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# The doctrine of the rule of law in the twentieth century

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# THE DOCTRINE OF THE RULE OF LAW IN THE TWENTIETH CENTURY\*

Background paper 1985

Abstract:

The concept of rule of law has been recognized repeatedly in twentieth century political and philosophical discussion, but with a constantly shifting meaning. In this paper we document most of the serious contributions to thought about rule of law before 1985 as a background to further work on the topic.

Key words: rule of law, legal theory, philosophy of law, natural law, F. A. Hayek, constitutionalism,

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Since the theory of natural law as a foundation and imitation of the positive law has come into question, the central jurisprudential issue has turned from an inquiry of what the substance of the law should be to an inquiry of what makes law determinable. Some modern theorists, generally not fond of legal positivism, have sought to derive limitations upon and characteristics of the positive law from the principle that whenever possible the law should rule and not men. Given that the doctrine of the rule of law these theorists are developing is a doctrine of anti-tyranny, these theorists have not been content to say that the rule of law is extant whenever men are ruled by positive laws. This positivistic tautology denigrates and trivializes the very ancient doctrine of the supremacy of law so as to render it true of any state, ancient or modern, free of tyrannous. Instead, the modern developers of the theory of the rule of law give it a great deal of thought and attention precisely because they believe that it is best stated as a doctrine of anti-tyranny and not just as another way of stating legal positivism.

In this writing the ups and down of the doctrine of the rule of law in the present century shall be traced. Following the popularization of the term by A.V. Dicey in the latter part of the

nineteenth century, we shall find that for the first sixty years of this century much attention was given to the doctrine, culminating in its fullest expression to date, that given by F. A. Hayek. But in the last twenty years the amount of attention has waned somewhat, both in quality and frequency.

Although it is appropriate to begin a discussion of modern theorists on the rule of law with Dicey, some mention should be made that the doctrine is not new to this era. The supremacy of law is an age-old doctrine, and a brief treatment of its antiquity will be given in our first section. The second part will treat Dicey and his commentary. Part three will evaluate the many statements of the doctrine of rule of law between Dicey and the Hayekian development of the doctrine, circa 1960, which is the topic of the fourth section. Finally, we shall summarize the discussion which has taken place in the past twenty years, and evaluate the contributions made. As we proceed through each part, we shall not fail to note, and probably cannot resist noting, some infelicitous expressions which have been made along the way.

## I

No more should need be done to illustrate the antiquity of the doctrine of the rule of law than to find it in the writings of Plato. Indeed it is oft said that all succeeding political philosophy is a footnote to and a commentary on Plato. At least one reason for such a hyperbole is that despite centuries of lucubrations much disagreement is found among commentators as to the stance of Plato in his most quoted work, the Republic. Plato has been accused of being the sponsor of about every political "ism" known to man. Popper thought he was a great exponent of

authoritarian regimes,<sup>1</sup> while McIlwain states such a posture is a "distortion," the result of disregarding "Plato's plain statements of his purpose in the Republic" and of ignoring the Statesman, which plainly shows that this is not Plato's true position but the very antithesis of it".<sup>2</sup>

Regardless of which political camp Plato is properly placed, it is clear that he was aware of the doctrine of the rule of Law. Barker comments that in the Republic Plato "had gone against the cherished and current beliefs of his people--its belief in the sovereignty of law...--and he must have appeared... as an advocate of that tyranny which the Greeks hated with such a perfect hatred, because it murdered law and self-government and equality."<sup>3</sup> But whether the Republic advocates tyranny depends upon how seriously one takes the "ideal" society built in the work--and upon how seriously he meant it to be taken. For our purposes here suffice it to say that the Statesman and the Laws have proved much less disputations, so much so that even Barker admits that in these writings Plato sees the law "as the fruit of experience and invention of wisdom and sees "the value of a democracy which is based on the rule of law."<sup>4</sup>

Aristotle, apparently happier with the clarity of the Statesman than the irony of the Republic, picks up on many of the ideas of the former, including the rule of law. In the Politics he stresses that "it is more proper that the law should govern than any of the citizens," that "only guardians and servants of the law" should be in government.<sup>5</sup>

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<sup>1</sup>Popper, The Open Society and Its Enemies, Vol. 1.

<sup>2</sup>McIlwain, Constitutionalism, Ancient and Modern,, p. 33.

<sup>3</sup>Barker, Greek Political Theory, p. 330.

<sup>4</sup>Barker, Greek Political Theory, p. 337.

<sup>5</sup>Aristotle, Politics, 1287a

Like Plato, Aristotle, refuses to associate the rule of law exclusively with democracy, or democracy exclusively with the rule of law, for when "the people govern and not the law" the democratic state embodies nonetheless the rule of men in which "everything is determined by majority vote and not by law." When such a situation persists, a free state is not extant, "for, when government is not in the law, then there is no free state, for the law ought to be supreme over all things." <sup>6</sup>

In the Rhetoric, we even have a statement which shows an attempt to compose a list of the elements of the rule of law: "It is of great moment that well drawn laws should themselves define all the points they possible can, and leave as few as possible to the decision of the judges, [for] the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them."<sup>7</sup>

It is often a lesson in humility to study the thought of the ancients, for it teaches us the egotistic view we often have of our own institutions and concepts of government is undeserved. This eye-opening experience is also available in a study of medieval political thought. The theory of practice of government in the medieval age serves as a worthy proem to modern developments, particularly in the area of the rule of law, although it must be admitted that to some extent their theory was better than their practice.

In Britain, for example, a thirteenth century commentator by the name of Bracton wrote "Rex non debet esse homine, sed sub Deo et sub lege quio lex facit regem": The king should not

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<sup>6</sup>Aristotle, Politics, 1292a

<sup>7</sup>Aristotle, Rhetoric, 1354ab

be under man, but under God and law, because law made him king.<sup>8</sup> Bracton taught that the king has full power in the administration of government, or gubernaculum, but beyond this, in the realm he called jurisidictio, "there are bounds to the king's discretion established by a law that is positive and coercive, and a royal act beyond these bounds is ultra vires."<sup>9</sup>

It is strikingly pleomorphic to quote a thirteenth century Frenchman by the name of Beaumanoir. He states, "L prince n'est pas sus la loi, mès la loi est sus le prince; quar il li donèrent tiel privilege comme il avoint": The king is not above the law, but the law above the king; for the laws give him his position.<sup>10</sup> A century later, Hincmar, Archbishop of Rheims, wrote that nobody, not even the king, may disregard the law.<sup>11</sup> In the sixteenth century Seyssel wrote that a stable and long-lived monarchical regime will occur "when the head is regulated by good laws and civil customs."<sup>12</sup> Kings as well as commentators believed in the supremacy of laws. Pepin, in a comment that typifies the common view of monarchical power only in its use of the royal "we," said, "Inasmuch as we shall observe the law toward everybody, we wish everybody to observe it toward us."<sup>13</sup> Charles the Bold vowed to "keep law and justice" and Louis the Stammerer was sworn to "keep the customs and laws of the nation."<sup>14</sup> In medieval

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<sup>8</sup>Tune, "The Royal Will and the Rule of Law," p. 401.

<sup>9</sup>McIlwain, Constitutionalism: Ancient and Modern, p. 85.

<sup>10</sup>Tune, "The Royal Will and the Rule of Law," p. 404

<sup>11</sup>Ibid.

<sup>12</sup>Seyssel, La Monarchie de France, p. 79; quoted and translated by Keohane, "Claude de Seyssel and Sixteenth Century Constitutionalism in France," p. 54.

<sup>13</sup>Tune, "The Royal Will and the Rule of Law," p. 404

<sup>14</sup>Ibid.

France, as well as in England, the realm of the king's power was executive or regulatory in nature.

Expressions of the supremacy of law were also prominent in medieval Germany. "Germanic and ecclesiastic opinion were firmly agreed on the principle...that the state exists for the realization of the Law; the power of the State is the means, the Law is the end--in itself; the monarch is dependent upon the Law, which is superior to him, and upon which his own existence is based"--<sup>15</sup> Monarchs had a duty to protect the law, for in his view the king was enjoined to maintain the customary law, to uphold the legitimate rights of individuals, and to safeguard the possessions of the State." In the same coronation oath, it was "impressed upon the Consciousness of the people the dependence of the king upon the law," after which the acclamation of the assembled people was given.<sup>16</sup> As it was said in these times "Nieman ist so here, so daz recht zware": no one is so much Lord that he may coerce the law.<sup>17</sup>

Kern identifies three sources for the binding of the medieval monarch to law: custom, the Stoic law of nature transmitted by the Church Fathers, and the Christian ideal that the king is God's vicar and instrument.<sup>18</sup> The second and third of these influences are incorporated into the medieval version of natural law, which the first identifies custom. Thus the king was regulated by law and custom in order to prevent tyranny, defined by Seyssel as domination of pure will.<sup>19</sup>

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<sup>15</sup>Kern, Kingship and Law, p. 70.

<sup>16</sup>Kern, Kingship and Law, p. 76-77.

<sup>17</sup>Kern, Kingship and Law, p. 182

<sup>18</sup>Kern, Kingship and Law p. 181.

<sup>19</sup>Keohane, "Claude de Seyssel and Sixteenth-Century Constitutionalism in France," p. 55.

It is true that these two courses were very much integrated and the natural law theory is now dead, its demise is not fatal to the doctrine of the rule of law. We shall see as we explore the developments of more recent times that the important thing is that there is a standard antecedent to the state. As we trace twentieth-century thought we shall see that a modern standard is available which does not depend upon natural law underpinnings, and which may be said to be a viable jurisprudential theory differentiable from both natural law and legal positivism.

While there was no paucity of theory supporting the rule of law during the middle ages, there was a dearth of institutional controls and sanctions to prevent and punish abuses of power. This assessment applies to antiquity as well as to medieval times. In the ancient regime there was "no remedy for an unconstitutional act short of actual revolution."<sup>20</sup> In the medieval era, the king was liable to receive resistance if he infringed the law, but only that: "The supremacy of law, in other words, was not guaranteed by regular institutional controls."<sup>21</sup> Such devices are the virtue of modern constitutionalism.<sup>22</sup> The medieval era shows the roots of those devices, to be sure, particularly in the area of representation and consent, but it isn't until later that they really flower.

