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Why We Don't Understand the Rule of Law or Explaining the Rule of Law: A Practice in Search of a Theory

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Why We Don't Understand the Rule of Law

or

Explaining the Rule of Law: A Practice in Search of a Theory

**J. Reuben Clark Society
Las Vegas Chapter
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ABSTRACT:

This lecture summarizes the main attempts to formulate an understanding of rule of law among legal theorists and explains why they fail to account for the real experience of law. It also explains key characteristics of law that need to be recognized in an adequate account of the rule of law.

KEY WORDS: rule of law, legal theory, natural law, legal positivism, F. A. Hayek, conventionalism, covenant, constitutionalism

- I. Introduction: In spite of the growing world-wide appreciation for the rule of law as a crucial foundation for modern civilization, we still limp along with theories of law that do not provide a central role for or adequately explain the rule of law.
 - A. The “rule of law” is most simply defined as the government of laws and not men. It is understood to be the opposite of tyranny in which some strong man or faction rules all others for their own interests.
 - B. The idea of rule of law arose anciently, has arisen repeatedly in different times and places, and even exists in some form in most primitive societies. The American founding is famous for producing the most advanced theoretical understanding of the rule of law and the most substantial support for the rule of law in a general population.

- C. While the advantages of more complex and expansive political and economic organization for the enhancement of quality of life and expansion of individual opportunity, are historically obvious, all institutions of authority invite corruption as humans see opportunities to convert authority into private power.
 - D. While a variety of practical institutional devices and political doctrines have emerged over the centuries to curb subversions of public authority to private advantage, none work perfectly or consistently, and in some countries cynicism regarding the rule of law is overwhelming.
- II. In the course of the normal human quest for explanations, three principal strategies for explaining the recurring phenomenon of law have persisted.
- A. The common sense view of law from ancient times to the present has been conventionalist in the sense that law is assumed to derive its authority from some kind of agreement between the citizens of the polity, an agreement based on an assumption that their interests are better served by yielding some of their natural liberty for improved protections, etc.
 - 1. This view has distinguished ancient and modern defenders.
 - a. Plato's *Republic* assumes a social contract as the obvious origin of the state, and in his *Crito*, Socrates chooses to die, rather than give anyone an excuse to believe that he would violate that promise and obligation to the city.
 - b. Most recently, England's most prestigious judge, Tom Bingham, concluded his famous lecture on the rule of law with this observation:

But it seems to me that the rule of law does depend on an unspoken but fundamental bargain between the individual and the state, the governed and the governor, by which both sacrifice a measure of the freedom and

power which they would otherwise enjoy. The individual living in society implicitly accepts that he or she cannot exercise the unbridled freedom enjoyed by Adam in the Garden of Eden, before the creation of Eve, and accepts the constraints imposed by laws properly made because of the benefits which, on balance, they confer. The state for its part accepts that it may not do, at home or abroad, all that it has the power to do but only that which laws binding upon it authorise it to do. If correct, this conclusion is reassuring to all of us who, in any capacity, devote our professional lives to the service of the law. For it means that we are not, as we are sometimes seen, mere custodians of a body of arid prescriptive rules but are, with others, the guardians of an all but sacred flame which animates and enlightens the society in which we live.¹

2. But this explanation appears to fail when we note that it is difficult or impossible to demonstrate the existence of any such agreement for most legal societies.
 - a. This happens explicitly when new citizens gain their citizenship.
 - b. But when did you agree to all this?
 - c. I will argue that there are good answers to these objections, and that this “conventionalist” theoretical approach is the only one that can explain law adequately with the idea of the rule of law at the center.

B. Realists from ancient times to the present point to the fact that public

¹ Tom Bingham, “The Rule of Law,” The Sixth Sir David Williams Lecture, delivered 16 November 2006 to the Centre for Public Law at University of Cambridge, p. 35. This text was accessed June 1, 2010. at http://www.cpl.law.cam.ac.uk/past_activities/the_rt_hon_lord_bingham_the_rule_of_law.php.

authority is really based on power, and conclude that law is an instrument by which the powerful govern the weak, who in turn obey out of fear or habit. Law is just a social fact.

1. Inspired by the genius of Jeremy Bentham, John Austin founded British legal positivism on the claim that when a gunman points his gun at your head, you are “obliged” by your interest in self-preservation to do what he requires. But this seems like a verbal trick. Legal obligation seems more complicated than that.
 2. H. L. A. Hart’s seminal book, *The Concept of Law* was published in 1961 as a fundamental critique and correction of the Austinian tradition, putting legal positivism on new and firmer ground and proved to be the focal point for almost all legal philosophy over the following half century.
 3. But this positivistic approach can make little sense of the moral force of legal obligation.
 - a. Why are citizens obligated to obey the law when it hurts more than it helps?
 - b. And why are judges obligated to enforce the law rather than their own self-interested advantages?
- C. Religious peoples have frequently made the simplistic link between divine and civil authority, and have claimed the authority of the gods as grounding for legal obligation.
1. In the attempt to maintain this logic for religiously diverse polities, the notion of natural law developed to claim a link between universal moral truth or “the good” and the authority of the laws.
 2. But this does not seem to help much in the courtroom where judge, counsel, and jury treat law as a social fact, created in a

procedurally correct way by human authorities for whatever political or moral reasons they might have had at the time.

