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0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

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[More information](#)

## Introduction

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Just over a decade ago, following the almost total collapse of communism, it seemed to many observers to be the dawn of a new age, an age in which Western ideas of freedom, democracy, individual rights, and capitalism finally would come to dominate, spreading their beneficent effects to the many blighted parts of the globe that had previously rejected them in the name of Marxism, or traditional values, or anti-Westernism, or some other self-defeating ideal. “The End of History”<sup>1</sup> had arrived. Peace and prosperity were about to reign worldwide.

How quickly have things turned. There has since been a bewildering array of nationalist, ethnic, religious, and political conflict, of genocide and other unthinkable atrocities, of economic crises that have threatened global financial stability, of terrorism and war, all at levels exceeding what occurred during the hottest moments of the half-century-long Cold War. New global fault lines, previously sublimated beneath the overarching confrontation between communist systems and the West, have emerged and deepened, between rich and poor countries, between North and South or East and West, between Islamic and non-Islamic countries, between liberal and non-liberal societies, between mercantilist (state-run) capitalism and free trade capitalism, between dominance by global corporations and the preservation of local autonomy, between US military, economic, political, and cultural influence and the rest of the world, at once bitterly resistant while guiltily complicit. For all but the most sanguine observers, the triumphalist confidence of the 1990s has dissolved.

Amidst this host of new uncertainties there appears to be widespread agreement, traversing all fault lines, on one point, and one point alone: that the “rule of law” is good for everyone. Among Western states this belief is orthodoxy. Listed first in the “Declaration of Democratic Values” issued by the seven heads of state of the major industrial democracies: “We believe in a rule of law which respects and protects without fear or favor the rights and liberties of every citizen and provides the setting in which the human spirit can develop in freedom and diversity.”<sup>2</sup> In the words of US President George W. Bush, “America will always stand firm

Cambridge University Press

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Excerpt

[More information](#)

## 2 Introduction

for the non-negotiable demands of human dignity: the rule of law . . .”<sup>3</sup> It is commonplace wisdom that the defining characteristic of the Western political tradition is “freedom under the rule of law.”<sup>4</sup>

Western promotion of the rule of law is not limited solely to the enhancement of liberty. In the early 1990s, the Western-funded World Bank and International Monetary Fund began conditioning the provision of financial assistance on the implementation of the rule of law in recipient countries. This imposition was justified on economic grounds as a means to provide a secure environment for investments, property, contracts, and market transactions.<sup>5</sup> At a training session of World Bank staff members and consultants, “‘Rule of law’ was probably the most-repeated phrase of the week.”<sup>6</sup> Development specialists uniformly agree that absent the rule of law there can be no sustainable economic development.

Support for the rule of law is not exclusive to the West. It has been endorsed by government heads from a range of societies, cultures, and economic and political systems. Russian “President Putin continues to place judicial reform and the full implementation of the principles of the rule of law among the country’s highest priorities.”<sup>7</sup> China recently signed a UN pact for cooperation and training to develop the rule of law.<sup>8</sup> “Chinese leaders say they . . . support the establishment of the rule of law,” a commitment underscored by the highly publicized attendance of President Jiang Zemin at a seminar on the rule of law.<sup>9</sup> His successor as President, Hu Jintao, observed following his selection that “We must build a system based on the rule of law and should not pin our hopes on any particular leader.”<sup>10</sup> Robert Mugabe, embattled President of Zimbabwe, previously stated that “Only a government that subjects itself to the rule of law has any moral right to demand of its citizens obedience to the rule of law.”<sup>11</sup> Seven months after taking office, Indonesian President Abdurrahman Wahid identified as one of his major achievements: “we are beginning the rule of law.”<sup>12</sup> President Mohammed Khatami of Iran has made “repeated remarks about the value of a civil society and the importance of the rule of law.”<sup>13</sup> Mexican President Vicente Fox Quesada declared that the lack of the rule of law is “the theme that worries Mexicans most.”<sup>14</sup> Even a notorious Afghan warlord, Abdul Rashid Dostum, campaigning for a position in the post-Taliban government, was quoted as saying “Now is the time to defend ourselves not with tanks and armed corps but by the rule of law . . .”<sup>15</sup> These and similar testimonials have come from leaders of a variety of systems, some of which have rejected democracy and individual rights, some of which are avowedly Islamic, some of which reject capitalism, and many of which oppose liberalism and are explicitly anti-Western. The reasons they

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Excerpt

[More information](#)

articulate for supporting the rule of law might differ, some in the interest of freedom, some in the preservation of order, many in the furtherance of economic development, but all identify it as essential.

