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0521825598 - Democracy and the Rule of Law

Edited by Jose Maria Maravall and Adam Przeworski

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JOSÉ MARÍA MARAVALL AND ADAM PRZEWORSKI

Introduction

Our central question is why governments do or do not act according to laws.

The traditional answer to this question has been that the law has an autonomous causal efficacy. People obey the law because it is the law: actions follow prior norms. This view is now being contested by arguments that law cannot be treated as an exogenous constraint on actions. In some situations, the actions that individuals want to and do undertake are stable and predictable even if they do not implement any antecedent laws.

The normative conception of the rule of law is a figment of the imagination of jurists. It is implausible as a description. Moreover, it is incomplete as an explanation. Why do people obey laws? Why do they obey a particular law? Would they obey any norm just because it is a law?

By a normative conception, we mean only the following. First, a set of rules constitutes law if and only if it satisfies some formal conditions. Second, the rules that satisfy these formal conditions are obeyed. Hence, law rules when actions follow anterior norms. The question whether the law rules is thus one of obligation, obedience, or compliance.

Lists of the formal requirements for a set of rules to qualify as law converge. According to a standard formulation (Fuller 1964: ch. 2), laws are norms that are (1) general, (2) publicly promulgated, (3) not retroactive, (4) clear and understandable, (5) logically consistent, (6) feasible, and (7) stable over time. Moreover, these norms must have a hierarchical structure (Raz 1979: 210–29), so that particular norms conform to general ones.

Law rules if “those people who have the authority to make, administer, and apply the rules in an official capacity . . . do actually administer the law consistently and in accordance with its tenor” (Finnis 1980: 270). This implies that they also abstain from undertaking actions not

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Excerpt

[More information](#)

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empowered by rules. As Solum (1994: 122) observes, when law rules, no extralegal commands are treated as obligatory.

In the strongly normative conception, the law is the source of its own normativity. The relation between laws and actions is seen as one of obligation. If norms qualify as laws, then it is the duty of public officials to follow them and it is the duty of everyone to obey orders of public officials justified by these norms. But even if the motivation to act according to the law is not moral, a conception is normative as long as actions are distinguished by their consistency with preexisting norms.

Regardless of the motivation for compliance, the most valuable effect of the rule of law is that it enables individual autonomy. Rule of law makes it possible for people to predict the consequences of their actions and, hence, to plan their lives. To cite Raz, "In curtailing arbitrary power, and in securing a well-ordered society, subject to accountable, principled government lies the value of the rule of law" (1994: 361).

In our view, this conception confuses a description for an explanation. Situations in which actions can be described in terms of the normative conception may transpire even when these actions do not implement any anterior norms. Regularity need not be an effect of rules; it is the regularity of actions that makes them appear as if they implemented prior norms. Moreover, actions of government that are predictable, stable over time, and limited generate the conditions for individual autonomy attributed to the rule of law by the normative conception, whether or not these actions follow anterior norms.

To develop a positive conception of the rule of law, one must start with political forces, their goals, their organization, and their conflicts. To advance their goals, actors use the instruments they can muster. These instruments may be economic, military, or ideological. But they also include specifically state powers. The instruments available to Silvio Berlusconi as an owner of mass media are distinct from those at his disposal as the president of AC Milan. And both are different from the instruments available to an Italian prime minister.

The state is a system of institutions, each with somewhat specific prerogatives. These prerogatives are instruments, rather than prescriptions (Gregg 1999: 366–7). As such, they are a source of specifically institutional power. Citizens can vote; the legislature can pass laws; courts can issue orders to put people in jail; in almost all countries the executive can propose the budget. A private firm can buy votes, legislators, or judges, but it cannot issue laws. Neither can the courts.

State institutions are populated, which means that some people have specifically institutional powers. The state as a whole may use this

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Excerpt

[More information](#)

Introduction

power with regard to private actors – for example, when the legislature imposes taxes, the bureaucracy collects them, and the courts sanction those who evade them. But the particular state institutions may confront one another, as when the legislature votes against the executive or when courts sentence a minister to jail. Moreover, because these institutional powers are valuable to private actors, they may try to utilize them in conflicts in the private sphere or in their relation to a particular state agency. Thus, private interests may seek to influence the legislature; citizens may seek recourse in courts to counteract an arbitrary decision of the bureaucracy.