3. The natural law approach actually works against pluralism of religions and cultures in any legal society by nationalizing the “true” or “politically correct” view, however that might be seen by a particular theorist.
 - a. Sharia (Islamic law) provides a good example of this today in Middle Eastern countries where it rules supreme.
 - b. Catholic law held similar sway in the middle ages in Europe.
 - c. Catholic thinkers today have been the principal promoters of the revival of natural law thinking.
 - d. John Finnis, a student of H. L. A. Hart at Oxford, led a resurgence of natural law theorizing, and attempted a rapprochement with Hart’s positivism. While he is respected by most legal philosophers, he is also widely ignored.
4. It denies authority to the legislature that makes laws and the judiciary that must interpret and apply them, reserving that authority for moral or religious truth.
5. Finally, natural law has never solved the epistemological problem—how can we know the truth? It fails to recognize that law is a general standard *by stipulation*, and not a discovered universal truth. Such discoveries have eluded all human societies.
6. Where religious law rules, it is based on the *agreement* of a homogeneous population or the *power* of a dominant majority.

- D. Over the last century, legal theorists have focused principally on the latter two of these three approaches—natural law and legal positivism.
 - E. But neither approach has provided much traction for understanding the rule of law as the central goal and product of law.
 - 1. The *practice* of rule of law has developed rapidly in modern societies, with lots of new techniques for controlling corruption and government power coming into play year by year.
 - 2. But the legal theory that can explain rule of law in a way that recognizes its centrality for societies of law has made no progress.
 - a. Rather, both positivist and natural law thinkers continue to treat the rule of law as a nice ideal which can be invoked along with other values when describing particular legal systems.
 - b. But neither sees it as the core construct of legal systems.
- III. Human nature presents both the opportunity and the problem.
- A. The opportunity: Humans are naturally inventive and collaborative, discovering new ways of working together to improve the quality of their lives and their world.
 - B. The problem: But humans are also naturally self-indulgent, justifying their own shortcomings when they would not accept the same behavior in others.
 - 1. Philosophers from Plato to David Hume and the Founding Fathers have recognized the corruptibility of human nature.
 - 2. Neurobiologists now conclude that the human brain is just designed that way, and that we can develop compensatory

practices, but not remedial ones.

- IV. Legal society is one of the most powerful human inventions ever, and has given rise to modern civilization. Modern society would be impossible without law.
- A. It provides individual freedom of action, harnessing the creative power and initiative of the entire population.
 - 1. This is accomplished principally by the shift from commands to rules. When citizens know the rules by which their conduct will be judged, they can pursue their own objectives within the constraints posed by the rules.
 - 2. Further, by holding authoritative persons to the same rules, the citizenry is protected from exploitative behavior from government.
 - B. It protects markets and private business initiatives. (*E.g.*, market law in the late middle ages.)
 - C. It expands both consumer and production markets by making contracts between strangers enforceable.
 - D. It protects a variety of religious and cultural perspectives and makes pluralist society possible. We can live together peacefully and productively without having first to agree on the ultimate questions.
- V. Contemporary efforts to establish the rule of law in post-soviet and post-colonial countries over the last four decades appear to be losing the battle, and rule-of-law practitioners have now publicly confessed that there is no adequate theoretical account of law and the rule of law to provide guidance for their efforts.
- A. Rule of law *practices* are highly developed and widely known. American style constitutional democracy has returned to pre-eminence as a world-wide political ideal after a century interlude

when many developing nations were captured by the Marxist vision.

1. Legal procedures ensure neutral treatment in cases of legal conflict.
2. Constitutionalism is the science of so constructing the functions and procedures of government as to preserve the rule of law and to minimize the likelihood of tyranny—of the concentration of power in a few persons.
 - a. Principles of constitutionalism reached their highest development in the American constitution, but constitutional thinking continues to develop.
 - b. Examples of constitutional principles that are sometimes confused with principles of the rule of law, but which function to protect those principles from constant and undue pressure would include:
 - (1) Separation of powers was so important in the eyes of Montesquieu, the French admirer of the British constitution, that he simply equated it with the rule of law.
 - (2) Checks and balances existed in English practice, but were raised to new practical and theoretical heights by Madison and other American founders, who were inspired by David Hume's philosophical writing on political factions and how to control them in government.
 - (3) Independent judiciary
 - (4) Election of public officers by secret ballot for limited terms
 - (5) Bicameralism—requiring the majority vote of two

separate legislatures elected on different principles drastically reduces the range of politically feasible initiatives and the opportunity for exploitative legislation from temporary legislative majorities.

