Part I

Introduction

Thinking about the Rule of Law

Jens Meierhenrich and Martin Loughlin

Introduction

This Companion provides an introduction to the theory and history of the rule of law, and thus to one of the most frequently invoked – and least understood – ideas of legal and political thought. Not so long ago, the "rule of law" was regarded as a rather esoteric expression, one employed by common lawyers – alongside such expressions as the *Rechtsstaat*, *État de droit*, and *Stato di diritto* that their continental confrères invoked – to identify certain technical features of the legal systems in which they worked. Over the last several decades, however, its usage has expanded rapidly and has now become a key phrase in the vulgar tongue of contentious politics, domestic and international. And in the process, it seems to have been converted from a technical phrase into a rhetorical slogan – an expression of such generality that it can be filled with whatever values the heart desires. For this reason, the rule of law now circulates in the marketplace of ideas as a debased currency.

This being so, ours is an opportune time for a major exercise in reappraisal. Several questions are addressed: What is the rule of law? What should it be? Whatever it might be, is it worth having if it cannot sustain the liberty of all citizens? Is it worth promoting if it can be used not just to bolster democracy but also authoritarian varieties of rule? What can be done about the rule of law? What can be done *with* it? What are the virtues of the rule of law? What of its vices? Our volume speaks to the meanings and machinations, to the values and violence, of the rule of law. We present it as "a noble but flawed ideal," a phrase we borrow from Martha Nussbaum, who recently found wanting another cherished tradition in the Western canon.[1]

[1] Martha C. Nussbaum, *The Cosmopolitan Tradition: A Noble but Flawed Ideal* (Cambridge: Belknap Press of Harvard University Press, 2019).

During another stock-taking two decades ago, José Marà Maravall and Adam Przeworski opined that the "normative conception of the rule of law was a figment of the imagination of jurists," one that was both "implausible as a description" and "incomplete as an explanation."[2] We agree, but our way of approaching the rule of law is not as rigidly rationalist as theirs. We come to it from an interdisciplinary perspective, one that draws on the scholarship of anthropologists, historians, philosophers, sociologists, and political scientists as well as lawyers, so that, with a bit of luck, our way of seeing the rule of law will be commensurable with both nomothetic *and* ideographic modes of reasoning.[3] To this end, we have invited a wide range of leading scholars to examine specific aspects of this topic, in the hope that will help us reassess both the promise of the rule of law and its limits.

Our contributors ask thorny questions about the appropriateness as well as the utility of the rule of law as a social imaginary for tackling the most pressing issues of our times. Our conviction is that in order to make sense of the rule of law today – both literally and figuratively – we need to view it as a social phenomenon with diverse and contradictory instantiations. To bring it into sharper focus, we commissioned chapters to reconsider key *histories* (Part II) and *moralities* (Part III) of the rule of law, and to trace notable *pathologies* (Part IV) and *trajectories* (Part V) thereof. In a substantial concluding chapter (Part VI), one of us reflects critically on the insights gleaned from surveying the landscape of the rule of law in the four preceding parts. The far-ranging analysis, which doubles as a very short introduction to the topic, culminates in a call for a realistic theory of the rule of law.

Allow us to say a little more about the organization of what is to come – and why, and how, the arguments of our distinguished contributors are relevant to thinking about the rule of law.

[2] José María Maravall and Adam Przeworski, "Introduction," in idem, eds., *Democracy and the Rule of Law* (Cambridge: Cambridge University Press, 2003), p. 1.

[3] On the methodological divide, and for one influential proposal of how to bridge it, see Robert H. Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast, *Analytic Narratives* (Princeton: Princeton University Press, 1998), p. 12. For a trenchant critique of this proposal, see Jon Elster, "Rational Choice History: A Case of Excessive Ambition," *American Political Science Review*, 94 (2000), 685–695.

Histories

An argumentative thread running through our collection is the claim that we are better off to speak of *rules of law*, in the plural, than to imagine the rule of law as a singular phenomenon. Part II consists of five chapters that speak to the motif of multiples. Adriaan Lanni, Jens Meierhenrich, Luc Heuschling, Lawrence Rosen, Lauren Benton, and Lisa Ford introduce us to alternate realities of the rule of law. They alert us, if you will, to the changing character of the rule of law. Moving deftly across space and time – as well as cultures and legal traditions – this set of perspectives highlights not only the need to think about the variety of practices that over the centuries have come to be associated with the expression of the rule of law, but also the importance of historicizing, locally, its plethora of meanings.