By skipping to Dicey we do not mean to infer that the doctrine of the rule of law lapsed in the interim. Rather, the doctrine is mentioned by several notables, and to bridge the gap just a bit, we shall refer to a few. Hobbes, for example, picked up on Aristotle's phrase, although he

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<sup>20</sup>McIlwain, Constitutionalism: Ancient and Modern, p. 38.

<sup>21</sup>Franklin, Constitutionalism and Resistance in the Sixteenth Century, p. 11.

<sup>22</sup>Wilson, The American Mind, p. 321.



thought it was an error that "not men should govern but the law."<sup>23</sup> Harrington responded that "the act whereby a civil society is instituted and preserved upon the foundations of common rights and interest...[is], to follow Aristotle and Livy, the empire of laws, not of men."<sup>24</sup>

Locke, while not mentioning the traditional phrases associated with the rule of law, does state the "whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws promulgated and known to the people, and not by extemporary decrees"<sup>25</sup> or by the "irregular and uncertain exercise of the power."<sup>26</sup> "Freedom of men under government," he wrote, "is to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it; a liberty to follow my own will in all things, where that rule prescribes not: and not to be subject to the inconstant, uncertain, arbitrary will of another man."<sup>27</sup> To mention the other branches of government as well as the legislative, Locke argues "...indifferent and upright judges.... are to decide controversies by those laws [promulgated by the legislature]; and to employ the forces of the community at home only in the execution of such laws"<sup>28</sup>; while the "supreme executor of the law...has no will, no power, but that of the law."<sup>29</sup>

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<sup>23</sup>Hobbes, Leviathan (Oakeshott edition), p. 448.

<sup>24</sup>Harrington, Oceana ?

<sup>25</sup>Locke, The Second Treatise of Civil Government, Section 131.

<sup>26</sup>Ibid, Section 127.

<sup>27</sup>Ibid, Section 22.

<sup>28</sup>Ibid, Section 131.

<sup>29</sup>Ibid, Section 151.

Many characteristics of the rule of law, even though they also did not use traditional phrases associated with the doctrine, were expounded upon by Paley and Beccaria. Paley commented chiefly on generality,<sup>30</sup> while in the main work of Beccaria may be found the elements of clarity, certainty, foreseeability, enforcement, and equality, as well as generality.<sup>31</sup>

Kant writes: "The greatest problem of mankind, the solution to which nature compels him to seek, is the establishment of a civil society in which administers the rule of law."<sup>32</sup> This underscores the strong German tradition of the rule of law and limited government, the Rechtsstaat.<sup>33</sup>

To Dicey goes the credit for popularizing the term "rule of Law"<sup>34</sup> and much that it entails. Dicey, a savant of the British constitution, discusses the rule of law along with the sovereignty of Parliament and the conventions of the constitution in his work Law of the Constitution. These three principles are presented as axiomatic characteristics of the development of the British constitution.

The rule of law in this context, Dicey states, has three main elements.<sup>35</sup> First, there can be no punishment without a violation of the established law, or the principle of nullum crimen, nulla

<sup>30</sup>Paley, The Principles of Moral and Political Philosophy, pp. 348 ff.

<sup>31</sup>Beccaria, An Essay on Crimes and Punishments.

<sup>32</sup>Kant, Idea for a Universal History, quoted by Mestmacker, "Power, Law, and Economic Constitution," p. 177.

<sup>33</sup>Dietze, Two Concepts of the Rule of Law.

<sup>34</sup>Consgrove, The Rule of Law: Albert Venn Dicey, Victorian Jurist, p. xiv.

<sup>35</sup>Dicey, Law of the Constitution, pp. 183-199.

poena sine lege.<sup>36</sup> A violation once asserted must be proven in the ordinary courts before any deprivation in property, freedom, or person may be exacted. Dicey expressly contrasts this principle with a system of government which includes bodies with wide discretionary powers. This implies that it is violative of the rule of law to punish a person who could not have known beforehand that his action was subject to state sanctions. Dicey obviously feared that government agencies with broad discretionary powers would determine the legality of an action after the act and this would produce arbitrary enforcement and undefinable rules. It is plain that for Dicey the rule of law is a doctrine of anti-tyranny.

Second, the rule of law means that no person is above the law or that every man is subject to the law. All men are not only subject to the same law, the law will be enforced against all men in the same ordinary courts. This is the traditional concept of equality.

Third, the rule of law is an expression of the nature of the laws of the British constitution: that they are the consequences of rights as defined by the courts. This element is in effect an affiliation with the common law tradition.

It should be noted that each of Dicey's principles are expressed in terms of the courts, and most restatements of his position are cognizant of that. One can look to Hewart for evidence as to how in Britain the rule of law came to be stated in the Dicean manner,<sup>37</sup> and Pound in America saw the rule of law as the equivalent of the common law doctrine that the judiciary may pronounce upon the legal validity of actions of administrative, executive, and legislative

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<sup>36</sup>For more information on this principle see Hull; Sibua.

<sup>37</sup>Hewart, The New Despotism, p. 26-27.

authorities.<sup>38</sup> Dicey undoubtedly perceives the independent courts and the common law heritage as the bulwark and foundation of the rule of law, particularly in terms of historical development. By making reference in each of his elements to the virtues and responsibilities of the ordinary courts, Dicey emphasizes his belief in the superiority of the judiciary in safeguarding rights and preventing tyranny as opposed to administrative rule in particular.

These elements of Dicey's concept of the rule of law can be traced to Blackstone, De Lolme, Ferris, Cox and Hearn, all of which had praised the British constitution for its ability to provide for the supremacy of law.<sup>39</sup> In 1775, De Lolme, a Frenchman, hailed the British constitution because under it violations of law whether done by the prince or the pauper were redressed.<sup>40</sup> More prefatory to Dicey is the work on the British constitution of Cox, in 1813, which contained a chapter entitled "The Supreme Power of the Law." In it he states that "every class of persons in England is subject to the laws" and that "it can scarcely be disputed that in no other country is the supremacy of the law so effectually guarded."<sup>41</sup>

Ten years before the publication of the Law of the Constitution, Dicey characterizes the rule of law as not only a feature of the British constitution, but as the essence of all British political institutions.<sup>42</sup> He intones that the doctrine of the rule of law has arisen from the evolution of political institutions: "the curious paradox which lies at the basis of English

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<sup>38</sup>Pound, s.v. "The Rule of Law"

<sup>39</sup>Arndt, "The Origins of Dicey's Concept of the "Rule of Law"

<sup>40</sup>De Lolme, Constitution of England. p. 371.

<sup>41</sup>Cox, Institutions of English Government, p. 427.

<sup>42</sup>Dicey, "Stubbs" Constitutional History of England.

institutions [is] that the great power of the crown was in a sense the cause of the ultimate freedom of the people....[T]he power of the king first checked the lawlessness of the nobility, then established a uniform system of law and of direct taxation which still forms the foundation of the English scheme of government and administration, and lastly accustomed the English people to that rule of the severe but always fixed and definite law which is the real glory of English institutions, and which, in ages when arbitrary government was universally established throughout the rest of Europe, made the English constitution, with all its obvious defects, seem the most beautiful phenomenon in the history of mankind to all statesmen and theorists interested in the welfare of the human species."<sup>43</sup>

It is under this heading of the rule of law as the result of the evolution of institutions that Dicey's three principles emerge. To Dicey goes due credit for having made the rule of law famous,<sup>44</sup> and for formulating in a rudimentary fashion of the elements of the doctrine.

### III

A major critic of Dicey is Jennings who takes issue with the Dicean conception of the rule of law on about every point. Jennings attempts to reduce the doctrine of the rule of law to a dilemma. "If it is only a synonym for law and order, it is characteristic of all civilized States; and such order may be based on principles which no democrat would welcome and may be used, as recent examples have shown, to justify the conquest of one State by another. If it is not, it is apt to express the political views of the theorist and not to be an analysis of the practice of

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<sup>43</sup>Ibid., p. 154.

<sup>44</sup>Graveson, "The Bases of Modern English Law," pp. 249-250.

government. If analysis is attempted, it is found that the idea includes notions which are essentially imprecise."<sup>45</sup> This excerpt fairly well capsulizes Jennings' attack, which, in addition to responses directly aimed at Dicey's three principles, has three prongs directed, it seems, at the viability of and value of formulating the doctrine of rule of law at all: first, the rule of law may simply be the same as rule of the law of any law--even the command of the totalitarian; second, Dicey's conception was too intimately tied with his political views, so that rule of law is just an expression of a view of public policy which laments the growth of the service state; and third, even if the first two prongs proved invalid, any attempt to formulate the doctrine would necessarily involve concepts so hopelessly imprecise as to render the result of dubious worth. The point of this section is that Jennings' three prongs recur in variant forms among multifarious writers until the doctrine is in great need of repair, and it may be said that the mission of Hayek's Constitution of Liberty is to make such repairs and improve the formulation of the doctrine in such a way that the three areas of concern should be of no consequence. Before we proceed, it would be pointed out that as much confusion is inserted by well-meaning but careless enthusiasts, particularly near the time Hayek was writing, as may be said to have originated from those who think the doctrine to be of no value or contribution.

It is clear that the role of law, as developed by the ancients, the medievals, and up to and including Dicey, is a doctrine of anti-tyranny, and that the rule of law is not merely the same as rule by law, which if taken in this latter sense, would stretch the doctrine so as to encompass the entire ambit of states. For if it were meant by the rule of law merely rule by law, then, as Jennings points out, that is true even of the most despotic state..., even if that law be only 'The

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<sup>45</sup>Jennings, The Law and the Constitution, p. 59.

