23] Having this background to fall back on in case of failure helps merchants work toward achieving an acceptable compromise. And the same is true of disputes more generally within many types of community.

Owing to the three problems I have identified—the problem of over and under-inclusiveness, the problem of bad laws and situations where discretion is necessary or compromise is better than winners and losers—formal legality does not do well under all circumstances. Sometimes, a rule of law system that strictly complies with the demands of formal legality will produce negative results.

This recitation of the disadvantages of formal legality, however, should not be interpreted to denigrate its value. Formal legality is perhaps best appreciated by comparison to when it is lacking. To not know in advance how government officials will react to one's conduct, commercial or otherwise, is to be perpetually insecure. Societies that operate within a regime of formal legality benefit greatly by reducing this state of uncertainty.

C. *The Rule of Law, not Man*

The third theme is the contrast frequently drawn between the rule of law and the rule of man. This commonly phrased opposition is put in different ways: 'the rule of law, not man'; 'a government of laws, not men'; 'law is reason, man is passion'; 'law is objective, man is subjective'.

The inspiration underlying this idea is that to live under the rule of law is not to be subject to the unpredictable vagaries of other individuals—whether monarchs, judges, government officials or fellow citizens. It is to be shielded from the familiar human weaknesses of bias, passion, prejudice, error, ignorance or whim. This sense of the rule of law is grounded upon fear and distrust of others. Aristotle's words on this still resonate today:[24]

> And the rule of law, it is argued, is preferable to that of any individual… Therefore he who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. The law is reason unaffected by desire.

Neither Plato nor Aristotle saw the rule of law as the best possible system in the ideal. Plato's ideal Republic was governed by Guardians educated in Philosophy. Rule by wise men is better than rule by law. "Indeed," Plato remarked, "where the good king

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[23] See Ibrahim F.I. Shihata, *Complementary Reform: Essays on Legal, Judicial and Other Institutional Reforms Supported by the World Bank* (The Hague: Kluwer Law International, 1997).

[24] Aristotle, *Politics*, ed. by Stephen Everson, (Cambridge: Cambridge University Press, 1988) vol. 3 at 78.

rules, law is a hindrance standing in the way of justice like an obstinate and ignorant man".[25]

Despite holding this view, Plato and Aristotle both advocated the rule of law because they recognised that humans suffer from passion and distortions of reason—and because the power to rule over others has the potential for abuse and can corrupt even the best among us.

But there is a problem at the heart of the opposition between rule of law and rule of man.

The idea of 'the rule of law, not man' has been forever dogged by the fact that laws are not self-interpreting or self-applying. The operation of law cannot be sequestered from human participation. Hobbes considered it a delusive ideal for this reason.

The inevitability of human participation in the application and interpretation of rules provides the opening for the reintroduction of the very weaknesses sought to be avoided by resorting to law in the first place. The indeterminacy of law and language suggest that this opening can never be shut completely.

The standard solution to this problem is to identify the judiciary—the legal experts—as the special guardians of the law. The judge *becomes* the law personified. This occurs when a judge undergoes extensive training in legal knowledge and in the craft of judging—indoctrinated into and internalising the law—and when a judge takes a solemn oath to decide cases according to the law.

In the ideal, the judge must be unbiased, neutral between the parties, free of passion, prejudice and arbitrariness, loyal to the law alone. Thus, we see common declarations that the judge is the mouthpiece of the law, or the judge speaks the law, or the judge has no will. Final say in the interpretation and application of the law properly rests with the judiciary because no other government official undergoes this requisite transformation in which the subjective individual is replaced with the objective judge.

Although 'the rule of law, not man' ideal applies to all government officials, it is the special preserve of judges for these reasons. Judges are the ones whose specific task is to insure that other government officials are held to the law. The ultimate responsibility for maintaining a rule of law system therefore rests with the judiciary.

Several conditions must hold if judges are to accomplish this.

There must be a well-developed legal tradition, a rich body of legal knowledge and a robust legal profession that embodies and advocates the value of legality. Lawyers must be participants in the criminal law system, in establishing property ownership, in facilitating commercial transactions, in seeking recovery for injuries and in handling major disputes. Lawyers must advise individuals, civic groups, corporate actors and government officials in legal affairs. And in many societies, lawyers occupy leading positions in business and government, bringing into these positions their legal acumen and their respect for legality.

In addition, the judiciary must enjoy independence, with institutional arrangements that protect the judiciary from interference by others. The standard formula for achieving this involves (1) the selection of judges based upon legal qualifications (their legal training and experience); (2) long-term appointments for judges; (3)

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[25] John Walter Jones, *The Law and Legal Theory of the Greeks* (Oxford: Clarendon Press, 1956) at 7 [quoting Plato].

protection against the removal of judges in retaliation for their decisions and (4) reasonable remuneration for judges, with sufficient resources to maintain a functioning court system (support staff, books, courtrooms and the like).

These institutional factors, however, are not enough by themselves to assure the autonomy of judges. They must be supported by attitudes external to the judiciary, among government officials and the public at large, in particular the attitude that it is improper to interfere with the judiciary as it fulfills its role of interpreting and applying the law, even when its decisions are unpopular. A famous example of this occurred in the United States, when President Roosevelt proposed to pack the Supreme Court with judges who would uphold his New Deal legislation. Although the conservative Supreme Court had made recent decisions that were unpopular with the public, Roosevelt's plan was widely opposed and immediately failed, because it was seen as an effort to undermine the independence of the judiciary. It is the particular duty of the legal profession to advocate and defend the independence of the judiciary when it is threatened.

Citizens and government officials, in addition to defending the integrity of the court, must voluntarily comply with judicial decisions, including those decisions they find objectionable. This is essential because the judiciary, which has no military force, relies upon the general respect of the populace.