To start us off, Lanni corrects significant misconceptions about the prehistory of the rule of law. Reconstructing from court practices and written texts of the period, she explains how the law ruled in ancient Athens. We also learn why Plato and Aristotle regarded with disdain these radically democratic Athenian practices. Less concerned with what worked in practice, and more with what they thought should apply in principle, Plato and Aristotle advocated more robust conceptions of the rule of law, with a stricter application of written law, than the city-state actually practised to sustain its exclusionary social order.

Meierhenrich, next, demonstrates that the difference between the concept of the *Rechtsstaat* and the rule of law is more than a variation on a theme. He argues that, globally speaking, the idea of the *Rechtsstaat* has been no less influential than the idea of the rule of law. Comprising a distinct meaning, the *Rechtsstaat* has left its institutional imprint on societies far and near. This continental European idea – which he calls "rule under law" – pre-dated the Dicyean conception of the rule of law by at least half a century. As a global phenomenon, the *Rechtsstaat* tradition has long rivalled that of the rule of law, which over time, and in certain parts of the world, it has grown to resemble. Given the practical importance of the *Rechtsstaat* tradition from the long nineteenth century to the present, Meierhenrich believes it imperative not to equate it – and the manifold everyday practices it has since inspired – with the rule of law tradition. Local histories of convergence, he cautions, must not distract us from the

fundamental differences – historical, philosophical, conceptual – at the heart of these two contending ways of thinking about the concept of law and the manner of its rule.

Heuschling picks up the thread of the *Rechtsstaat* from Meierhenrich and weaves it into a historical narrative about the "Gallicization" of the neologism. What, he asks, did the French stand to gain from importing the German way of law? He develops an answer by analyzing the antecedents – and the aftermath – of the transplantation of the *Rechtstaat* during the Third Republic. Heuschling explains what prompted Léon Duguit in 1907 to come up with the concept of the *État de droit*, France's variation on the German idea of freedom. His chapter tells a story of legal change. From the Third to the Fifth Republic, Heuschling traces the meandering logic and effects of a little-known legal transfer and reconstructs the discursive formations involved and the resistances encountered.

Lawrence Rosen's chapter leads from the *Rechtsstaat* tradition to Islamic conceptions of the rule of law. After introducing histories of the rule of law – as this chapter understands the term – in Islam and the development of Islamic legal thought over the centuries, Rosen identifies common cultural themes that cut across rival approaches to law in the Islamic world. He relates the principal ideas of classical legal thought – with their focus on the Quran, the Traditions of the Prophet, and the four main schools of law – to the role of custom *('urf, adat*), which, Rosen argues, in practical terms is often the prevailing source of law. From the Malays of Sumatra to the Berbers of North Africa local custom *is shari'a* – and not infrequently it acts as a constraint on the strict application of formal law. In his phenomenological account, Rosen also highlights the significance in Islamic conceptions of the rule of law of norms such as bargaining and equivalence, institutions such as the marketplace and the judiciary, and procedures such as rules of evidence, all of which commonly function as enabling constraints. Viewed from the vantage point of the everyday, Rosen notes, a considerable overlap between Muslim and non-Muslim visions of the rule of law exists. His chapter reinforces the sense that the exploration of singularities is thus a necessary precondition not only to theorizing the rule of law but also to evaluating its social performance, in all senses of that term.[4]

[4] On the performative dimensions of the rule of law, see, for example, Jens Meierhenrich and Catherine Cole, "In the Theater of the Rule of Law: Performing the Rivonia Trial in South Africa, 1963–1964," in Jens Meierhenrich and Devin O. Pendas, eds., *Political Trials in*

Benton and Ford also agree that there is more than one history of the rule of law to be told. They address "empire's neat but jarring place in the history of the rule of law,", thus acquainting readers with the dark sides of virtue. Noting that the rise in rule of law rhetoric coincides with the moment "when European jurists surveyed that world's laws and found all but their own wanting," they nevertheless remain alert to the need to avoid a reductionist portrayal of this jurisprudence of power. Benton and Ford show imperial legal orders were fluid, layered, and, above all, plural. With special reference to the British Empire, they contrast strategies of "imperial legal ordering," these techniques of authoritarian rule, with the variegated rights regimes that local conditions demanded. Although the rule of law emerges as a shadowy figure in their account, Benton and Ford caution that no unified idea of an "imperial rule of law" ever existed.