This apparent unanimity in support of the rule of law is a feat unparalleled in history. No other single political ideal has ever achieved global endorsement. Never mind, for the moment, an understandable skepticism with respect to the sincerity of some of these avowed commitments to the rule of law. The fact remains that government officials worldwide advocate the rule of law and, equally significantly, that none make a point of defiantly rejecting the rule of law. At the very least, even in the case of cynical paeans on its behalf, the mere fact of its frequent repetition is compelling evidence that adherence to the rule of law is an accepted measure worldwide of government legitimacy.

Notwithstanding its quick and remarkable ascendance as a global ideal, however, the rule of law is an exceedingly elusive notion. Few government leaders who express support for the rule of law, few journalists who record or use the phrase, few dissidents who expose themselves to risk of reprisal in its name, and few of the multitude of citizens throughout the world who believe in it, ever articulate precisely what it means. Explicit or implicit understandings of the phrase suggest that contrasting meanings are held. Some believe that the rule of law includes protection of individual rights. Some believe that democracy is part of the rule of law. Some believe that the rule of law is purely formal in nature, requiring only that laws be set out in advance in general, clear terms, and be applied equally to all. Others assert that the rule of law encompasses the “social, economic, educational, and cultural conditions under which man’s legitimate aspirations and dignity may be realized.”<sup>16</sup> Dissidents point out that authoritarian governments that claim to abide by the rule of law routinely understand this phrase in oppressive terms. As Chinese law professor Li Shuguang put it: “‘Chinese leaders want rule by law, not rule of law’ . . . The difference . . . is that under the rule of law, the law is preeminent and can serve as a check against the abuse of power. Under rule by law, the law can serve as a mere tool for a government that suppresses in a legalistic fashion.”<sup>17</sup> In view of this rampant divergence of understandings, the rule of law is analogous to the notion of the “good,” in the sense that everyone is for it, but have contrasting convictions about what it is.

The theory experts have it no better. Political and legal theorists also often hold vague or sharply contrasting understandings of the rule of law. One theorist remarked that “there are almost as many conceptions of the rule of law as there are people defending it.”<sup>18</sup> Many theorists believe that it is “an essentially contested concept,”<sup>19</sup> that is, a notion characterized by disagreement that extends to its core. “It would not be very difficult

Cambridge University Press

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Excerpt

[More information](#)

## 4 Introduction

to show that the phrase ‘the rule of law’ has become meaningless thanks to ideological abuse and general over-use.”<sup>20</sup>

The rule of law thus stands in the peculiar state of being *the* preeminent legitimating political ideal in the world today, without agreement upon precisely what it means. Bringing greater clarity to this ideal is the primary objective of this book. This ideal is too important to contemporary affairs to be left in confusion. Despite the surrounding uncertainty, it is not the case that any proposed meaning is as good as another. There is a relatively short list of plausible conceptions, each derived from a recognized historical-political context, with relatively clear elements and discernable implications.

This effort is not offered for edification alone. According to an article in *Foreign Affairs*, several decades and hundreds of millions of dollars have been expended on developing the rule of law around the world with minimal positive results.<sup>21</sup> If it is not already firmly in place, the rule of law appears mysteriously difficult to establish. This exploration of the history, politics, and theory surrounding the rule of law will elaborate on the circumstances of its origin and will identify its ingredients. It will not produce a formula that can be replicated in every situation, for owing to the uniqueness of each social-political context that cannot succeed. But learning about how it originated and how it functions will provide useful information for those looking for alternative paths that that might work in local circumstances.