Whenever everyone is doing what is best for him or her, given what everyone else does, actions are predictable and, unless some exogenous event occurs, stable. Hence it is not stability that distinguishes the rule of law but the distribution of power. When power is monopolized, the law is at most an instrument of the rule of someone. Only if conflicting political actors seek to resolve their conflicts by recourse to law, does law rule.

An autocracy, a situation in which one political force monopolizes power and rules unbounded, may entail what both Barros and Holmes, following Montesquieu, refer to as “rule by law.” Here, law is the instrument of the sovereign, who, by definition of sovereignty, is not bound by it. Moreover, because this state of affairs is based on a monopoly of force, nothing compels the sovereign to rule by law. Extralegal commands are as forceful as those dressed as law.

As Holmes puts it, “rule of law and rule by law occupy a single continuum and do not present mutually exclusive options.” What distinguishes them is not the nature of the law, whether it operates as a tool or as a framework, but the power system to which they respond. In Holmes’s words, “the powerful will cede power only to rival powerful forces.” Rule of law emerges when, following Machiavelli’s advice, self-interested rulers willingly restrain themselves and make their behavior predictable in order to obtain a sustained, voluntary cooperation of well-organized groups commanding valuable resources. In exchange for such cooperation, rulers will protect the interests of these groups by legal means. Rule of law can prevail only when the relation of political forces is such that those who are most powerful find that the law is on their side or, to put it conversely, when law is the preferred tool of the powerful.

To cite Holmes again, “To say that ‘law is a tool of the powerful’ . . . is not to embrace or promote cynicism.” If such well-organized groups cannot use laws to their advantage, they will promote their interests

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Excerpt

[More information](#)

José María Maravall and Adam Przeworski

by extralegal means. If they can, an institutional equilibrium ensues in which all relevant forces find it useful to channel their public actions through political institutions, and conflicts are processed on the terrain of institutions. Those who have the votes use the legislature, those who have laws on their side use courts, those who have access use the bureaucracy. The difference between rule by law and rule of law lies then in the distribution of power, the dispersion of material resources, the multiplication of organized interests; in societies that approximate the rule of law, no group becomes so strong as to dominate the others, and law, rather than reflect the interests of a single group, is used by the many.

In any institutional equilibrium, actions are predictable, understandable, stable over time, and limited. Hence, individuals can anticipate the consequences of their own behavior; everyone can autonomously plan one's life. As Troper argues, the "constraints on individual actions are different from legal obligations and taking them into account is different from obedience. Nevertheless, one could claim that the result is similar to that expected of the *Rechtsstaat*. . . citizens are politically free, because they can predict the consequences of their actions."

If citizens are to be able to predict actions of public officials, they must know what to expect of them. What enables citizens to forecast actions of governments is not whether these actions are described by laws. For example, to anticipate whether the legislature will raise taxes, private economic agents need to know that only the executive can initiate tax legislation, which means that the project must enjoy support of the ruling party or coalition, that the bill must be approved by a parliamentary committee, and that it must be passed by a majority of those voting in the legislature as a whole. Note that some steps in this example are not described by laws: the approval of the executive committee of the ruling party is not. Indeed, in some countries taxes can be raised only if the initiative is approved by a Confederation of Industry. To form predictions, economic agents treat the written and unwritten rules in the same way – specifically, they consider the need for approval by the ruling party or by interest groups as equally necessary as the approval by the legislature. To be able to say "This will never happen because the logging interests oppose it" is as good a base for predicting what the government will do as a constitutional provision against takings.

But if regularities arise endogenously, so that laws are codifications of the actions that political actors choose to pursue given what others do, why do we write some of these descriptions down as "laws"?

First, in some situations there are multiple ways in which the political life of a society can be structured. We can, for example, elect one, two, or

Cambridge University Press

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Excerpt

[More information](#)

Introduction

more legislators in a district, and each of these electoral systems may induce regular and predictable, but not necessarily the same, actions on the part of voters and of political parties. Yet to make these actions consistent, we need to pick one among the several possible rules. Otherwise, parties will offer two candidates in a district and voters will vote to elect three. As Kornhauser (1999: 21) puts it, “The legal structure identifies which of many equilibria the players will in fact adopt. The enactment of a law results in the institution of a new equilibrium.”