The danger of this strain of the rule of law is that the *rule of law* might become *rule by judges*. Whenever judges have final say over the interpretation and application of law, they will determine the implications of law in concrete situations.

The old saying, 'The judge speaks the law'—paints the person of the judge as invisible, with the law alone speaking through the mouth of the judge. But this saying can just as easily be turned around to this: 'The law is what the judge says it is'. As every lawyer knows, the law can be manipulated in the hands of a skilled judge to achieve desired results.

In certain societies around the world today, there is growing concern about the expansion of judicial power—known as the 'judicialisation of politics', in which judges render sweeping decisions that potentially infringe on the decision-making authority of other institutions of government. This over-stepping of judicial bounds can produce a backlash that leads to the politicisation of the judiciary, whereby groups within society seek to seat judges who will aggressively advance their political positions through their legal decisions. Going down this path threatens to undermine the independence of the judiciary as well as the collective judicial commitment to render decisions in accordance with the law.

This scenario provides a warning that judges must be selected with the utmost care, not just focusing on their legal knowledge and acumen, but with at least as much attention to their commitment to fidelity to the law, to their willingness to defer to the proper authority for the making of law, to their qualities of honesty and integrity, to their ability to remain unbiased and not succumb to corruption, to their good temperament and reasonableness and to their demonstrated capacity for wisdom. They must possess the judicial virtues.[26]

Law cannot but speak through people. Judges must be individuals who possess judgment, wisdom and character, or the law will be dull-minded, vicious and

[26] See Lawrence B. Solum, "Judicial Selection: Ideology Versus Character" (2005) 26 Cardozo L. Rev. 659.

oblivious to its consequences. It was Aristotle who first insisted that the character and orientation of the judge is the essential component of the rule of law.

V. At the Overlapping Core of the Three Themes

I have now covered three core themes that course through discussions of the rule of law: (1) government limited by law; (2) formal legality and (3) the contrast between being ruled by law and being ruled by man. And I have brought out many of the positive and negative implications of the rule of law.

Now, I would like to say a few words about what lies at the overlapping core of these three themes. All three themes, approaching from different angles, would converge on this proposition:

> When the government exercises coercion against a citizen, it must do so in accordance with legal rules stated in advance, in a manner consistent with the dictates of formal legality. Legal rules must affirmatively authorise the government action. The government action cannot transgress any standing legal restrictions. At some point there must be recourse to an independent court dedicated to upholding the law that will make a determination of the legality of the government's action. And the ruling of the court must be respected by government officials.

The rule of law demands this much, at least.

It goes without saying that no nation perfectly lives up to the ideals of the rule of law. A number of systems fall so short of these ideals that they must be denied the label, regardless of their claims otherwise. All rule of law systems, even those that are admirable in many respects, have their failings and exceptions and flaws.

But any nation that hopes to meet the core demand of the rule of law must insure that when the government exercises coercion against citizens, it does so in accordance with standing laws and it must insure that the government is answerable in court for its actions. Everything else aside, this lies at the heart of the rule of law.

VI. The Essential Component behind a Rule of Law Society

The final topic I will address is the essential element that gives rise to and sustains the rule of law within a society.

For the rule of law to exist, people must believe in and be committed to the rule of law. They must take it for granted as a necessary and proper aspect of their society. This attitude is not itself a legal rule. It amounts to a shared cultural belief. When this cultural belief is pervasive, the rule of law can be resilient, spanning generations and surviving episodes in which the rule of law had been flouted by government officials. The Anglo-American rule of law tradition initially developed over a period of centuries in England and then spread through colonisation to other locations, where the same attitudes toward law took root, although not to the same degree everywhere and not in the same ways.

When this cultural belief is not pervasive, the rule of law will be weak or non-existent.

Cultural beliefs are not subject to complete human control, so it is no easy matter to inculcate belief in the rule of law when it does not already exist. In many societies,

the government is distrusted and recourse to the law is feared or avoided. Negative views towards the law are common where the law has a history of enforcing colonial or authoritarian rule, where legal officials are perceived to be corrupt or inept, where legal professionals are distrusted, or where the content or application of the law is seen to be unfair or identified with particular interests or groups within society or with the elite.

A widely shared cultural belief that the law *should* rule is *the* essential element of the rule of law—and that is the hardest to achieve. Above all else, for this cultural belief to be viable, people must identify with the law and perceive it to be worthy of ruling. The populace must believe that the law reflects their values and serves their interests. General trust in law must be earned for each generation, again and again, by legal actors living up their legal obligations.

VII. Closing Observations

I will close by stating the essential insight I hope you will take away from these remarks. Theorists have often remarked that the rule of law has no agreed upon meaning. While there is much disagreement, to be sure, I am not convinced that it extends as deeply as is often suggested. In this talk, I have focused on a widely recognised, core overlapping meaning.

The key insight, in my view, is not that there is no one meaning, but that there is *no one manifestation* of the rule of law. There are many different ways and textures to how countries manifest the rule of law—to how they instantiate a society in which government officials and citizens are bound by and abide by the law. The rule of law in Japan is very different from the rule of law in Germany, which is different from the rule of law in Singapore and in the United States. All of these societies have recognisably robust rule of law systems, albeit with different strengths and weaknesses. And within each society, the implications of their rule of law system—how it plays out in daily life—is a function of the surrounding political, economic, cultural and social environment.

What this insight tells us is that when a working rule of law system is in place, focusing on 'the rule of law' itself, as a political ideal or a theoretical construct or a set of quantitative indices, does not get us very far, and having this as the central focus might even serve as a distraction. What really matters is the role law plays within the broader government and society on issues of importance to the people, whether the legal system on the whole, or in particular instances, is a positive force for the good, or not.