

Introduction

Everyone seems to care about the rule of law. The rich and powerful governments of the world judge others by it; the poor and weak insist that they have it, and thus are entitled to the respect and commercial opportunities offered by the developed world; the United Nations, the World Bank, and nongovernmental organizations galore try to promote it, and philosophers praise it. But what is it? And should we really care? Is it just another form of neocolonial cultural hegemony, an excuse for state-building that just means making the governments of the world safer for multinational corporations (“economic development”)? Or can it have meaning to the masses as well as the elite, to Afghanistan as well as the United States? These are the questions that this book explores. Ultimately, I will suggest that the rule of law really is valuable for all, but not for the reasons most academics and policy makers have traditionally thought, and that this yields important insights on how it is achieved and how policy makers should promote it.

Most of us know the rule of law in the form of buzzwords: “A government of laws, not of men.” “Nobody is above the law.” We can more or less reliably pick out the countries that have it – the Western democracies are the usual suspects – and we have a pretty good clue of the countries that don’t: in recent history, the classic examples are tyrannies like the Soviet Union and Haiti under the Duvaliers; today we think of countries like Afghanistan, in the grip of chaos and violence thanks, in Afghanistan’s case, to foreign invasion. Pressed to explain what it means for those countries to lack the rule of law, most of us would start to talk about show trials and disappearances, Tonton Macoutes in Haiti and KGB agents terrorizing the Russian public, bribe-taking, and police running amok. On the brighter side, we might talk about fair trials and public laws, about neutral judges and police who read you your rights as they take you to the lockup. But do we have anything more than a list of good things to strive for and bad things to avoid?

Scholars in a variety of academic disciplines think that they do. Philosophers and lawyers, often following leading accounts by Lon Fuller and Friedrich Hayek, have collected a cluster of ideas under the rubric of the rule of law: the law is to be predictable, stable, public, general, and (to some scholars) more or less actually

obeyed within the societies it purports to regulate. But within these loose boundaries, there is no agreement as to the details of what it means to satisfy these broad ideals, and many even deny that all are important – the leading legal philosopher Joseph Raz, for example, has argued that the law need not be general. On the other hand, some, such as Ronald Dworkin, have argued that the rule of law makes much more extensive demands on political communities, perhaps amounting to an entire theory of justice.¹

Nor do the philosophers and lawyers agree on the importance of the rule of law in a general theory of law and politics: among the many areas of disagreement are whether a state has to have the rule of law to have something that might be described as “law” at all, whether the rule of law requires anything of ordinary citizens or just of government officials, and whether the rule of law is part of a theory of democracy or independent from it – or, on the other end, whether the rule of law is flat out inconsistent with democracy. All of this chaos has led some scholars, such as Jeremy Waldron, to call the rule of law an “essentially contested concept.”²

At the same time that philosophers and lawyers are unable to agree on what the rule of law is, social scientists are busily making use of their interpretations of the concept in empirical studies. Unfortunately, they appear to have next to nothing to do with what the philosophers and lawyers say the rule of law is. Some of the measures the empirical social scientists use turn out to be downright bizarre. For example, the World Bank’s “governance indicator” for the rule of law combines data about, among other things, the strength of intellectual property protection, how much crime there is, the prevalence of illegal donations to political parties, how quickly disputes get resolved, and, my personal favorite, “access to water for agriculture.”³ Similarly, the World Justice Project’s (generally much superior) rule of law index concatenates variables about the control of crime, religious freedom, labor rights, and freedom of opinion, with more conventional rule of law ideas like public laws and government powers specified by law.⁴

Often those in the social sciences and the policy community essentially assimilate the rule of law to the protection of property rights.⁵ This notion, however, does little to help us think about possibilities like a socialist state that nonetheless regulates its citizens under a well-organized legal system, or, in the other direction, a capitalist tyranny that protects the property rights of the elite and promotes economic development while conducting a reign of terror featuring disappearances, show trials, and similar markers of a twentieth-century failed legal system.⁶

Even though academics can’t come up with a consistent story of what the rule of law is, states in the developed world, and the international organizations that they dominate, offer the rule of law as a panacea to the developing countries.⁷ The entities that concern themselves with promoting the rule of law include the United Nations, the European Union, the North Atlantic Treaty Organization, the World Bank, the Organisation for Economic Co-operation and Development, the Organization for Security and Cooperation in Europe, the American Bar

Association, the Carnegie Endowment, the Open Society Foundations, Human Rights Watch, and many others, and the Government Accountability Office reports that the United States had spent upwards of \$970 million on promoting the rule of law from 1993 to 1998.