Moralities

Turning from histories to moralities, the third part of our collection explores the intelligibility of the concept of the rule of law. Our contributors here review the work of some of most important theories – and theorists – of the rule of law in the Western canon.

Jeremy Waldron sets the scene by reprising his well-known argument about the rule of law as an "essentially contested concept," which is the label the British philosopher Walter Bryce Gallie used to describe a term so vague that its diverse meanings are symptomatic of a chronic condition that cannot be healed conceptually. Gallie maintained that "displaying a certain kind of semantic vagueness, essentially contested concepts make it necessary to resort to historical considerations as a way to settle the disputes over their meaning."[5] Gallie's hermeneutical enterprise charts "a middle ground between a radical form of historicism, which sees all symbolic phenomena as the product of contingent historical trajectories, and an antihistorical form of realism, according to which the meaning of

Theory and History (Cambridge: Cambridge University Press, 2016), pp. 229–262. See also Bruno Latour, *The Making of Law: An Ethnography of the Conseil d'État*, trans. Marina Brilman and Alain Pottage (Cambridge: Polity, [2002] 2010).

[5] Tullio Viola, "From Vague Symbols to Contested Concepts: Peirce, W. B. Gallie, and History," *History and Theory*, 58 (2019), 246.

concepts and standards are fixed and just waiting to be discovered."[6] In Chapter 6, Waldron explains the relevance of this argument for thinking about the rule of law. His application of Gallie to discursive formations related to the rule of law sets the scene for the more detailed investigations of individual moralities that follow.

In those chapters, by Sharon Krause, Mark Walters, Martin Loughlin, Kristen Rundle, and Douglas Hay take turns to assess some of the most influential arguments in defense of the rule of law as a moral idea. Krause introduces us to Montesquieu's masterwork of 1748, *The Spirit of the Laws*. We learn why Montesquieu placed his faith in the role of institutions to curb arbitrary power, and what convinced him that these institutions were essential to achieving the rule of law, that is, to crafting standing rules. "[J]ust as the sea, which seems to want to cover all the earth, is constrained by the grasses and the smallest rocks that are found on the shore," Montesquieu wrote, "so monarchs whose power seems to be without limits, are constrained by the smallest obstacles."[7]

In addition to advocating intermediate constraints, Montesquieu was a proponent of using "fundamental laws" to curtail the reach and rule of the prince. Krause notes how important it was for him that the institutions of legality, and the laws they produced, were responsive to the "spirit" of the nation and the dispositions of the people *as well as* to the laws of nature and to such virtues as equity, proportionality, and moderation. These were *sense-giving features* of the rule of law, and so for him were moral psychology and everyday practices. According to, Montesquieu, the rule of law was a cocktail of the right passions. The rule of law, as he saw it, had to be general *and* flexible. It was a concrete abstraction, if you will: contingent on local mores, but answerable to universal values. As Krause's chapter makes plain, Montesquieu's vision of the rule of law was one of the first to treat legality and legitimacy as indivisible – and as indispensable to the protection of liberty.

Albert Venn Dicey followed Montesquieu in emphasizing the vital significance of maintaining a spirit of legality, as Walters shows in Chapter 8. He explains what makes Dicey's account of the rule of law quintessentially Anglo-Saxon, and why it was more than the unfortunate outburst of parochialism Judith Shklar believed it to be. Dicey's treatment of the rule

[6] Viola, "From Vague Symbols to Contested Concepts," 251.
[7] As quoted in Sharon Krause, "The Rule of Law in Montesquieu," in this volume, p. 142.

of law, a term to which he gave systematic meaning but did not invent, was one of the first integrated accounts of what Alexis de Tocqueville thought of with admiration as the legality of English habits. Dicey, writes Walters, was seized of the ambition to give the vague assumptions that Tocqueville and other foreign scholars were making about English governing practices formal legal expression – and under the banner of the rule of law.