Leader may do and order what he pleases."<sup>46</sup> The rule of law is meant to be used as a standard which free states may be differentiated from totalitarian states; it is explicitly contrary to the rule of will. "In the term 'Rule of Law,' as used by Dicey, 'rule' has the connotation 'to rule' rather than 'a rule.'"<sup>47</sup> Jennings understood this, and his use of the point is to create a dilemma: if the rule of law is simply rule by law, then every state possesses the characteristic, and the doctrine is tautological and largely useless; if it means more than this, then what the theory entails must be fleshed out which leads a theoretician like Dicey to encounter other difficulties, namely prongs two and three of Jennings' argument.

Phillips, an early respondent to Jennings' attack, states that "The dilemma is a false one....The Rule of Law does not imply merely the existence of public order. It implies an enforcement of public order by methods which are compatible with freedom."<sup>48</sup> Dicey's small list of elements is not an attempt to deftly dupe his readers into his political persuasion; it is to identify the characteristics which the rule of law had historically been said to possess. The mere assertion that these characteristics are remarkably close to Whig values does not deny their authenticity. The discovery of difficulties in determining and identifying such elements and their nature does not render the process unfruitful, nor does it falsify individual elements.

To put the implications of the doctrine of the rule of law in a most forceful manner, it can be said that legal propositions which do not comply with the elements of the rule of law are not

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<sup>46</sup>Jennings, The Law and the Constitution, pp. 46-47.

<sup>47</sup>"The Rule of Law." p. 314.

<sup>48</sup>Phillips, "Constitutional Government and the Rule of Law," pp. 264-265.

laws at all, but commands. From the making of this distinction the elements of the rule of law have been historically and theoretically derived. Although we may seek to refine the model and experience some discomfort at not being able to fully explain particular elements, we must not lose sight of the role the doctrine of the rule of law has played as being contrary to the rule of will.

Legal positivism, on the other hand, knows no such distinction, and expressly defines law in terms of command. Hence many commentators in the twentieth century have never been able to view the rule of law in any other way than as rule by law, or as rules of the law, as a lawyer commonly uses the term. It is fitting here to quote Paton, who is responding directly to Dicey's three principles, but misses the point completely that the rule of law is not just another brand of legal positivism. Indeed, contextually, Paton is identifying the rule of law as one theory of the relationship between the state and the law, differentiable from positivism because, true to its medieval heritage, it considers the law as being above the antecedent to the state. But as he discusses this view, he refuses to take the meaning of the term "the rule of law" as it is used by Dicey, and slips into the language of legal positivism by using the term "a rule of law." Here is Paton's statement concerning Dicey's three principles: "These are undoubtedly the characteristics of the past and are not logical deductions from a rule of law. For law may have a varying content; it may protect the subject against despotism or give the most ruthless power to a tyrant. It is not enough for the democrat to demand a rule of law--everything depends on the nature of that law. Every legal order which functions has a rule of law; this applies to Nazi state as well as a democracy."<sup>49</sup>

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<sup>49</sup>Paton, Jurisprudence, p. 139.



Other spokesmen refuse to consider the rule of law in any other manner than in lawyer's terms, as in a particular rule of or about the law, or, more generally, in positivistic terms, as in rule by law, any law, as though the entire history of the term involving an entirely different meaning is null, void, and defunct because it is contrary to the irrefragable truths of our enlightened age. "The term 'rule of law' has no absolute and static meaning," writes Friedmann. "In a formal sense, the rule of law means any ordered structure of norms set and enforced by an authority in a given community. It is free from any ideological content and encompasses tyrannous as well as liberal and humanitarian orders."<sup>50</sup> Kelsen states,

"It is the task of the science of law to represent the law of the community, i.e., the material produced by the legal authority in the lawmaking procedure, in the form of statements to the effect that "if such and such conditions are fulfilled, then such and such a sanction shall follow."

These statements, by means of which the science of law represents law, must not be confused with the norms created by the lawmaking authorities.... The legal norms enacted by the law creating authorities are prescriptive; the rule of law formulated by the science of law are descriptive....

The rule of law, the term used in a descriptive sense, is a hypothetical judgment attaching certain consequences to certain conditions."<sup>51</sup>

In another place, Kelsen does seem to consider the term in a manner closer to its heritage,

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<sup>50</sup>Friedman, The State and Rule of Law in a Mixed Economy, p. 94.

<sup>51</sup>Kelsen, General Theory of Law and State, p. 45.

but even so his intent is to refute the contention that the rule of law is incompatible with socialism because the doctrine is associated with freedom. Kelsen endeavors to dismiss Hayek's view of the doctrine and its implications as developed in The Road to Serfdom. To accomplish this end it must be realized that Kelsen adopts a conception of rule of law much different than that of Hayek, and in the process emasculates the doctrine of its historical virility, using instead the empty positivistic cant. "By the rule of law the principle is understood," he opines, "that the administrative and judicial functions of the state should be determined so far as possible by pre-established general norms of law, so that as little as possible discretionary power is left to the administrative and judicial organs; freedom is thus guaranteed because arbitrary government is avoided."<sup>52</sup> Thus misconceived, it is easy for Kelsen to conclude that the rule of law places no restrictions whatever on the power of the legislative branch so that the "rule of law principle may prevail although the whole life of the individual is regulated by general legal norms prescribing in detail his behavior in relation to others, and thus restricting to a great extent his freedom of action."<sup>53</sup> The rule of law has as its purpose only to provide that the application of the law conforms to the will of the sovereign body that created the law.

The point of this exercise is the positivistic treatment of the doctrine of the rule of law inevitably exclude the historical precept that it is the opposite of rule of will. It is a tendency among writers so inflicted to define the rule of law so broadly so as to include the entire spectrum of government types, so as to render the doctrine meaningless and deprive it of its essentially anti-totalitarian character. One even went as far as to say that the rule of law is a legal

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<sup>52</sup>Kelsen, "Foundations of Democracy" p. 77.

<sup>53</sup>Ibid., p. 78.

implementation of a particular ideology<sup>54</sup>, and it seems it does not matter that the ideology selected might be totalitarianism. Perhaps this is because positivism's desire to eliminate any ideology or moral sentiments from the study of jurisprudence, and the dispute of tyranny versus liberty is a prima facia case of an ideologically based controversy, imbued with moral sentiment. Anything conclusory on this topic is most likely tainted and the fruit of the poison tree. So even when the effort is to present and refute the historical doctrine as preserved by Dicey and Hayek, as attempted by Paton and Kelson, it is only accomplished by introducing brands of the doctrine carrying positivism's trademark.

Hayek's conception of rule of law presented in The Road to Serfdom is also subject to attack in the context of the second prong of Jennings' attack. Part of the dilemma presented by Jennings echoes what has just been said about positivism. Jennings asserts that when Dicey proceeds to flesh out the theory of the rule of law to something more than simply the rule by law, he inexorably ends up with only a statement of his own political views. Jennings states that Dicey's first principle, that of the supremacy of the regular law, "does not mean that powers ought not to be abused; what he really has in mind is that wide administrative or 'executive' powers are likely to be abused, and therefore ought not to be conferred."<sup>55</sup> It was not too difficult for Jennings to pick the mind of Dicey on this point, for Dicey explicitly states that the rule of law "excludes the existence of arbitrariness, or prerogative, or even wide discretionary authority

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<sup>54</sup>Leiken, "Prospect for the Effective Rule of Law in Twentieth Century America," p. 329.

<sup>55</sup>Jennings, The Law and the Constitution, p. 287.

on the part of the government."<sup>56</sup> But Jennings goes on to state that Dicey "was stating as a principle of the British Constitution what he, and many others of his generation, thought ought to be a principle of policy.... The 'rule of law' in this sense means that public authorities ought not to have wide powers; that is, that the 'collectivism' which has infused the policies of all Governments since Disraeli's is an undesirable principle. The 'rule of law' in this sense is a rule of action for Whigs and may be ignored by others."<sup>57</sup>

Of course, one should not be surprised to discover that Dicey and Jennings were politically on opposite sides of the fence. The rule of law was to Dicey a traditional, historical, ancient doctrine signifying freedom from arbitrary government. It may be that Dicey felt some affinity for the rule of law because of his political persuasion, or it may be that his political persuasion was largely determined by his jurisprudential outlook. Whatever the case, there is no doubt that Dicey's conception of the doctrine squares with its historical roots. On the other hand, Jennings reflected a positive liberalism which advocates government intervention as the cure for what ails us. One wonders then if the antagonist was not articulating his own political philosophy in the guise of jurisprudence as much as the protagonist.

The fact is that much of the criticism of defenders of the rule of law focuses on the assertion that the doctrine is simply "out of step with the times."<sup>58</sup> Friedmann writes, "To me it is inconceivable that, in the foreseeable future, the role of the state could be reduced--as it is postulated by so many who indulge in half-baked nostalgias. This would not be so if our life

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<sup>56</sup>Dicey, Law of the Constitution, p. 198.

<sup>57</sup>Jennings, *op.cit.*, p. 288.

<sup>58</sup>Pennock, Administration and the Rule of Law, p. 10.

could revert to the pattern of the eighteenth and earlier centuries,"<sup>59</sup> which, of course, cannot be done, and this assessment echoes the sentiment that it is the complexity of our times that mandates--but not only mandates, necessitates--a pervasive and ubiquitous government involvement in what used to be of purely private concern.

In the parade of critics of Dicey, we must add to the list Wade and Bradley.<sup>60</sup> They write "if it is contrary to the rule of law that discretionary authority should be given to government department or public officers, then the rule of law is inapplicable to any modern constitution."<sup>61</sup> This attack, while it incorporates the belief that Dicey is out of step with the times, is a bit more sophisticated, for it hits Dicey where it might be expected to hurt the most. Dicey has presented the rule of law as a characteristic of the British Constitution; Wade and Bradley are saying though it may have been true then it is not true now. But we should not infer that Dicey would have necessarily disagreed with this assessment. In the introduction of the eighth edition of his work, Dicey is found reflecting on the changes he had observed since initial publication in 1875, and states, "The ancient veneration for the rule of law has in England suffered during the last thirty years a marked decline."<sup>62</sup> Dicey does not alter his list of the age-old principles of the rule of law simple because in some respects his government no longer honors them. Rather, he encourages repentance.