In the face of the widespread disagreements that I've already noted, each of the two distinct academic communities has some areas of consensus. Among philosophers and lawyers, there seems to be a near universal belief that the rule of law promotes individual liberty. This should seem odd, since there are so many different conceptions of what the rule of law is (and even more different conceptions of what liberty is). Similarly, political scientists and economists generally seem to think that the rule of law promotes economic growth.⁸ This too is odd, since they lack a consensus definition of what it is that they're measuring.

By way of armchair diagnosis, I suspect the disconnection between the law/philosophy conversations about the rule of law and the political science/economics conversations is attributable to faults on both sides. From the philosophers and lawyers, the standard normative theory accounts of the concept of the rule of law are quite abstract and difficult to connect to observable phenomena of the sorts that can be tested by social scientists, yet simultaneously extensive and demanding, generating lengthy laundry lists of requirements that states must satisfy.⁹ Moreover, it is often not obvious how to conceive of differences in the degree to which states satisfy the rule of law, and some theorists go so far as to deny that achievement of the rule of law can be a matter of degree.¹⁰ Both of those features make it difficult for social scientists to generate testable hypotheses in which the rule of law is either a dependent or an independent variable, and thus naturally leads them to turn to other ways of conceiving the idea. And from the political science and economics side, much of the conversation seems to be distorted (not to say corrupted) by the needs of the "development community" (i.e., the World Bank, the International Monetary Fund, and the like) and the foreign policies of the richest countries, which in turn are substantially focused on exporting capitalism and a safe investment environment for multinational business, in accordance with the privatization agenda often labeled the "Washington consensus"), in which the rule of law in its guise as the protection of property rights can be found.¹¹

Yet the different conversations on the rule of law must not be separate. A normative and conceptual account of an "essentially contested concept" like the rule of law cannot be given wholly from the armchair – especially not when its practical extensions are so closely tied to our perceptions of specific states and institutions of the contemporary world and a particular course of history. Rather, such an account must prove itself by its ability to make sense of those real-world institutions, which requires delving into history, law, and political science to find its place in those domains. Similarly, political scientists and economists cannot measure the rule of law unless they have some clue what it is and why it matters to study the things that are being observed – that is, unless a philosophical foundation is first

built for the object of measurement. And development professionals will not be able to promote the rule of law unless they have both adequately conceptualized measurement tools in order to determine its presence and effects, as well as an account of why it is worth having – both to make sense themselves of why they are involved in the enterprise in the first place and to understand what might motivate the people in the countries they are trying to aid to care.

Accordingly, this book aims to heal the breaches between law and philosophy, political science and economics, and the development community. It first makes an argument about what the rule of law is (emphatically *not* capitalism or private property rights): a normative principle regulating political states, according to which coercive power – in the first, weaker, version of the rule of law – must be used under rules that give those over whom that power is exercised the opportunity to call the users of the power to account on the basis of reasons; in the second (stronger) version, those rules must be actually justifiable to all on the basis of reasons that are consistent with the equality of all. It then argues that understanding the rule of law this way can help us understand what has motivated those who have defended the rule of law in the past – an attempt to sustain the equal standing of those with a stake in legal systems. And it can help us understand what will help build and sustain the rule of law in the future – legal systems that, by treating their people as equals, give those people reasons to commit to their defense in the face of threat and instability. In that way, the social scientific account of the rule of law directly incorporates the normative value that the rule of law serves as an explanatory factor in its development and persistence as well as the basis for policy initiatives to bring it about in the real world.

The first task is to give a consistent and convincing account of what the rule of law is, using the normative/conceptual tools of lawyers and philosophers. The normative and conceptual account is designed from the start to span the divide between the philosophy/law community and the economics/political science community. It is parsimonious and relatively concrete, so that social scientists can measure it, and the defense of the account against other competing accounts of what the rule of law is and why we should care about it incorporates the criterion that the correct account of the rule of law should have something to do with the real world: it should help us understand actual states, and the many ways in which the rule of law appears to function in the world around us. The egalitarian theory in the first four chapters represents a sharp break from the traditional theorizing about the rule of law, associated with scholars ranging from Friedrich Hayek to John Rawls, who have connected the rule of law to individual liberty.