- B. But rule of law theory is partial and inconsistent.
1. Rule of law is widely understood as a political or legal ideal that is independent of any particular theory of law.
 2. It is most effectively identified as a set of principles which implicitly limit the kinds of rules that can be laws, including:
 - a. Normativity: laws must be stated as rules, not commands.
 - b. Generality: the rules must apply to all citizens all the time—including those in positions of public authority.
 - c. Equality: the laws cannot be different for different social groups or classes.
 - d. Prospectivity: laws can only be enforced when they have been enacted and published in advance.
 - e. Possibility: Laws cannot require citizen conduct which is impossible or impracticable.
 3. It is often confused with constitutionalism itself or with human rights theories.

VI. Legal positivism and natural law theory may have run their course as is evident from their failure to explain this core legal concept—the rule of law. If conventionalism is to be developed as a theory of law that can make sense of the rule of law, it will have to establish the following:

- A. Humans naturally think in terms of imagined realities—“as if” the

world were constructed this way or that. This is now clearly established by studies of how the human brain works.

- B. Rule-making is the normal way for humans to solve their problems with each other.
 - 1. Infants can learn the rules of language and of the home.
 - 2. We all learn to make our own rules in the home and in games we play. Legislation (stipulating rules or normative expectations) is natural to humans.

- C. Human beings can create moral obligation by submitting to the expectations of others—making those expectations legitimate or authoritative. (Michael Oakeshott)
 - 1. Thomas Hobbes, in his much misunderstood 1651 book *Leviathan*, advanced the theoretical basis of the conventionalist approach and stated that “no man can be obligated save by an act of his own.”

- D. The public authority to make and enforce laws derives from an *implicit* and *universal* agreement of the citizens.
 - 1. Agreement can be assumed by participation when free exit is allowed, and
 - 2. When all participants have appropriate opportunity to influence the formation of the rules.

- E. The principles of the rule of law are the implicit and sometimes explicit reservations that we have placed on public officials in the exercise of their powers.
 - 1. Adherence to these restrictions is what makes sense of universal agreement—unanimity underlying authority.

- a. The Constitutional Reform Act of 2005 in Britain stipulates that the Act does not adversely affect “the existing constitutional principle of the rule of law.”²
 - b. But neither this act, nor any previous legislation defines that principle.
2. We can think of them most generally as restrictions we would insist on imposing on government action where we have given the government authority to make and enforce rules affecting all aspects of our lives—where we have given up our veto rights by entering into civil society. Examples of such restrictions might include:
- a. Rules cannot violate the deeply held moral and religious beliefs of citizens. To the extent that these are matters many people hold to be more important than anything else, including life itself, it is not reasonable to expect them to put these at risk in agreements made with others to improve their situations in other respects. This may limit the range of moral and religious views that can share a single legal system. But note that it is a negative restraint only and does not require complete moral and religious agreement. It does require religious liberty.
 - b. Authoritative decisions cannot arbitrarily single out individuals or groups for particular penalties or benefits.
 - c. The public officials themselves, in their private roles as citizens and in their public roles as magistrates, are subject to all the rules they create.
 - d. There can only be one set of rules for everyone. There can be no special (privileged or repressed) categories of citizens.

² Quoted by Bingham, p. 1.

- e. Rules cannot be changed after the fact or made retroactive in their application without the actual consent of all concerned or compensation to those negatively affected.
- f. All making and enforcement of rules must be knowable. and observable by all citizens.
- g. Every citizen must have reasonable access to the process by which the rules are formulated and administered.
- h. Every citizen, when accused of rule violations, must have full opportunity to defend his or her case before disinterested judges.

VII. Conclusions and further observations:

- A. Recent work in neurobiology surprisingly opens the way to overcome long-standing objections to the conventionalist approach to explaining law and the rule of law.
- B. The conventionalist approach makes clear that the rule of law exists first in the minds of the citizens.
 - 1. Unless they understand it and support it vigorously, it cannot survive the determined efforts of would-be tyrants.
 - 2. Public virtue is essential for the successful regime of law.
- C. The world-wide pursuit of rule of law will not succeed unless it can find a way to instill this understanding and commitment at the grass roots level in nations that have no tradition of individual liberty.
- D. If the desire for liberty is universal, there can always be hope that people will choose to sacrifice to achieve it.

- E. The Americans were inspired by their own inflated notions of liberty under English law.
- F. The American example now projects an example of liberty under law to all people through global media and communications.