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<sup>59</sup>Friedmann, The State and Rule of Law in a Mixed Economy, p. 98.

<sup>60</sup>Manningham-Buller, "The Rule of Law: Its Status in the Modern World," p. 1016.

<sup>61</sup>Wade and Bradley, Constitutional Law, p. 67.

<sup>62</sup>Dicey, Law of the Constitution, p. xxxviii.

Another stance Dicey took in this vein for which he has been roundly excoriated is that it is incompatible with the doctrine of the rule of law to erect a separate court system to handle administrative law cases, but that such cases should be heard in the regular courts as the need arises.<sup>63</sup> Indeed, Dicey was writing in an age when "the rule of law" and "the cognizance of the ordinary courts" were used convertibly.<sup>64</sup> Pound defined the rule of law as "a characteristic doctrine of the common law that the judiciary, in ordinary legal proceedings, may pronounce upon the legal validity of...administrative, executive, and legislative action..."<sup>65</sup> But there is some evidence that Dicey mellowed somewhat. The almost rabid disgust for the French administrative court system found in the first edition of Law of the Constitution is moderated in the eight edition by recognition of improvements, although he still had serious reservations.<sup>66</sup> The fact that Dicey could in a categorical manner evaluate a system of administrative courts may infer that the problem is more of a problem in creating appropriate safeguards rather than one so serious that a blanket prohibition is warranted.<sup>67</sup> It at least ought to be understood that a system of judges subject to all the restraints typical of common law judges is obviously compatible with the rule of law whereas administrative officials doing double duty as rule-maker and rule-enforcer is

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<sup>63</sup>See Friedmann & Wilson & Harvey

<sup>64</sup>Barker, Church, State, and Study, p. 172.

<sup>65</sup>Pound, "Rule of Law," p. 463.

<sup>66</sup>Dicey, Law of the Constitution, pp. xliii-xlvi.

<sup>67</sup>Burin, "The Theory of the Rule of Law and the Constitutional State," p. 340.

highly suspect.<sup>68</sup> But even further, if a conflict between the rule of law and powerful administrative agencies seems inevitable, certainly we should prefer as "the best permanent solution...a reduction in the amount of government to which we are subjected."<sup>69</sup>

At least we trust that limiting administrative discretion is better than removing concern for the problem from the doctrine of the rule of law. But Kadish and Kadish say the latter has already been accomplished: "The sharp restriction of delegated discretion is no longer regarded as one of the essential features of the rule of law model.... The expansion of government's role to deal with problems of urbanization, industrialization, and technology in the public interest have made it inevitable that substantial discretionary authority be delegated to government officials."<sup>70</sup>

Similarly, Hayek encountered the wrath of most commentators when he suggested that it is contrary to the rule of law to have government planning of economic affairs because such planning could not accomplish its ends without creating particular laws for particular individuals or groups and without creating an environment in which an individual could not adequately plan his own affairs because he could not reasonably foresee when his action would contravene or be countered by the will of the state. But when Hayek's conclusion is attacked, it is not attacked on the basis that there is a flaw on his conception of rule of law, or on his ratiocination from the premises given by the rule of law. Rather, opponents counter him only at the public policy level, and never at the theoretical level. Friedmann, for example, believes that the spoiling of

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<sup>68</sup>Cooper, "The Executive Department of Government and the Rule of Law,"

<sup>69</sup>The Ins of Court Conservative and Unionist Society, Rule of Law, p. 12.

<sup>70</sup>Kadish & Kadish, Discretion to Disobey, p. 43.

individual plans by unforeseeable actions of others occurs constantly in the unplanned society.<sup>71</sup>

Other arguments for the planned society even at the expense of the rule of law include the need for efficiency in administration and the maximization of the "public interest."

The extent to which the rule of law survives this onslaught is determined by the extent to which we will allow public policy to determine the elements of a jurisprudential theory instead of vice-versa. Do we sanction the creation of burgeoning and blundering bureaucracies when "it is the very law of bureaucracy's being that it should strive to do things in its own 'efficient' way with the minimum of legal restraint, and that it therefore constantly seeks, often in spite of itself, to dispense itself from law?"<sup>72</sup>

What we have been discussing is directly relevant to the question as to whether the rule of law is compatible with the modern welfare state. Of course, it is difficult to find compatibility and accept Dicey's definition of the rule of law. The answer of some is like the answer of Jennings': if the rule of law means no welfare state as we know it then we have no rule of law, and they go on supporting programs which empower the bureaucracy, considering the demise of the rule of law as no great loss or as something unneeded in these progressive times. There is next, of course, a middle ground, which says that we may have our cake and eat it too, if we just make minor adjustments. Those who temper the conflict see the rule of law as a strictly procedural dogma, with no substantive tenets.<sup>73</sup> As long as a due process and procedural justice

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<sup>71</sup>Friedmann, Legal Theory, p. 426.

<sup>72</sup>Allen, Democracy and the Individual, p. 71.

<sup>73</sup>Jones, The Rule of Law and the Welfare State:



is maintained the rule of law prevails,<sup>74</sup> and, it appears, the state is not otherwise bound. Others, like Hayek, see the welfare state as the road to serfdom. Pound said that "unless we are vigilant, the service state may lead to a totalitarian state."<sup>75</sup>

The third prong of Jennings' attack is the doctrine of the rule of law is extremely imprecise. Jennings is able to agree that if there is a viable doctrine of the rule of law it must involve limitations on the power of political authorities, equality before the law, and liberty, but believes that each of these involve disputation and are so hopelessly imprecise that any theory based on them would be inherently problematic.<sup>76</sup>

Yet it is by precisely identifying the elements of the rule of law that much of the bothersome imprecision can be removed. If a list of characteristics inherent to the concept of the rule of law can be derived, then an identifiable and exportable standard would result, which is not dependent for its formulation on a particular state at a particular time. Although it is safe to say that Hayek in The Constitution of Liberty makes the first attempt to exhaustively identify these elements, it has not been uncommon for writers to associate with the rule of law certain characteristics that appear in the literature repeatedly. We have already noted, for example, that Aristotle offers a list of elements that includes prospectivity, generality, a separation of powers, and a limited role of judges by reducing judicial discretion as much as is practicable. Paley and Beccaria hold up what we now call the elements of the rule of law as a standard by which all law

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<sup>74</sup>Firmage, "The Utah Supreme Court and the Rule of Law: Phillips and the Bill of Rights in Utah" p. 626.

<sup>75</sup>Pound, "The Rise of the Service State and its Consequences," p. 202.

<sup>76</sup>Jennings, The Law and the Constitution, pp. 46-51.

can be measured, and we could add to that list Burke, who writes that "The properties of law are, first, that is should be known; secondly, that is should be fixed, and not occasional."<sup>77</sup>

The most commonly discussed element is generality, a term used by Bentham<sup>78</sup> and defined by Rousseau as follows: "When I say that the object of law is always general, I mean that he law considers subjects en masse and actions in abstract, and never a particular person or action....In a word, no function which has a particular object belongs to the legislative power."<sup>79</sup> More recently, Patterson has written that a "proposition of law is general because its terms refer to an indefinite number of individual instances, in contrast with a term which refers to an individual instance or a definite number of individual instances."<sup>80</sup> Neumann calls this "generality of formulation" and adds "a general law contains the demand for the inadmissibility of retroactivity. A law which provides for retroactivity contains particular commands inasmuch as the facts to which the law refers already exists."<sup>81</sup> It is little wonder that the principle of generality has been called "the bedrock of the rule of law"<sup>82</sup> because "Through its generality law can be made to further two important ends of political justice, the elimination of the personal prejudices of the official, and the equity between all claimants with respect to their claims."<sup>83</sup>

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<sup>77</sup>Burke, Works, Vol. 7, p. 64.

<sup>78</sup>Bentham, The Limits of jurisprudence Defined, p. 161.

<sup>79</sup>Rousseau, Social Contract (Everyman's Library) p. 35.

<sup>80</sup>Ibid., p. 110.

<sup>81</sup>Neumann, The Democratic and Authoritarian State, p. 30.

<sup>82</sup>Burin, "The Theory of the Rule of Law and the Structure of the Constitutional State," p. 315.

<sup>83</sup>Patterson, Jurisprudence: Men and Ideas of the Law, p. 97.

The principle of equality under the law is obviously closely associated with generality, but expands the impact of the rule of law upon the body of law to include enforcement. A perfectly general law is of no efficacy in preserving the rule of law if it is enforced in an invidiously discriminatory fashion. Other than this extension differentiating generality and equality becomes more difficult. Dicey listed equality before the law as his second element, and by that he specifies that both rule and the ruled are subject to the same ordinary law of the land. The principle of equality carries with it the sense that it is applicable to the entire legal apparatus, and when we say "equality under the law" we usually mean under the whole body of law. On the other hand when we say that a law is general, we are talking about a particular statute.

It is a point of dispute as to the policies governments must have in order to satisfy the principle of equality. For example, MacIver echoes Dicey's formulation and then expands it: "The rule of law...is violated if by reason of birth, status, wealth, or special privilege any individuals or groups are legally exempted from legal responsibility for acts which if committed by other individuals or groups would come within the cognizance of the courts....We might go farther and claim that the rule of law is violated in so far as there are not formal but substantial discriminations which prevent an equal access for a person to legal redress. The greatest of these is the expense of the appeal to the law."<sup>84</sup> It is this sort of thinking which leads us to provide free legal counsel to indigent criminal defendants. But it is not clear that failure to do so provides us sufficient evidence to substantiate a violation of the rule of law, since it is open to discussion whether only formal impediments must be eliminated or must practical impediments also be

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<sup>84</sup>MacIver, The Modern State, pp.264-265.

included.

Leoni seems to pick up on the distinction made earlier that equality refers to the whole body of law while generality refers to a particular law when he asserts that the principle of equality is violated in a heavily regulated society wherein there may be "three or four thousands of laws of the land--one for landlords, one for tenants, one for employer, one for employees, etc."<sup>85</sup>

In such a state of affairs the principle of generality may be satisfied because all people within a category are all equally under the law of that category, and the members thereof are not identifiable. But the fact that such categories are created so that not all are subject to the same law is, for Leoni, a violation of the principle of equality under the law because a different body of law applies to one group as opposed to others.