This effort to clarify the rule of law to assist in its realization should not be interpreted as an unreserved promotion of this ideal. I share the view of many that the rule of law is a major achievement deserving of preservation and praise. But it has limitations and carries risks seldom mentioned by its advocates. A striking disjunction exists between the theoretical discourse on the rule of law and the political and public discourse on the rule of law. Theorists have observed the decline of the rule of law in the West for some time some now, beginning with A. V. Dicey over a century ago, renewed by Friedrich Hayek fifty years ago, and widely repeated by legal theorists, especially in the USA, in the past three decades. Therefore, even as politicians and development specialists are actively promoting the spread of the rule of law to the rest of the world, legal theorists concur about the marked deterioration of the rule of law in the West, with some working to accelerate its demise. This decline suggests that problems are being glossed over in its promotion.

Two particular concerns bear mention at the outset. First, some of the most vociferous champions of the rule of law, famously including Hayek, have claimed that it is incompatible with an expansive social welfare state and with the achievement of distributive justice. Theorists often

Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

tie liberalism, unrestrained capitalism, and the rule of law into an all or nothing package. However, many of the non-Western societies that wish to implement the rule of law have no desire to become liberal, and many Western societies with the rule of law are committed to the social welfare state. A host of fundamental social and political issues are thus implicated in the decision to adopt the rule of law ideal. Second, the rule of law carries the ever-present danger of becoming rule by judges and lawyers. Aside from having obvious anti-democratic implications, this raises additional concerns in societies where judges and lawyers are drawn exclusively from the elite, or from some other discrete subgroup. Countries working to develop the rule of law must be cognizant of these and other potential problems.

Equal attention will be allocated in this work to elucidating the weaknesses and strengths of the rule of law, to considering the theoretical and practical arguments for and against it. Like all ideals, there are certain social-cultural contexts for which it is ill suited, and it must be weighed against and sometimes give way to other important social values. Like all ideals, choices must be made in how the ideal is to be formulated and how it is to be implemented, choices that take into consideration immediate context and prevailing preferences.

A telling revelation of this exploration is that the rule of law ideal initially developed in non-liberal societies. This millennia-old ideal survived extraordinary changes in surrounding social, political, and economic circumstances, which led to alterations in how the ideal operated and what it was taken to represent. These changes have generated a few complicated puzzles that were not present at earlier stages. Not only will this exploration disclose how these problems arose, which is relevant to contemporary liberal societies, it will also reveal ways in which modern non-liberal societies can understand the rule of law in a fashion amenable to their situations.

This exploration will proceed chronologically, beginning briefly with Ancient Greece and Rome, then focusing more attention on the Medieval period, then on the modern rise of liberalism, ending up in the present, looking at the rule of law at the national and international levels. History, politics, and theory are interwoven throughout the book, showing up in each chapter, but they also serve as general organizing themes, delivered in sequential order. The first few chapters are thus more historical, the middle chapters more political, and the concluding chapters more theoretical.

Although a number of challenging topics in political and legal theory will be canvassed in the course of this work, an effort has been made to present the ideas and issues surrounding the rule of law in a manner

Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

---

6 Introduction

accessible to readers with no theoretical background. While it is written to be of use to theorists and students, one objective of this book is to expose a general audience to the insights to be gleaned from the historical, political, and theoretical discussion. The rule of law has swept the realm of public political discourse. Given its prominence, it is essential that a thorough understanding of this ideal be available to anyone with an interest and the requisite determination to know.

Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

## 1 Classical origins

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### Greek thought

Many accounts of the rule of law identify its origins in classical Greek thought, quoting passages from Plato and Aristotle. Though this is not incorrect, a caveat must be kept in mind. For half of a millennium, known as the Dark Ages, Greek thought was almost entirely lost to the West, until rediscovered and given new life in the high Middle Ages by religious scholars.<sup>1</sup> The rule of law as a continuous tradition took root more than a thousand years after the heyday of Athens. Greek ideas with respect to the rule of law are therefore best understood as exemplary models, inspiration, and authority for later periods. Many of the problems the Greeks, Plato and Aristotle in particular, grappled with so insightfully are timeless problems; hence their timeless relevance and appeal.