Second, laws indicate to citizens when to act against governments. By coordinating expectations, they facilitate collective actions that impose sanctions on governments. Weingast attributes a particular importance to the constitution: if a government acts in ways that are not predictable from the constitution, citizens have a reason to treat these acts of government as particularly undesirable and to single out these deviations for punishment. Hence, laws serve as focal points facilitating coordination among citizens.

Finally, we write laws only with regard to those actions to which we intend to apply the coercive power of the state. This is why many regularities are not dressed as legal norms: consulting the São Paulo Confederation of Industry on tax legislation is not. Even if in some societies people customarily wear black at funerals while in others they wear white, such customs are not codified as laws. Even if everyone attends a church, church attendance is rarely a matter of legislation. But if you do not pay taxes, you go to jail.

In sum, laws inform people what to expect of others. Even if it were to deviate from the announced course of action, the state announces what it plans to do, including what it intends to punish. Such announcements provide safety for individuals. At the same time, they facilitate coordination of sanctions against a government that deviates from its own announcements. In this sense, publicly promulgated rules provide an equilibrium manual. And because citizens value predictability, and the security it affords, they may care that the government would not violate laws even if they do not care about the actions that constitute violations. For example, people may condone the fact that political parties finance their activities by imposing an informal tax on public contracts, yet condemn these actions because they violate the law.

In what sense are equilibria institutional? One way to think about this question is to follow Calvert (1995a,b), asking whether the same equilibrium, the same set of interactions, could and would emerge in a situation without or with a particular institution. Calvert compares two situations. In one, randomly selected pairs of individuals repeatedly play

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Excerpt

[More information](#)

José María Maravall and Adam Przeworski

a game in which everyone “defects,” generating outcomes that are collectively undesirable. In the second, everything is the same except that there is one individual, called the “director,” who is informed about the outcome of each interaction and who, in turn, informs everyone about the past record of the partner with whom one happens to be matched. Now everyone “cooperates,” and collectively desirable outcomes ensue. Thus, what induces cooperation is the institution of the “director.” Everyone uses the institution of the director while his actions change the relation between current actions and future consequences, inducing everyone to cooperate. Cooperation would not occur without the institution of the director; hence cooperation is not an equilibrium of the preexisting situation. The equilibrium is institutional because it is constructed by exercise of institutional power.

Institutions orient actions because they shape incentives and expectations. A proper set of incentives can induce political forces to behave in conformity with the institutional framework.

Some rules are impossible to break. In the view of Searle (1969, 1995), echoed in this volume by Sánchez-Cuenca as well as Troper, this is a property of “constitutive” rules. Physical possession does not constitute property unless the parties who transfer the possession sign a specific piece of paper, a “contract.” A command is not a law unless it is properly adopted by a legislature. A ballot for two candidates in a single-member district is not a vote. Even if I wanted to break such rules, I cannot. I cannot break the rule about what constitutes property or a vote because, regardless of my intentions, others understand my action in terms of this rule. If I cast two votes in a single-member district, my action will be meaningless to others; I will have cast an “invalid” vote. If I appropriate a piece of land without a “valid” contract, others will not recognize it as my property.

Constitutive rules do not preclude actions from being taken. The executive may issue a command and call it a law. But if the executive does not submit a bill to the legislature and have it properly approved, the command will not be recognized by courts as law. A political party that won fewer votes than its opponent may force its way into office. But it will not have won the election. If the constitutive rule is that what counts as winning is obtaining a majority of votes, usurpation of office by a minority will not be recognized as an electoral victory.

Thus, how actions are understood depends on constitutive rules, whereas whether particular actions are undertaken is a matter of incentives. But constitutive rules shape incentives. If the constitutive rule defines as law an act of the legislature, and if the executive wants its

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Excerpt

[More information](#)

Introduction

commands to be recognized as law, it has an incentive to obtain a legislative majority.