Also related to the concept of generality is the element of foreseeability, which means that an individual citizen of a state in which the rule of law prevails can know in advance what actions invite prosecution for offenses. "Because of the generality of law," Patterson notes, "men can be enabled to predict the legal consequences of situations that have not yet been litigated, and hence to plan their conduct for a future which is thereby rendered less uncertain."<sup>86</sup> Burin adds, "Only if the law is general, addressing itself to an indeterminable number of persons and future situations, can the Rule of Law fulfill its primary, protective role of making calculable the incidence of government forces."<sup>87</sup> One comment published in 1949 illustrates the applicability

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<sup>85</sup>Leoni, Freedom and the Law, p. 69.

<sup>86</sup>Patterson, op.cit., p. 97.

<sup>87</sup>Burin, op.cit.

of this element as part of a standard by which adherence to the rule of law might be assessed. Lord MacMillan said, "The ruthless despotisms which have afflicted large parts of Europe in recent times and under which the citizen could never know from moment to moment what might happen to him are the very negation of the law."<sup>88</sup>

It may be possible, save for the inevitable confusion that follows this course, for government to regulate life in every particular and still satisfy foreseeability. It is not, however, historically consistent with the rule of law for it to do so. Indeed the connection between the rule of law and liberty is that both assert that there should be a sphere of action into which the law does not intrude. The rule of law means that the law forms a line of demarcation between "an area of individual freedom of action and an area of clearly defined prohibitions of individual action..."<sup>89</sup> "...[I]t is 'government under law' that makes it possible in our society to define, and redefine, spheres in which a man's actions are not subject to governmental control."<sup>90</sup> Not only does the centrality of the existence of this private sphere of individual action associate the rule of law with liberty, but it may also explain the doctrine's historical affinity with a free market economy. Curtis asserts that "It is no coincidence that the Anglo-Saxon people who had carried the principle farthest excelled in commerce."<sup>91</sup>

There is no foreseeability or demarcation of private sphere of individual action if the law

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<sup>88</sup>MacMillan, "the Rein of Law" Western Europe Strives to Re-Establish It," p. 28.

<sup>89</sup>Corry & Abraham, Elements of Democratic Government, p. 559.

<sup>90</sup>Bromley, "Government, Law, and Democracy," p. 18.

<sup>91</sup>Curtis, The Capital Questions of China, p. 15.

is uncertain. Therefore, certainty is an opposite concern and an additional element of the rule of law. "If a law is certain, the exercise of power can be considered separate from the person or the authority exercising the power; accordingly, individuals before the court may be satisfied that their conduct is punished because of previously established rules and not on the basis of rules fashioned on the instant for their particular disadvantage."<sup>92</sup> Indeed it has been argued that the deliberate inclusion of uncertainty into a legal system, even if in the name of enhanced flexibility, is the hallmark of a transition from a government of laws to a government of men.<sup>93</sup>

Correlatively, the rule of law is frustrated if the laws are not known or at least knowable. Public enactment, enforcement, and publication of legal rules seems indispensable to the existence of the rule of law.

It has been argued that "if a law is uncertain in its meaning, the distinction between law-maker and law-enforcer collapses" and the "process of interpretation becomes indistinguishable from the process of law-making and the exercise of judicial authority becomes legislative in character."<sup>94</sup> If the rule of law is to retain its essential character as the converse of the rule of will, then it must be said that the judicial and executive branches in the process of enforcement must not have and should not be perceived to have such extensive powers over the meaning of the law that citizens remain uncertain of the impact of a law even if it is clear in its language. This may require the institutionalization of a legal fiction. Judges, by the mere fact that

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<sup>92</sup>Katz and Teitelbaum, "PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law," p. 5.

<sup>93</sup>Kennedy, "Men or Laws."

<sup>94</sup>Katz and Teitelbaum, op.cit.

legislation cannot anticipate all situations and relationships, do inevitably make law, but they make a lot more when they perceive it as their duty or right to do so. It is therefore not uncommon to see proponents of the rule of law assert that the doctrine "seems to require a conception of law as being at any time a complete and existing system" and that "the judge has but one function which is to find the law and apply it to the fact."<sup>95</sup> The judge may indeed have the effect of making law, but he is a better judge if he has the attitude that it is his responsibility "to deal with the case before him in that way which was indicated by an interpretation of existing authorities, rather than in that way which seemed to him on the facts to be the fairest or most desirable from a social point of view."<sup>96</sup> Such fictions characterize the common law, and explain why deference to law and the common law are compatible traditions.<sup>97</sup>

Several times in this discussion mention has been made of the enforcement of laws, so it will not be surprising to discover that the control of private lawlessness is also an element of the rule of law.<sup>98</sup> "Indeed, if sanctions do not exist, it can be said that the rule of law does not" exist.<sup>99</sup> Sometimes the rule of law is defined solely in terms of "The legitimacy of the law as a means of ordering and controlling the behavior of all people in a society."<sup>100</sup> As should be clear

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<sup>95</sup>Cooperrider, "The Rule of Law and the Judicial Process," p. 505.

<sup>96</sup>Ibid., p. 506.

<sup>97</sup>Brewster, "The Rule of Law and the Voluntary Society"

<sup>98</sup>Jones, The Efficacy od Law, pp. 72-75.

<sup>99</sup>Manningham-Buller, " 'The Rule of Law': Its Status in the Modern World," p. 1018.

<sup>100</sup>National Commission on the Causes and Prevention of Violence, The Rule of Law: An Alternative to Violence

by now, the rule of law is much richer than that, but nevertheless enforceability is integral to the doctrine's existence. Thus, rising criminality does, in a real sense, denote a decline of the rule of law,<sup>101</sup> which may be an important relationship to explore during the eighties, whereas after the turbulent sixties it was wondered whether civil disobedience was compatible with the rule of law.<sup>102</sup>

Of course, the relationship between the rule of law and public order may be said to have two strands: "first, authority, which implies the coercive powers of enforcement, and second, acquiescence, which implies genuine acceptance by a majority."<sup>103</sup> The latter strand explains the addition of the principle of consent to the elements of the rule of law: "Without some coercion, there is no 'law,' but without the consent of the governed, there is no 'Rule of Law.'"<sup>104</sup>

To continue in this vein, it seems arguable that if the rule of law is to have an efficacy then the laws must reflect the values of the society.<sup>105</sup> It may even be that the society itself must have certain values in order for the rule of law to be preserved.<sup>106</sup> Not least among these values is the old concept of public virtue, which means that people are willing to sacrifice and be obedient to law in order that society might be preserved, and this is essential to the rule of law.<sup>107</sup>

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<sup>101</sup>MacDermott, "The Decline of the Rule of Law."

<sup>102</sup>Chavez, "Civil Disobedience and the Rule of Law."

<sup>103</sup>Burger, "The Fragility of Freedom," p. 433.

<sup>104</sup>Nord, "The Rule of Law," p. 317

<sup>105</sup>Levi, "Law Day Address."

<sup>106</sup>Widgery, "The Rule of Law."

<sup>107</sup>Donaldson, "Respect for the Law."



Dickenson gives the elements of the rule of law a different focus as he discusses the impact of the rule of law upon legal change. He notes that unless a legal system gives due deference to the doctrine, what is lost through too rigid and careless change may be greater than any benefits derived. He cautions that four principles must be respected in order to maintain the rule of law" first continuity, for "Law, like nature, does not grow by sudden leaps;"<sup>108</sup> second consistency, "in the sense that law must preserve at least a certain respect for ultimate consistency in matters of substance is not always in points of logic;"<sup>109</sup> third, reciprocity, "in the sense of a reciprocal balance between rights and duties;"<sup>110</sup> and fourth individualism, "in the sense that law in the last analysis must deal with individual beings as its principle unit."<sup>111</sup>

Because of the connection which Dicey makes between the rule of law and the evolution of the British constitution, namely that the rule of law is also a produce of history, Jennings concludes that the rule of law is therefore "not a product capable of export" and that there are no universal principles of government attached thereto.<sup>112</sup> On the other hand, a more recent commentator defends the rule of law as "the greatest contribution England has made to the civilization of the world..."<sup>113</sup>

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<sup>108</sup>Dickenson, Legal Change and the Rule of Law, p. 154.

<sup>109</sup>Ibid., p. 151-155.

<sup>110</sup>Ibid., p. 155.

<sup>111</sup>Ibid., p. 156.

<sup>112</sup>Jennings, The Law and the Constitution, p. 45.

<sup>113</sup>Goodhart, "The Foundations of Law," p. 209.

It is one thing to talk about the rule of law as a custom or "the legal habit,"<sup>114</sup> referring to the doctrine's origins--or to a tradition of obedience to law, but it is quite another thing to discuss the utility and exportability of the doctrine, its elements, and its appurtenances on particular constitutional devices. Jennings has a point if he means that constitutional provisions or particular state structures devised to insure and preserve the rule of law are not exportable because their construction and utility heavily depends upon a country's heritage and culture. On the other hand, if elements of the rule of law truly are elemental, they must be exportable, even if they are gleaned primarily from European political history. Elements are here distinguished from (to use Madison's well-known term) auxiliary devices in that they are integral to the meaning of the doctrine and that without them there could be no rule of law. Naturally, the universality of the doctrine is based upon the assumption that the rule of law is always preferable to the rule of will, no matter what the culture, country, or era. But the "outward structure or pattern of the Rule of Law differs, and must differ, from country to country,"<sup>115</sup> because institutional evolution and cultural heritage must be accommodated. For example, Wilson notes that the "written constitution in Latin-American countries has often proved to be an ineffective barrier against despotism."<sup>116</sup>

A chief contribution that we shall see Hayek making is expressing the rule of law in terms of elements which then form a standard by which any country may be evaluated with respect to its success at instituting the rule of law. On this basis, studies have been done of cultures

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<sup>114</sup>Miller, The Data or Jurisprudence, p. 351.