Fifth-century BC Athens, at the height of its glory, took great pride in being a democracy governed directly by its citizens. The overarching orientation of Athenians was toward the *polis*, the political community. Every male citizen over thirty years of age, of whatever class or wealth, was eligible to serve (for pay) on juries that decided legal cases; they also served as magistrates, on the governing Council (with a rotating head), and on legislative assemblies, with positions filled by lot. To insure accountability, magistrates presiding over cases could be charged with violations of the law by complaints from private citizens.<sup>2</sup> Owing to these characteristics, “democracy was synonymous for the Athenians with the ‘rule of law.’”<sup>3</sup> Athens did not have a class of legal professionals or state officials who monopolized the production of law or the delivery of legal services. Law was – literally – the product of the activities of its citizens. Equality before the law was an important value in their system. This did not mean that the same legal standards were applied to everyone. The law recognized categories of individuals (for example, women, children, slaves, and non-citizens) with different legal implications. Rather, equality meant that the law would be applied to all in accordance with its terms without regard to whom, whether aristocrat or lowly artisan, stood before it.<sup>4</sup>

Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

## 8 Classical origins

The danger in a popular system of this kind is that democracies can be as tyrannical as absolute monarchies.<sup>5</sup> Protecting against a populist tyranny, the law was accorded a status that set it apart, rendering it not easy to modify by the popular courts and legislative assemblies.<sup>6</sup> The role of these courts and assemblies was to respect the law and act as guardians of the law, not to declare the law as they pleased. Seen as the reflection of a transcendent order that stands behind the lived community, law enjoyed a sanctified status. “Greek philosophers and statesmen, like others before and after them, were beguiled by the dream of putting on record some system of basic law which would be so perfectly adapted to the true interests and the actual social conditions of the society for which it was framed as to be venerated as eternal and unalterable.”<sup>7</sup> The phrase “the laws of Solon,” a reference to the legendary monarch who in the sixth century BC established a body of laws and the popular courts, was used to stamp particular laws as ancient and untouchable. New laws could be passed, and old laws changed, but such enactments were subject to review. Proponents had to demonstrate the inadequacy of existing laws as a condition of passage, and all decrees of the assemblies were examined for consistency with preexisting law.<sup>8</sup> If legislation was found to be in contradiction with preexisting valid laws, the proponents of the legislation could be fined.<sup>9</sup> The result of these various mechanisms and standards was to maintain a democratic system “while subordinating the principle of popular sovereignty to the principle of sovereignty of laws.”<sup>10</sup>

Plato was from an aristocratic family. His student Aristotle – a Macedonian, non-citizen resident of Athens – was the son of a physician and later the tutor of Alexander the Great. By the time of Plato and Aristotle, Athens had already declined from its height, having lost the war with neighboring Sparta at the close of the fifth century BC. Its citizenry were thought to have degenerated, lacking in the self-discipline and orientation to the *polis* that had made Athenian democracy so superior. Instead they were overly preoccupied with commerce and excessively indulged in enjoying the fruits obtained from Athens’s maritime expansion. Underlining the risks of popular rule, Plato’s teacher, Socrates, was condemned to death by Athenian democrats. Under these circumstances, Plato and Aristotle were acutely concerned about the potential for tyranny in a populist democracy; accordingly, they emphasized that the law represented an enduring and unchanging order. Plato’s legal code in *The Laws* was intended to be permanent. The faith they expressed in the rule of law was in contemplation of its stability and restraining effect.

Plato insisted that the government should be bound by the law: “Where the law is subject to some other authority and has none of its own, the collapse of the state, in my view, is not far off; but if law is the master



Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

Greek thought 9

of the government and the government is its slave, then the situation is full of promise and men enjoy all the blessings that the gods shower on a state.”<sup>11</sup> Aristotle’s words on the rule of law still resonate:

Now, absolute monarchy, or the arbitrary rule of a sovereign over all citizens, in a city which consists of equals, is thought by some to be quite contrary to nature; . . . That is why it is thought to be just that among equals everyone be ruled as well as rule, and therefore that all should have their turn. And the rule of law, it is argued, is preferable to that of any individual. On the same principle, even if it be better for certain individuals to govern, they should be made only guardians and ministers of the law . . . 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.<sup>12</sup>