Incentives include rewards and punishments. By creating new powers, institutions make it attractive to use these powers. In Calvert's example, the "director" has the power of fingering people who defected in the past, thus condemning them to privately administered punishments. In equilibrium, everyone wants to inform the director about the outcome of an interaction and everyone finds it useful to ask the director about the past record of the current partner. A general heading a dictatorship may want to become an elected president, even if he faces the risk of being defeated in elections. In turn, the formation of the *Ministerio Público* in Brazil will make public officials think more than twice before they engage in corruption.

Finally, institutions induce equilibria by imposing coherence on justifications of actions. A decision by an institution is seen by others as conforming to the institutional framework only if it can be predicted. Hence, institutional actors must provide reasons that would be seen by others as consistent with their institutional prerogatives. These reasons are not unique. But they must be recognized by others as valid. Within the legal context, this implies that they must be couched in a particular language. A higher court would not want to say "We did it because it is Friday" because the lower courts would not follow this ruling. Judges can speak to judges only in the language of law, even if they may have full discretion in what they are saying. (Besides his chapter in this volume, see Troper 1995.)

Thus far we have done nothing but distinguish the possible states of affairs. Our emphasis throughout is that situations that appear to conform to the normative model of the rule of law may and do arise even when political actors, some of whom have specifically institutional prerogatives, do not implement any anterior rules. Moreover, to repeat for the final time, such situations generate all the virtuous effects attributed to the rule of law in the normative conception. The question now is, Under what conditions should we expect such situations to transpire?

Can any institutional equilibrium emerge and survive under any conditions? This question was central in the Marxist debates about the "relative autonomy of instances." The instrumental version of Marxism maintained that political institutions, including the law, can only be a reflection of underlying economic power. Only some political and legal institutions are compatible with the capitalist organization of production. One mechanism by which this correspondence is generated is that those endowed with economic power utilize it to gain political

Cambridge University Press

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Excerpt

[More information](#)

José María Maravall and Adam Przeworski

power and use laws to perpetuate their economic power. As a result, democracy is just the best shell for what is in effect always a dictatorship of the bourgeoisie (Lenin 1932: 14). This version was contested by Althusser (1965a,b) and Poulantzas (1964, 1967). Even if “in the last instance,” whatever that means, the legal system could not undermine the economic system of capitalism, each of the “instances” has a logic of its own. Specifically, the law cannot be used as an instrument of particular interests of capitalists because the legal system must be general and internally coherent to constitute law. As Barros shows, even rule by law must respect the specificity of law as an instrument of rule.

Another way to pose this question is to ask to what extent institutions can constrain the power of organized groups. What matters from our point of view is that unless political, including legal, institutions are at least somewhat independent from military or economic power, the effect of institutions cannot be distinguished from that of what Sánchez-Cuenca refers to as “brute power.” The rule of law is conceivable only if institutions tame or transform brute power.

Holmes argues that political actors act within the institutional framework only to the extent that institutions constitute effective means for pursuing organized interests. In our terms, the equilibrium is institutional only if all the powerful interests channel their conflicts through the institutions. Hence, the chances of political forces when they use institutions must not diverge too far from the power of organized interests. The legal system must recognize this power; otherwise it will not be used. Thus, those groups that have the capacity to defend their interests by extralegal means are also those best protected by the law. Yet once law becomes an effective instrument of some interests, more and more people will organize to avail themselves of this instrument. As organized interests multiply, a society will come closer to the rule of law, power will not be monopolized, and the law will not be used by the few against the many. “Power politics incubates the rule of law,” according to Holmes; his optimistic conclusion is that all interests become organized, power is dispersed, and the law is an instrument used by everyone.

Democracy cannot exist unless at least one rule is followed – namely, that which regulates who should occupy office given the results of elections. Przeworski argues that this rule is obeyed when political actors have too much at stake to risk being defeated when they seek to establish a dictatorship. And because the stakes are larger in countries that are affluent, he concludes that in wealthy countries this rule is implemented

Cambridge University Press

0521825598 - Democracy and the Rule of Law

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Excerpt

[More information](#)

Introduction

even if electoral chances diverge from “brute power,” whereas in poor countries only if the two correspond.