<sup>115</sup>Bose, "The Rule of Law in the East," p. 354.

<sup>116</sup>Wilson, The Elements of Modern Politics, p. 203.

considerably different than that of the roots of the rule of law. Using the doctrine as developed primarily in Great Britain and Germany as the standard, Southern Rhodesia has been evaluated as a highly creditable study.<sup>117</sup> A study of Kenya included this important insight: "The validity of the hopes attending the [Kenyan] Constitution...depended very much on the degree to which the ruling constitutional philosophy took account of Kenyan realities. Since constitutions seek to regulate vital dynamics of the exercise of power, great importance must always be attached to the peculiar history of a people and its key political concerns in the process of constitution-making. Such particular attributes will not always fit into a formalistic conception of the rule of law conceived in alien situations. It is here that the 'imported model' theory breaks down."<sup>118</sup> It is a mistake to simply import someone else's constitution and institutions and adopt them as one's own; such attempts are doomed to failure because of insufficient attention to a cultural heritage, which is best accomplished by using as much as possible existing institutions to achieve the rule of law.

A somewhat ironic example of the use of the rule of law as a universal standard is found in the study that suggested that Great Britain would be more in accord with the doctrine if it reduced the power of its parliament, whereas West Germany would accomplish the same end if it strengthened its parliament.<sup>119</sup> Institutions and institutional adjustments are not subject to universalization, but the elements of the doctrine of the rule of law aid in developing and

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<sup>117</sup>Zimmerli, "Human Rights and the Rule of Law in Southern Rhodesia."

<sup>118</sup>Kuria and Ojwang, "Judges and the Rule of Law in the Framework of Politics: The Kenya Case," p. 265.

<sup>119</sup>Dahrendorf, "A Confusion of Powers: Politics and the Rule of Law," p. 15.

evaluating the same.

The applicability of a standard derived from the theory of the rule of law has been taken one step further in a study which attempted to compare devotion to the rule of law of the two major American political parties as determined by voting records in Congress.<sup>120</sup> The rule of law statutory criteria developed in the study is based on the works of Hayek<sup>121</sup> and Lowi.<sup>122</sup> A statute conforms to the rule of law if it is general, prospective, clear, publicly promulgated, drafted by a governmental body not involved in direct enforcement, and subject to judicial review. It must also minimize administrative discretion and treat equally individuals in applicable classification. With regard to the latter requirement a statute may be applicable only to identifiable individuals or situations. The study states that since rigid and maximized loyalty to the standard would quite possibly mandate only a minimal state not at all envisioned or supported by either Hayek or Lowi, that the standard is best used as a device that compares relative compliance rather than absolute compliance.

The lesson here is that providing an intelligible rule of law standard can be or has been developed, it will not dictate what form of government a state should have or the content of its statutes, but it can be used to compare states as to the relative minimization of the rule of will and compare policy alternatives to maximize a private sphere of individual action. The standard is not or should not be so precise, even after the improvements Hayek has made (which will be

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<sup>120</sup>Bensel, "Creating the Statutory State: The Implications of a Rule of Law Standard in American Politics."

<sup>121</sup>Hayek, The Road to Serfdom and Constitution of Liberty

<sup>122</sup>Lowi, The End of Liberalism

identified shortly), that questions of particular institutional devices or particular statutes are firmly and incontrovertibly settled. The standard will not say, for example, that a society with a written constitution achieves the rule of law better than one without one. But it could evaluate whether the United States with a written constitution is working better by the standard than Great Britain without a written constitution, who may be working better in turn than the Soviet Union who has a written constitution. The rule of law will not dictate whether there should be a law prohibiting abortion or whether there should be government aid to the needy, but it has a great deal to say about how an abortion statute is written, enacted, and enforced and it would evaluate various welfare policies and their risks of affronting certain elements of the rule of law. Since the rule of law does not set everything in concrete, there is still plenty of room for public debate, for the rulemakers to follow their own lights, and for other criteria to be used in government decision making. Impressive in this regard is probably most welcome, but despite this flexibility, it must be said that this does not mean that rule of law sacrifices its paramount importance. It does not mean that it is wise that short-term expedience prevail over long-term liberty; rather, it should infuse into political discussion a heightened concern for the preservation of the private sphere. It does not mean that only running a risk of violating the rule of law is a small and insignificant matter. Rather it identifies ground that if governments dare tread upon it at all, they must do it with extreme care, caution, and after much deliberation.

It was during the fifties and early sixties that we saw Jennings' worry about imprecision undeniably manifested. But the impression did not come from scholarly attempts to limit the doctrine in a coherent and cohesive fashion. For imprecision invaded what was heretofore becoming a rejectable jurisprudential theory because the rule of law became, quite frankly, a fad,

mainly among legal practitioners, meaning lawyers, judges, and law professor. A host of conferences were held, beginning with a 1952 meeting in West Berlin of lawyers from an international spectrum to discuss alleged violations of individual rights in East Germany. Then this meeting resulted in the International Commission of Jurists, "a non-profit, non-political association whose purpose is the mobilization of the legal profession for the protection of human rights and the expansion and fulfillment of the rule of law."<sup>123</sup> The Commission had American support from the American Fund for Free Jurists, Inc., a special committee of the American Bar Association. The commission held conventions under the title of the International Congress of Jurists and published a journal, the Journal of the International Commission of Jurists. In 1955 the Harvard Law School held a conference under the title of "Under Law." In 1957 the International Association of Legal Science, an affiliate of UNESCO, conducted a meeting at the University of Chicago to discuss "1) the Rule of Law as understood in the West, and 2) the Rule of Law in Oriental countries."<sup>124</sup> In 1958 this same organization sponsored a conference in Warsaw, Poland, wherein socialists and communists defended their adherence to the rule of law<sup>125</sup> which amounted to saying, "Sure we practice the rule of law: everything is ruled by law." Finally, in 1958 President Eisenhower proclaimed May Day as Law Day (perhaps to counter the Soviet holiday). Speeches were made for several years by prominent people in the legal profession in honor of the holiday, mostly delivered before civic groups and law students.

The imprecision wrought by all this attention by the legal community was profound and

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<sup>123</sup>Rogge, "The Rule of Law," p. 985.

<sup>124</sup>Bodenheimer, "Reflections on the Rule of Law," p.1.

<sup>125</sup>Kiralfy, "The Rule of Law in Communist Europe"

will be discussed shortly, but not all the product was bad. The Inns of Courts Conservative and Unionist Society, a group of British Barristers, published in 1955 a contribution in which they suggested means by which "the rules of natural justice should apply to all administrative decisions of a discretionary nature which might injure the subject,"<sup>126</sup> although they said "the best permanent solution is a reduction in the quantity of government to which we are subjected."<sup>127</sup> Political science texts before and during this era treated the rule of law prominently, of which we might cite the texts written by Wilson,<sup>128</sup> Corry and Abraham,<sup>129</sup> and Hitchner and Harbold.<sup>130</sup> Nevertheless, the imprecisions commonly made by fans of the rule of law during the fifties is probably what spurred Goodhart to write an article stating that the rule of law is not the same as democratic government, rights dogmas, or rule by law, since such loose equations were commonly made.<sup>131</sup> Confusion along these lines, as we have remarked, changes the focus of the rule of law from what McIlwain calls "[t]he one great issue that overshadows all others," namely, "Between constitutionalism and arbitrary government."<sup>132</sup> We will center upon the ostensible connection between the rule of law and rights doctrines, since it is that implausible joinder which led to most of the conferences and congresses on the rule of law.

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<sup>126</sup>The Inns of Court Conservative and Unionist Society, Rule of Law, p. 40, italics omitted.

<sup>127</sup>Ibid, p. 12.

<sup>128</sup>Wilson, The Elements of Modern Politics.

<sup>129</sup>Corry and Abraham, Elements of Democratic Government.

<sup>130</sup>Hitchner and Harbold, Modern Government.

<sup>131</sup>Goodhart, "The Rule of Law and Absolute Sovereignty."

<sup>132</sup>McIlwain, Constitutionalism and the Changing World, p. 266.

Since the Second World War, the rule of law "has come to be identified with the concept of the rights of man,"<sup>133</sup> or, in most recent terms, "Its key additional ingredients in this period have been certain minimum standards of human rights."<sup>134</sup> It is, of course, an errant view, whether it considers the rule of law as a rights thesis or whether it considers the two theories merely equipollent and compatible, because it removes from the theory one of its chief virtues, namely that it does not rest upon moralistic, unempirical foundations as do rights based theories. Still, the same tension is here present: in seeking a limitation upon government so as to overcome the blatant deficiency in this area of legal positivism, some commentators feel the only recourse is to include as an ingredient of the rule of law the principle "that the guarantee of individual rights is intimately connected with that of the supremacy of the rule of law, or better, that it is but another aspect of the same principle."<sup>135</sup> Thus, commentators have gone so far as to define the rule of law as the set of "basic value judgements."<sup>136</sup>

In the era when the rule of law was perceived as the most gallupious thing ever to hit jurisprudence, it was quite a temptation to transform the rule of law into a moralistic desideratum. In 1955, for example, the International Commission of Jurists associated the rule of law and rights only in that the rule of law springs from rights won in the historic struggle for

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<sup>133</sup>Wade and Bradley, Constitutional Law, p. 72-73.

<sup>134</sup>Kuria nad Ojwang, "Judges and the Rule of Law in the Framework of Politics: The Kenya Case," p. 279.

<sup>135</sup>Letourneur and Drago, "The Rule of Law as Understood in France," p. 147.