Supporting this account, chapters on classical Athens (Chapters 5 and 6) and Britain (Chapter 7) show how this egalitarian conception of the rule of law helps us understand actual societies through history and how they need not be connected with distinctively American institutions like the separation of powers, binding judicial review, and the like. The last several chapters then draw on those case

studies of Athens and Britain, as well as the American legal system, and deploy strategic modeling tools commonly used in the new institutional economics to shed new light on what leads rule of law societies into existence and what holds them together. I argue that the key mechanism is commitment: the rule of law will exist and persist only if the members of a political community can see how it preserves their equal status, and are able to commit to coordinated enforcement of the law against the powerful. Thus, this book gives evidence that the masses in Athens defended the rule of law in order to protect their collective strength and status against the threats of oligarchic elites. It also gives evidence that the parliamentarians in England saw the rule of law as an important element of their status as equal citizens, against the overweening aspirations of the king. And it gives a strategic account of how these beliefs were right, and how these peoples managed to successfully control the abuse of power in the aid of community-wide equality.

The book concludes by turning from the past to the future, and argues that, ultimately, the reason we should promote the rule of law in the real world is based on that commitment to equality. Following on Chapter 6, Chapters 8 and 9 push the ideas developed in the previous chapters to their limits, by making broad claims about the arc of the development of the rule of law over centuries, and about what this suggests for contemporary efforts to bring it about in the short term. Thus, Chapter 8 develops and defends bold claims about the rule of law's teleology of equality: how the formal legal constraints on power of the weak version of the rule of law create long-term pressure to make the law more substantively equal over time.

Chapter 9 directly addresses the development community. It draws out the implications of the normative, historical, and strategic claims developed in the rest of the book to provide a case for the strategy broadly known as "bottom-up rule of law development," and suggests a focus, within that strategy, on promoting equal law that wins the commitment of the people living under it, and the institutions necessary to support mass coordination in order to implement that commitment. It then develops a novel measurement strategy for the rule of law. Unlike previous measurement attempts, this book offers a proof-of-concept unidimensional rule of law scale that is directly drawn from a conceptual account of the nature of the rule of law, and built in conjunction with it. It demonstrates that a preliminary implementation of a measurement based on these techniques behaves much as we would, theoretically, expect it to behave. This final chapter merely maps a preliminary outline for future efforts: I have neither access to the extensive cross-national data to fully implement the measurement technique described, nor the local expertise to offer specific counsel to rule of law development practitioners on the ground. Nonetheless, I hope that it will give development practitioners and social scientists strong reason to take the ideas it offers seriously, and to bring them to local expertise and more comprehensive data.

This book concludes by turning inward. Much rule of law scholarship and policy making are concerned with the promotion of the rule of law in economically, politically, and militarily weak or unstable countries that are presumed to lack it, in initiatives led by powerful and stable countries that are presumed to have it. In reality, however, those powerful countries – particularly the United States – are subject to serious criticism from a rule of law perspective. The actions of the federal government in conjunction with the war on terror suggest that law on the books is not fully public and regular; more alarmingly still, the unchecked actions of police across the nation suggest that neither American officials nor the American public are fully committed to defending equal legal rights for African-Americans. This book thus concludes by calling for rule of law development at home as well as abroad.

Three themes – *equality, commitment, and realism* – run through the book. The rule of law gives flesh to the ideal of legal equality, and, in doing so, expresses an important kind of social equality, is necessary for political equality, and generates a demand for material equality. It achieves these ends through commitment, in both the philosophical sense and the strategic sense: the rule of law makes it possible for citizens to become committed to the legal order in which they live, and demands that commitment in order to permit the law to be used as a tool to coordinate their behavior in order to preserve their equal standing. When a state achieves the rule of law, it achieves a commitment to equality among its citizens. And it does so in the real world.

Chapter 1

The rule of law: a basic account

In this chapter and the next, I present a novel account of what the rule of law demands and why we should care. The account brings together pretheoretical evaluations of rule of law institutions in real states, functional generalizations of those institutions, and an account of their moral worth.