The idea of the rule of law that runs through Dicey's *Introduction to the Study of the Law of the Constitution* of 1885 hinges on the importance of parliamentary sovereignty and on the supremacy of the ordinary law. In this common law conception of constitutionalism, Walters explains, the attribute of the rule of law Dicey regarded as definitive was the requirement that governmental powers have parliamentary authorization. Safeguarding this requirement was the revered institution of the judiciary. By marching in lockstep, parliament and the courts would hold prerogative rule in check.

Dicey's account extrapolates from sources he knew best. He was at pains to distinguish the English case, sometimes chauvinistically, from what he perceived to be France's perverse constitutionalism, as represented by the idea of the *droit administratif*. Walters tells us that formal requirements such as generality, prospectivity, clarity, and intelligibility, were of secondary importance in Dicey's scheme. He was a nationalist first, and a formalist second, and he valued concreteness over abstraction. For this reason, we should not read Dicey out of context. His conception of the rule of law is decidedly local – a theory of the rule of law in the vernacular. He was uniquely attuned to the rule of law as a social imaginary, which is why reading him in the twenty-first century can be rewarding, especially when thinking about cultures of legality, which for good reason is now *de rigueur*.[8] "A significant strength of Dicey's account," one commentator recently noted, "is that he does not confine the rule of law to the conduct of state officials."[9] But on the negative side, as Judith Shklar highlights, by equating the concept of the rule of law to the English practice, he essentialized the idea. And that explains why Dicey's *magnum opus* remains an influential but dispensable morality tale about the rule of law.

[8] See, for example, Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (Chicago: University of Chicago Press, 1999); and Jean Comaroff and John L. Comaroff, eds., *Law and Disorder in the Postcolony* (Chicago: University of Chicago Press, 2006).

[9] N. W. Barber, *The Principles of Constitutionalism* (Oxford: Oxford University Press, 2018), p. 89.

In Chapter 9, Loughlin examines Michael Oakeshott's argument that the rule of law expresses the idea of the state as a moral association. Oakeshott's account is rather different from Dicey's, and Loughlin explains why. He highlights Oakeshott's debt to Roman legal thought, especially to the concept of *respublica*, and explains why he conceived the rule of law to be an essential ingredient of "the civil condition." Loughlin also unpacks what Oakeshott's ineffable idea of the *jus* of *lex* entails. Re-reading Oakeshott, he concludes that ultimately it represents a republican conception of the rule of law, one that is, above all else, "a self-sustaining model of association identified in terms of the ascertainable authenticity of *lex*."[10]

Morality was also an important theme for Lon Fuller, although he eschewed the term itself in his relational account of the rule of law. Rundle reminds us that the meaning Fuller wanted to convey by speaking of "morality" in relation to the concept of law was very specific and must be distinguished from other, broader rule of law moralities. Chapter 10, then, addresses the task of uncovering the morality of the rule of law as Fuller understood it. His mission, Rundle explains, was to articulate the moral demands appropriate to the structuring of one particular relationship: that between the lawgiver and the subjects of law. The logic of their interactions, Fuller believed, cut to the heart of what it meant to govern through law, which is why he set out to capture it as precisely as he knew how. Rundle explains how Fuller did this, how he fared against such interlocutors as H. L. A. Hart and Joseph Raz, and what import his argument about the internal morality of (the rule of) law has for our time.

In Chapter 11, Douglas Hay provides an intellectual biography of E. P. Thompson, whose argument about the rule of law is widely known but rarely studied. Most scholars and practitioners of the rule of law are familiar with chapter 10, section iv of *Whigs and Hunters*, the 1975 book in which Thompson famously – and controversially – asserted that the rule of law was "an unqualified human good." Few, however, are familiar with the 258 pages of fine microhistory that preceded it, and fewer still with Thompson's pioneering social historical work of which that book forms but one part.[11] Hay, a student of his teacher's, situates Thompson's

[10] Martin Loughlin, "Michael Oakeshott's Republican Theory of the Rule of Law," in this volume, p. 181.

[11] E. P. Thompson, *Whigs and Hunters: The Origin of the Black Act* (New York: Pantheon, 1975), p. 266.