<sup>136</sup>Estep, "The Legislative Process and the Rule of Law: Attempts To Legislate Taste in Moral and Political Beliefs," p. 577.



human freedom.<sup>137</sup> By 1959, however, they had gravitated from expressing the rule of law in terms of its historical growth and development to rephrasing it as a dynamic concept which safeguards civil and political rights and established the social, economic, educational, and cultural conditions necessary for the realization of these rights in this time of progressive social and economic change.<sup>138</sup> The doctrine has become not just an unfolding of history but a belief system that can make history and form cultures because it is now attached to an expansive list of rights. The rule of law became defined as a collection of rights which permeates government and charges it with a positive duty to make those rights effective, which list of rights in now broadened to include various rights having to do with economic security.<sup>139</sup>

At times during this period of excitement over the rule of law commentators would lapse into the language of natural law and again associate rule of law with the antiquated theory. Many asserted that if rule of law means anything at all it must mean "that there is a higher law against which laws and ordinances must be measured if they are to be treated as legitimate."<sup>140</sup> What this higher law is takes traditional forms: it is what is just, the law of God, etc. Perhaps the most interesting discussion in this vein was one by a participant of one of the many conferences on the rule of law of the era, who in his first discourse, had disputed all conception of the rule of law, including that of Dicey and Hayek (in Road to Serfdom only), and then ended up in his second

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<sup>137</sup>International Commission of Jurists, Executive Action and the Rule of Law.

<sup>138</sup>International Commission of Jurists, Cuba and the Rule of Law.

<sup>139</sup>The American Bar Association Section on International and Comparative Law, The Rule of Law in the United States.

<sup>140</sup>Freund, "The Rule of Law," p. 315.

discourse saying he would improve upon the theory of the rule of law by positing what he called "the Ideal of Just Law," based on the "ultimate values" of the Judeo-Christian tradition.<sup>141</sup> But if the rule of law is to have any viability as a full-fledged standard it shall have to stand on its own, and not be simply rule of law, as the positivists would have it, or a reincarnation of natural law, as others wish.

That the rule of law is mentioned by both burgeoning legal positivists and by die-hard natural law theorists makes Jennings comment about imprecision a prophecy rather than merely an evaluation. The enthusiasm of the legal profession for the rule of law in the late fifties and the early sixties was a liability rather than a boon for the theory. Indeed, instead of a few legal practitioners making studies in improving the theory, there were many whose contribution was not "darkeneth counsel with words without knowledge."

Another misconception which arises out of this period of enthusiastic attention for the rule of law as given by legal practitioners is that the doctrine means that everything should be ruled by law. This erroneous simplification is riddled with irony-for the very doctrine which for centuries has stood for limited government is advertised as a doctrine justifying the exposition of government activity. It is as though the slogan of the rule of law is that law is the answer to all things. One commentator notes, "The term 'rule of law' now is coming to mean that all activities and relations between people should be regulated by law. It is argued that in an interdependent society any action of an individual and any transaction between individuals necessarily affects other members of the society, so it is intolerable that there should be any activities or transactions

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<sup>141</sup>Harvey, "The Rule of Law in Historical Perspective" and "The Challenge to the Rule of Law."

that are not regulated by law. Since human beings cannot exist except in a society, and a society is by definition interdependent, it follows that 'whatever is not compulsory should be prohibited. This is coming to be the new meaning of 'the rule of law'; instead of protecting freedom, the new rule of law annihilates freedom."<sup>142</sup>

This attitude, coupled with an ideology countenancing unrestricted governmental regulatory authority, results in a trend away from the rule of law rather than toward it. Rather than a last resort for social change, the law is now viewed as the primary instrument of change. But this "mania for law-making," this "inflation of laws" actually discredits and devalues the law.<sup>143</sup> For example, if citizens are confronted with mountains of laws, it becomes impossible for them to know when they violate a law, and, since violations seem inevitable, it may lead them to more readily violate a law wilfully. "a paradox of our times is the decline of law in the midst of the enactment of many laws."<sup>144</sup>

Another characteristic of the wide-spread enthusiasm for the rule of law is the hope that this doctrine would provide peace on earth--that the settling of disputes by law rather than by war. A typical appraisal of the use of law in world affairs is: "The rule of law is the best known and most respected concept developed by man since the dawn of civilization. It is the best common ground that the human race possesses upon which to erect a world order unifying all men against war."<sup>145</sup> Not only was their enthusiastic support for effective institutions of world

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<sup>142</sup>Wallis, An Overgrown Society, p. 32.

<sup>143</sup>Wilkin, "The Rule of Law--What It Truly Means," p. 582.

<sup>144</sup>Culbertson, "The Reign of Law." p. 242.

<sup>145</sup>Rhyne, "The Rule of Law," p. 334.

government such as world courts, international arbitration tribunals, and multi-national regulatory agencies, but some felt that the law that should rule international affairs was natural law: "The Law that is needed for international relations is the Law of laws....It is the universal and eternal principles of right and justice...It was established by the providence that created the universe and made it subject to law."<sup>146</sup> Despite the loud call for an international rule of law, there may not be enough international public virtue to make it workable, nor is there sufficient cultural uniformity to make it practical, and, falling far short of utopia as we do, we would be better off--and the citizens of individual countries would be better off if we concentrated on improving the rule of law nation by nation, rather than entrusting unrealizable hopes in a world organization.

We saw before our discussion of Hayek that many writers can identify portions of the doctrine. We saw an era fraught with misrepresentations. Hayek enters with the most comprehensive look at rule of law to date, and in this section we shall look at some writers who have also attempted to delineate the elements of the rule of law. It is one thing to express the doctrine in general terms, or to discuss only limited particulars, or to say only what the rule of law is not--that it is not a prohibition against bad law, that it is not majoritarianism, that it is not a natural law doctrine,<sup>147</sup> but it is quite another thing to attempt to construct a model of what it is. Fuller, Lucas, Rawls, Rax, and Oakeshott have all, in varying degrees, made such an attempt, although it is doubtful that they have really improved upon the product Hayek gave us.

Lon Fuller, when writing The Morality of the Law, was undoubtedly familiar with Hayek,

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<sup>146</sup>Wilkin, "The Rule of Law--What It Truly Means," p. 582.

<sup>147</sup>Levinson, "The Specious Morality of the Law"

although he does not credit Hayek as being a precursor of his attempt to identify the elements of the rule of law. Twice Fuller in his writings on the rule of law refers to Hayek's writings, once to The Road to Serfdom<sup>148</sup> and once to the Cair lecture,<sup>149</sup> but never to The Constitution of Liberty. His references are points of criticism, but only on relatively minor differences. It may be said that the most important distinctions that can be made between Hayek and Fuller are rather superficial, they are clearly in the same tradition. Indeed, much of Fuller's characteristics of the law are also in Hayek's list.

Fuller identifies his elements as eight "principles of legality."<sup>150</sup> He does not use the term "legality" as Hayek does--as a synonym for a body of particular laws as distinguished from the rule of law as a metalegal principle; rather, it is fairly said that he uses it as a synonym for the rule of law.

The eight principles are, at root, "indispensable conditions for the existence of law at all," although Fuller cautions that perfection in compliance with the principles is probably an unattainable utopia. Nevertheless, Fuller would say that regularized violations of some or all of the principles identifies a state not in accord with the rule of law, and, indeed, a state without law, at least so far as the violations occur. In a sense, Fuller is only saying that a state without any rule of will, given the frailties of men, is not possible.

Fuller's eight principles are: first, generality, or that "rules must apply to general classes

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<sup>148</sup>Fuller, The Principles of Social Order, p. 101.

<sup>149</sup>Fuller, The Morality of Law, p. 64, 65.

<sup>150</sup>Ibid., p. 41.

and should contain no proper names;"<sup>151</sup> second, publicity or promulgation; third, prospectivity, although there may be justifiable occasions for a retroactive law, and it is impossible to warrant that even a law prospective on its face will not have retrospective effects, for "If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever;"<sup>152</sup> fourth, clarity, which, for Fuller, does not mean that at times it is not wise to depend upon the courts and experience to clarify some terms ("Sometimes the best way to achieve clarity is to take advantage of, and incorporate into the law, common sense standards of judgment tht have grown up in the ordinary life lived outside legislative halls");<sup>153</sup> fifth, consistency, or that the law should be as free of contradictions as is humanly possible; sixth, possibility, or that the law should not demand the impossible; seventh, constancy, or that the laws should not be changed too frequently; and eighth, congruency, or that there is congruence between official action and the law, which would incorporate procedural due process.

One critic of Fuller's conception, Sartorius,<sup>154</sup> is satisfied that as a definition of rule of law, the governance of human behavior by general rules serves well. He seems to think that Fuller's eight points are subsumable under one principle, generality. But he also believes that the rule of law means the establishment of an institutional framework in order to hear disputes which will occur even if Fuller's requirements for legality are satisfied. Of course, Fuller does not

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<sup>151</sup>Fuller, The Morality of Law, p. 47.

<sup>152</sup>Ibid., p. 60.

<sup>153</sup>Ibid., p. 64.

<sup>154</sup>Sartorius, Individual Conduct and Social Norms, pp. 165-179.

believe that his eight principles spell the demise of adjudication.<sup>155</sup> But Sartorius has Fuller saying that adherence to the eight principles of the rule of law is sufficient to restrain government and insure just and moral laws. Sartorius states that Fuller's best defense to the contention that even the most wicked legal system can practice his eight principles is that, when viewed holistically, the overriding principle which prevents a bad government is publicity. Publicity is here prominent because Fuller believes badness cannot compete with goodness in the light of day.

To Rawls, the rule of law is simply the same as formal justice, which is the impartial and consistent administration of laws and institutions.<sup>156</sup> It is not derived from the principles of substantive justice as derived from his famous original positions, but it is a collection of procedural norms, somewhat in the vein of Lucas, and a characterization of how rules should be expressed, as is typical of Fuller. This amalgamation is presented in four elements:<sup>157</sup> first, "ought implies can," which is meant to express the possibility of compliance as a defence; second, like cases shall be treated alike; third, nullem crimen sine lege; and fourth, the tradition notion of natural justice or, in modern nomenclature, the due process of law.

It is readily seen that this list is highly procedural in tone. True to his predecessors, the rule of law for Rawls in no way restricts the content of the law. But missing from this conception are elements which for others are inherent in the rule of law because they are derived from its basic nature as a doctrine of anti-tyranny, such as the protection of a private sphere and

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<sup>155</sup>Fuller, The Principles of Social Order, pp. 98-103.

<sup>156</sup>Rawls, A Theory of Justice, p. 58.