Together, Chapters 1 and 2 defend two key theses. First, the rule of law is morally valuable because it is required for the state to treat subjects of law as equals (“the equality thesis”). Specifically, the rule of law fosters *vertical equality* between officials and nonofficials and *horizontal equality* among nonofficials.

Second, states comply with the rule of law to the extent that they satisfy the following three conditions (“the three principles”):

Regularity: Officials are reliably constrained to use the state’s coercive power only when authorized by good faith and reasonable interpretations of preexisting, reasonably specific, legal rules.

Publicity: The rules on which officials rely to authorize coercion are available for subjects of law to learn; officials give an explanation, on reasonable demand, of their application of the rules to authorize coercion in individual cases; and officials offer those who are the objects of state coercion the opportunity to make arguments about the application of legal rules to their circumstances; the public at large may observe these reasons and the arguments about them.

Generality: Neither the rules under which officials exercise coercion nor officials’ use of discretion under those rules make irrelevant distinctions between subjects of law; a distinction is irrelevant if it is not justifiable by public reasons to all concerned.

Each condition presupposes the satisfaction of those before it. (It is possible, however, to combine the partial satisfaction of a later principle with only a partial satisfaction of an earlier principle – for example, to have a state that is partly general, but excludes some discrete class of individuals from the protection of the laws, and hence is also only partly regular and public.) Regularity and publicity together lead to vertical equality. A state that has achieved them has achieved a weak version of the rule of law: its officials cannot easily abuse their power, and individuals can be fairly secure in their legal rights against the state. Generality leads to horizontal equality. A

state that has achieved it has achieved a strong version of the rule of law: in it, individuals are genuinely equal under the law.

When states achieve vertical equality, their legal institutions guard against *hubris*, officials' use of their powers to claim superior status. They also guard against *terror*, the use of the state's power to cow individuals into submissiveness.

When states achieve horizontal equality, their legal institutions prevent *legal caste*, the state's support of hierarchies among individuals, particularly along ascriptive group lines. They serve the obligation of *reciprocity* that individuals have to one another to share alike the cost to produce the public good of law and order. Finally, they ensure that everyone is *counted* – the interests of no one in the community are treated by the law with complete disregard.

The heart of this conception of the rule of law is responsiveness to reasons. The weak version of the rule of law treats people with respect, as minimally capable of responding to reasons given them by preexisting rules that govern their behavior, while also restricting those officials who wield coercive power to acting in accordance with those reasons, rather than simply their own wills. Moreover, they directly recruit the capacity of ordinary people to reason about reasons by making the use of state force against them conditional on their having an opportunity to publicly contest and deploy the reasons given by law.

The reasons at play in the weak version are artificial (or artifactual) in that they are creations of an act of rule making: by saying that they are “reasons,” I simply mean that they take the form of reasons: externally specified normative standards for behavior that can form the basis for better or worse rational arguments, and that can be deployed effectively to criticize people for failing to comply with them. The form of a reason is the opposite of arbitrariness, which is disconnection from reasons: the arbitrary official, when asked why she or he coerced some citizen, can just say “Because,” whereas the official who is bound to legal reasons at least has to be able to say something that is comprehensible to the person over whom power is exercised. In doing so, that official treats the other like an adult, and an equal.

The reasons at play in the strong version are real reasons, in that someone whom the state orders about on the authority of general laws will be able to understand the laws as actually meaningful to her (at least in a constructive sense if not a subjective one). The law will recognize her as a stakeholder in the society, and recognize that she ought not to be ordered about at gunpoint unless the orders can be understood to capture something that she has reason to do independent of the unadulterated will of some lawmaker.

This chapter explicates the weak version of the rule of law. Chapter 2 will cover the strong version.

I OPENING TECHNICALITIES

Mindful of the fact that the audience for this book includes not only philosophers and lawyers, but also political scientists, economists, and development experts, most

of the technical philosophical groundwork has been deferred to the end of this chapter; some has been published elsewhere.¹ In particular, many clarifications, fine points, and answers to objections appear in an article entitled “The Rule of Law and Equality”; the reader who thinks I have missed something obvious is advised to double-check there.² However, three points are important enough to highlight at the beginning of the main argument.