In institutional equilibria occupants of governmental offices undertake those and only those public actions which are expected of them. Hence, their actions are limited. It bears repetition that we are not saying that these actions implement some anterior norms but only that they are sufficiently regular so that they can be described by norms. How then does something that looks as if it were an implementation of anterior norms emerge out of conflicts in which political forces use institutions as tools?

The generic answer is that the institutional actors anticipate that a deviation from the expected behavior would subject them to punishment from other actors. The main distinction here is between sanctions that are external and internal to the government. External sanctions are those administered by actors outside the government as a whole: the mechanisms through which these sanctions are applied are often referred to as “vertical.” Elections are a vertical accountability mechanism: they reward or punish the incumbent government conditional on its actions while in office (Przeworski, Stokes, and Manin 1999). Internal sanctions are those inflicted by one government agency upon another. These are “horizontal” mechanisms (O'Donnell 1994, 1999).

Taking issue with the core tenet of liberalism, Gargarella claims that horizontal mechanisms are not necessary to induce limits on majority rule. In his view, the majority can control itself and, even if the majority does not manage to exercise self-restraint, it must anticipate sanctions by the people. For its own good, the majority does not want to act hastily or foolishly, and it can prevent itself from acting precipitously by institutional devices that promote rational deliberation. And the people can control their representatives by frequent elections, recall, or imperative mandates. Hence, there is no intrinsic conflict between majoritarianism and the rule of law.

According to Weingast, citizens can prevent major transgressions by the government if they agree about the proper limits of state action and act together whenever the government transgresses these limits. The constitution plays an important role in this explanation. But the constitution matters not because governments feel a duty to obey it. Rather, it serves as the focal device, enabling particular individuals to guess what others will consider as major transgressions and thus to agree when to act. Actions of groups with different interests must be coordinated. Specifically, those who may be advantaged by a particular transgression must act against it alongside those who are hurt by it. Even though

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0521825598 - Democracy and the Rule of Law

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Excerpt

[More information](#)

José María Maravall and Adam Przeworski

Weingast characterizes this readiness to act against transgressions by the state as a “duty,” it is induced by the possibility that in the future the government may change the beneficiaries and the victims.

But must actions of citizens be coordinated for the government to fear external sanctions? If the government knows who is organized, it can collude with some organized interests against other interests. In turn, if challenges to transgressions by the state arise spontaneously from the civil society, the government cannot anticipate when transgressions will meet with opposition. According to Smulovitz, such decentralized, uncoordinated enforcement is more effective than coordinated actions.

Whether the majority restrains itself or anticipates reactions from the civil society, actions of government are limited in these views even when the state is a unitary actor. In the classical liberal view, however, only a divided government can be a limited one. Divided and limited powers can be stable and avoid the unconstrained will of rulers; as Hampton (1994) and Kavka (1986) argue against Hobbes, this is the foundation of the rule of law: a sovereign whose powers are circumscribed. Moreover, a mere separation of powers is not enough, because separation of powers leaves unlimited latitude to the legislature, decisions of which must be implemented by all other branches of government. What is needed is a system of checks and balances that makes it impossible for any particular authority to undertake actions unilaterally, without the cooperation or consent of some other authorities (Manin 1994).

The Madisonian theorem asserts that a government divided in this manner will be a limited, moderate one. Whereas the theory of the separation of powers defends functional boundaries between the different public authorities, defined with precision in order to prevent interferences from one branch of government in the functions assigned to another, the theory of checks and balances sustains that each branch of government should exercise some influence on the others (Vile 1967). Only then would limited government be a self-enforcing equilibrium. To quote Manin (1994: 57), “Each department, being authorized to exercise a part of the function primarily assigned to another, could inflict a partial loss of power to another if the latter did not remain in its proper place. . . . each would be discouraged from encroaching upon the jurisdiction of another by the fear of retaliation. . . . the initial distribution of power would hold: no relevant actor would want to deviate from it.” As one agency counters another agency, actions of the government as a whole become predictable and moderate.

Institutional design – what Troper calls the “mechanical conception” – obviously matters. The particular agencies must have the means and