<sup>157</sup>Ibid., pp. 236-239.

minimal discretionary authority. It is true that Rawls associates the rule of law with liberty and that it defines the legitimate expectations of the citizenry, but this is not the same as Hayek's private sphere. Although it does not restrict the content of the law by identifying explicitly impermissible incursions into the private sphere of individual action, Hayek's conception does include the warning that it is violative of the rule of law to so exhaustively regulate human action that the private sphere is eliminated. It is a subtle but important difference in approaches. Hayek connects the rule of law to liberty in terms of its evolutionary history, by establishing connections of both ideals and the nature of progress, and by protecting the private sphere. Rawls relates the rule of law to liberty by stating that the law sets boundaries for man's liberties.<sup>158</sup> Thus contrasted, the approaches seem to be coming at the problem from two different directions. Moreover, it would seem that a government infused with a respect for the rule of law as defined by Hayek would be less likely to inordinately restrict the boundaries of the private sphere when compared to a government adopting Rawls's conception.

Following Hayek, Raz states that a meaningful definition of the rule of law has two aspects: "1) that people should be ruled by law and obey it, and 2) that the law should be such that people will be able to be guided by it."<sup>159</sup> From this definition Raz derives "some of the most important" principles of the rule of law, after stating that there is no point in attempting a comprehensive list. Why the sompliation of a complete list would be a futile exercise is not explained. The principles mentioned by Raz are: 1)prospectivity, 2) publicity, 3) clarity, 4) stability, 5) generality, 6) independent judiciary, 7) the principles of natural justice, 8) judicial

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<sup>158</sup>Ibid., p. 236.

<sup>159</sup>Raz, "The Rule of Law and Its Virtue," p. 198.



review, 9) accessibility of the courts, and 10) limited administration discretion (the enumeration is added).

The virtue of his treatment of principles one through five is that they can be defended as necessary because of the centrality of the individual in his definition. Foreseeability is the key; principles one through five preserve foreseeability, whereas the violation of them would abrogate the rule of law as defined.

Raz's treatment of generality is worth noting. To him, generality is simply that the making of particular laws is guided by public, stable, and general rules. Generality, in this version, apparently has nothing to say about what the law says or how it says it, only how it comes about. If generality is purely a procedural characteristic--and it has not been viewed as such historically--this naturally does not preclude the hegemony from fostering inequalities by creating privileges or enacting bills of attainder. Perhaps Raz feels generality cannot be any more stringent because it does not necessarily follow from his fundamental definition of the rule of law that a law which is directed to a single person or group is impermissible. Such a law, despite its particularity and specificity, must be obeyed and the actor affected can foresee the consequences of actions. It is irrelevant that others may not be affected whatsoever by the law since that is foreseeable as well. On the other hand, a law enacted not according to public, general rules of procedure does not facilitate foresee-ability on the part of the actor.

Raz notes that principles six through ten are descriptive of the judicial machinery. Although he does not speak in terms of making a transition from one level of analysis to another, as many of the last five elements seem a step or two removed from his fundamental definition, unlike the first five elements. The mere fact that one discusses a particular institution

rather than a one-step derivation from the central definition shows a transition from one level of analysis to another has taken place. These institutional safeguards act more to preserve principles one through five.

According to Raz, the value of his conception is that it is not tied to a particular set of values, and he seems to think Fuller's morality of the law is so bound. Raz claims the rule of law to be serving any purpose. He states that "the rule of law is just one of the virtues the law should possess" in order for the law to be good.<sup>160</sup> But an effort such as Fuller's which attempts to find in the rule of law a necessary connection between law and morality fails because it is grasping for things that are not there.

Raz's analysis despite its pretention of purity, and one not uncluttered by moral premises must deal with what is sacrificed when his conception is compared to the long rule of law tradition. Already mentioned in his procedural characterization of generality which is impercipient of its traditional treatment as a rule of how statutes may be expressed. Even a brief look at the historical conception of the rule of law shows that the element of equality is conspicuously missing from Raz's analysis. In fact, Raz asserts that a legal system based on the denial of human rights, on extreme poverty, or racial segregation, or sexual inequalities, and on religious persecution, may actually be more in accord with the rule of law than a society which seeks to eliminate or at least ameliorate those social ills. Raz, it seems, recognizes that a definition of the rule of law is not optimally tied to the good society in terms of specific social goals or institutions. On the other hand, if in the process he includes a toothless version of the principle of generality and excludes the principle of equality, a ruler can create self-serving laws

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<sup>160</sup>Raz, "The Rule of Law and Its Virtue," p. 210.

and not violate any of the principles, and Raz, in an effort to be morally neutral, has sacrificed in the process the doctrine's anti-despotic stance. It is a mistake to try to reformulate the doctrine while ignoring its past; rather we should look at the process of developing the doctrine as model building, in which we are only trying to capture the essence of the past for the benefit of the future.

Oakeshott begins his recent essay on the rule of law by covertly trying to distinguish his product from Hayek. He says the rule of law is often conceived "as a description of what a state might perhaps become, or what some people would prefer it to be."<sup>161</sup> Although Oakeshott does not explicitly identify Hayek's work as an attempt with this sort of misdirection, it is clear that he sees himself as offering a strikingly different approach because he fundamentally disagrees that it is profitable in terms of improving the doctrine of the rule of law to be about the business of fleshing out the definition by adding elements, characteristics, attributes, and the like. One dilemma which arises in such attempts is that while a list of attributes of the rule of law is sought it is recognized that these attributes are probably not extrinsic to law as convention, and hence it is of dubious value as an external standard. Oakeshott also appears to feel that such attempts then tend to develop a model of what a rule of law state would look like, and this is an error. In another apparently advertent reference to Hayek Oakeshott states, "...the more discerning apologist (recognizing the inconsistency of attributing the virtue of a non-instrumental mode of association to its propensity to produce, promote, or even encourage a substantive condition of things) have suggested that its virtue is to promote a certain kind of freedom."<sup>162</sup> Oakeshott calls

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<sup>161</sup>Oakeshott, "The Rule of Law," p. 121.

<sup>162</sup>Ibid., p. 163.

this approach "misleading because freedom does not follow as a consequence of the rule of law so much as it is inherent in its character--at least that is the proper place to mention liberty.

The rule of law is defined very broadly by Oakeshott. It stands "for human beings associated in terms of the recognition of certain conditions of association, namely 'laws.'"<sup>163</sup>

"The expression 'the rule of law,' taken precisely, stands for a mode of moral association exclusively in terms of the recognition of the authority of known, non-instrumental rules (that is-- laws) which impose obligations to subscribe to adverbial conditions in the performance of the self-chosen actions of all who fall within their jurisdiction."<sup>164</sup>

The question is what sort of laws, bodies of law, or states does this broad definition exclude? Does this definition conjoin rule of law with legal positivism?

One way to exclude undesirable states of human association is to precisely define law in such a way that not all that passes for law would be valid in a system devoted to the rule of law. This, of course, is precisely the motivation for deriving a body of characteristics, and before he is through, some sort of statement of elements is going to emerge despite his apparent rejection of Hayek. In fact, such a collection must be present in order to achieve rule of law rather than rule by law or "rule by policy," as Oakeshott would put it.

Like Hayek, Oakeshott asserts that whatever the rule of law is, it is empirically determined by and derived from the struggles of human history. Like any other human relationship, the rule of law is a result of human invention arising in the course of endeavors to improve the regulation of conduct. The rule of law, says Oakeshott, "stands for a mode of human relationship that has

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<sup>163</sup>Ibid., p. 121.

<sup>164</sup>Ibid., p. 138.

been glimpsed, sketched in a practice, unreflectively and intermittently enjoyed, half-understood, left indistinct: and the task of reflection is not to invent some hitherto unheard of human relationship, but to endow this somewhat vague relationship with a coherent character by distinguishing its condition as exactly as may be."<sup>165</sup> Now, this seems, does it not, to be an appeal to develop the theory of the rule of law to some extent more than a one-sentence imprecision.

The conditions Oakeshott identifies in this essay as elements which characterize the mode of association that we call the rule of law parallel the traditional tripartite separation of powers.<sup>166</sup> Although his main attempt is to derive from the rule of law the doctrine of the separation of powers, a task he accomplishes in admirable fashion, he also mentions foreseeability, knowability, certainty, and generality as integral to the rule of law,<sup>167</sup> inadvertently (perhaps) incorporating much of Hayek's formulation. Additionally, in his work On Human Conduct Oakeshott discusses "attributes intrinsic to association in terms of non-prudential rules," which sounds suspiciously close to rule of law as the association in terms of laws. These attributes are "the quality of legal subjects; rules not arbitrary, secret, retroactive or awards to interests; the independence of judicial proceedings...; no so-called 'public' or 'quasi-public' enterprise or corporation exempt from common liability for wrong, no offense without specific prescription; no penalty without specific offence; no disability or refusal of recognition without established

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<sup>165</sup>Oakeshott, "The Rule of Law," pp. 122-123.

<sup>166</sup>Oakeshott, "The Rule of Law" pp. 139-150.

<sup>167</sup>Oakeshott, On Human Conduct, p. 153.

inadequacy of subscription; no outlawry, etc., etc."<sup>168</sup>He even calls such a list the "inner morality" of a legal system, as Fuller does.<sup>169</sup>It is difficult to make a case that Oakeshott is a stranger to the ascribing a list of elements to the rule of law, even though some of the items on his list may be best transferred to a list of devices.

Obviously a thinker who would so restrict the nature of law is no advocate of legal positivism. To establish on the part of Oakeshott acceptance of the above list of elements in principle rejects positivism as an adequate explanation of the nature and authority of law. Additionally, Oakeshott takes pains to distinguish rule by policy and the rule of law.<sup>170</sup>

\*Dennis Jensen composed this document as my research assistant in 1985.

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<sup>168</sup>Oakeshott, On Human Conduct, p. 153.

<sup>169</sup>Ibid.

<sup>170</sup>Oakeshott, "The Rule of Law," pp. 139, 146, 148, 149, 155, 156, and 164.