Aristotle raised several themes in the above passage that perennially course through discussions of the rule of law: self-rule in situations of political equality; government officials being subject to law; and the identification of law with reason, serving as protection against the potential for abuse inhering in the power to rule. His final observation, the last two sentences above, has had the most impact. Aristotle’s contrast between the rule of law as reason and the rule of man as passion has endured through the ages.<sup>13</sup> “In Aristotle’s account the single most important condition for the Rule of Law is the character one must impute to those who make legal judgments . . . It is part of such a character to reason syllogistically and to do so his passions must be silent.”<sup>14</sup>

Both Plato and Aristotle asserted that the law should further the good of the community and enhance the development of moral virtue of all citizens. As Plato put it, “we maintain that the laws which are not established for the good of the whole state are bogus law.”<sup>15</sup> “Hence what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair.”<sup>16</sup> Law for Plato was the reflection of a divine order, consistent with the Good. Both thinkers recognized the possibility, however, that the law might be co-opted to serve elite interests. For Aristotle, “true forms of government will of necessity have just laws, and perverted forms of government will have unjust laws.”<sup>17</sup> He concluded that the “laws, when good, should be supreme.”<sup>18</sup>

Several cautions are in order to avoid the temptation of placing too modern of a spin on Plato and Aristotle. Neither advocated rebellion against the law, even against unjust laws. “There is nothing which should be more jealously maintained than the spirit of obedience to law,” Aristotle counseled, for even minor transgressions, if allowed to creep in, “at last ruins the state.”<sup>19</sup> He saw law as essential to social order and

Cambridge University Press

0521843626 - On the Rule of Law: History, Politics, Theory

Brian Z. Tamanaha

Excerpt

[More information](#)

## 10 Classical origins

insisted on general obedience. Neither was a fan of popular democracy,<sup>20</sup> which they viewed as potentially the rule of the mob, uneducated and lacking in talent, susceptible to seduction by a demagogue, with a leveling effect on society.<sup>21</sup> Furthermore, neither was an egalitarian. They believed that people had unequal talents in political capacity, virtues, and excellence – often associated with birth status – and held that those who are superior should rule and deserve more rewards.

Their view was that the best government was the rule by the best man, not rule by law, for law does not speak to all situations, and cannot contemplate all eventualities in advance.<sup>22</sup> “Indeed,” observed Plato, “where the good king rules, law is a hindrance standing in the way of justice like ‘an obstinate and ignorant man.’”<sup>23</sup> The rule under law that they advocated was a second-best solution, necessitated by human weakness. Plato bid the law rule in *The Laws* as a more realistic alternative to the benevolent (philosophically educated and virtuous) Guardians he proposed to rule in *The Republic*. Aristotle advocated rule under law owing to the risk of corruption and abuse that exists when power is concentrated in single hands.<sup>24</sup>

Significantly, although Plato and Aristotle extolled the supremacy of law, their focus was diametrically opposite to that of the Athenian democrats mentioned at the outset, who also believed in the rule of law.<sup>25</sup> Plato and Aristotle were greatly concerned about restraining popular tyranny. In contrast, the Athenian democrats – the very popular government that incited trepidation in Plato and Aristotle – were predominantly worried about capture of the government by aristocratic oligarchies, which they had suffered during the brief but notorious tenure of the Thirty Tyrants, installed by Sparta following its conquest. One of these usurpers was Critias, Plato’s uncle (and also a student of Socrates).<sup>26</sup> For Athenian democrats it was essential – a prerequisite of its supremacy – that the citizens themselves participated directly in giving rise to the law. As we shall see, the tension between these two concerns, law as a restraint on democracy and law as the product of self-government, has not lessened throughout history.

At the height of Athenian governance under the law, citizens had equality before the law; the laws were framed in general terms, not against any individual; the Council, magistrates, and legislative assemblies were bound by the law; and citizens were free to operate as they pleased outside what the law prohibited.<sup>27</sup> Athenians thus achieved a form of liberty under the law. This was not individual liberty in modern terms, which is a notion they did not possess,<sup>28</sup> but rather involved the liberty of self-rule and the liberty to do whatever was not expressly prohibited by the law.