First, the rule of law has institutional (or what I have previously called “descriptive”) and evaluative components. To see what I mean, compare an idea like democracy to an idea like justice. Justice covers a multitude of normative principles and concrete social practices; there are innumerable uses of the term that bear at most a family resemblance to one another. One’s favored conception of justice might be instantiated in anything from a tax-and-transfer system of redistribution to a society ruled by Platonic guardians. By contrast, while there are numerous theories of democracy, they all occupy pretty much the same territory: all have *something* to do with will or opinion aggregation, hearing minority views, removing disobedient officials, and so forth. The rule of law is more like democracy than justice: it has a relatively concrete set of practical extensions. This has important methodological implications: it suggests a coherentist account of the rule of law that draws together normative ideas about the value it serves and observations about the social practices that we ordinarily associate with it.³ It also suggests that the best account of the rule of law will have the property that I have elsewhere called “verisimilitude” – it will describe actual societies in the real world better than alternative, equally coherent, conceptions.⁴

Second, the rule of law regulates *states* when they exercise their power over individuals. It does not regulate the private use of coercion or violence.⁵ Particularly, it does not give us a reason to object to anarchy, nor does it oblige nonofficials to obey the law. However, as will be seen in Chapters 6 and 8, the rule of law does require nonofficials to be sufficiently committed to its preservation to be willing to collectively defend it against officials who might abuse their power. That is, in the first instance, a practical rather than a conceptual requirement, although, in view of the goal of this book to state a conception of the rule of law that bridges philosophical and social scientific approaches to the topic, it will soon become clear that such strong practical constraints feature in the concept of the rule of law as well.

While there are many regulative principles for both private and state violence, the unique significance of state violence generates a unique principle, the rule of law, to guard against its abuse. States are distinguished from all other entities by their expressive and practical significance. By “expressive significance,” I refer to the facts identified by Weber and legal philosopher Joseph Raz: states ordinarily claim a monopoly over the legitimate use of violence in their territories, and ordinarily claim that those in the territory are obliged to obey their commands.⁶ With that, they typically forbid individuals from resisting the force that they wield; often they also

claim to be acting in the name of the citizenry as a whole or some constitutive social, national, or ethnic group.⁷

By “practical significance,” I refer to the fact identified by Thomas Hobbes: states have overwhelming force within their territories. In ordinary political life, in a modern state, it’s impossible or staggeringly costly for individuals to resist its power; moreover, there’s ordinarily no external power to which individuals can turn to protect them from it.

These features (which I will henceforth call the “Weberian and Hobbesian properties”) make state power different in kind from the private use of force. Its expressive significance confers upon it more morally relevant dimensions than private power: a mugger who assaults you on the street doesn’t claim you’re obliged to quietly submit to the violence, or that it’s done in your name. The state does. Its practical significance makes it more fearsome and influential: you might have a chance to fight back against the mugger, or at least call upon the state to defend you. There’s no one to defend you from the state.

However, in some societies, there can be forms of nonstate power that sufficiently resemble state power, particularly in its practical significance, so that their control too becomes a matter for the rule of law. For example, in Classical Athens, as will be seen in Chapters 5 and 6, the rich and powerful had an interest in undermining the state, and were capable of overwhelming ordinary citizens on a one-to-one basis. There, the rule of law required their nonstate power be regulated, too, just because it threatened to take on the Hobbesian and Weberian properties. At the end of Chapter 3, I explain more precisely where the rule of law requires private power be regulated.

Finally, I claim that the egalitarian account of the rule of law and its moral value is factually and normatively robust. By “factually robust,” I mean that the arguments offered do not depend on strong assumptions about facts about social arrangements, human motivations, or the like that differ from society to society. This is a weaker criterion than necessary truth: the arguments might not be true in every possible social world, but they are true for a substantial range of reasonably common social worlds. By “normatively robust,” I mean that these arguments are, as far as possible, nonsectarian. They are meant to be acceptable without taking on overly controversial normative commitments. This argument for the moral value of the rule of law relies on the ecumenical core of the ideal of equality: if nothing else, those who value equality object to hierarchies of status and esteem, and demand that the state treat individuals with equal respect and take each of their interests into account.

The robustness criteria respond to concerns with the scientific and the political usefulness of a conception of the rule of law. First, a conception of the rule of law ought to be compatible with a social scientific explanation of its appearance in societies characterized by different political institutions and ethical ideals. Thus, we ought not to say that the rule of law responds to institutions and motivations that have appeared in few rule of law societies, or to values their citizens have rejected. In