

How is the Rule of Law a Limit on Power?

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I. Introduction

The Christian view of natural law sees human law-making and judging as specifications and clarifications of natural law and divine law, both of which have their origins in God.

This view of law was regarded by the legal positivists as:

- muddle-headed because it confused law as it is with law as it ought to be;
- dangerous because it created a presumption that laws were good and ought to be obeyed.

Against this view, Lon L. Fuller claimed was that in order to govern by law, there were at least eight matters to be considered:

- (1) rules should be general or generalizable,
- (2) rules must be publicised,
- (3) rules must not be retroactive,
- (4) rules must be understandable,
- (5) rules must not be contradictory,
- (6) rules must not require the impossible,
- (7) rules must not be changed so frequently that the subject cannot orient his action by them, and
- (8) there must be congruence between the rules as announced and their actual administration.

The legal positivists retorted that the rule of law is only instrumentally valuable, making law “good” in the same way that a sharp knife is good, in other words, fit for purpose.

‘The core of the ... principle [of the rule of law] is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefits of laws publicly and prospectively promulgated and publicly administered in the courts’.
(Tom Bingham)

To be free is to know that your life, liberty and possessions will not be taken away from you otherwise than in accordance with the law of the land (Magna Carta, chapter 29).

Thin conceptions of the rule of law: a society is governed by the rule of law when law is made according to the proper procedures and promulgated in the correct forms (e.g. Fuller).

Thick conceptions of the rule of law: the rule of law also includes positive, substantive qualities in the rules which have been made (e.g. Bingham).

Bingham's eight principles for the rule of law:

- (1) The law must be accessible and so far as possible intelligible, clear and predictable;
- (2) Questions of legal right and liability should ordinarily be resolved by application of the law not the exercise of discretion;
- (3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- (4) Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
- (5) The law must afford adequate protection to fundamental human rights;
- (6) Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- (7) Adjudicative procedures provided by the state should be fair;
- (8) The rule of law requires compliance by the state with its obligations in international law as in national law.

II. The concept of the rule of law

- Thomas Paine 'in America THE LAW IS KING' (1776)
- Samuel Rutherford *Lex, Rex* (1644)
- John of Salisbury 'Between a tyrant and a prince there is this single or chief difference, that the latter obeys the law and rules the people by its dictates, accounting himself as but their servant.' (1159)

III. The rule of law distinguished from other societies

Remota itaque iustitia quid sunt regna nisi magna latrocinia? Quia et ipsa latrocinia quid sunt nisi parva regna? 'Justice being taken away, then, what are kingdoms but great robberies? For what are robberies themselves, but little kingdoms?' (Augustine, *City of God*)

Thought experiment: dystopias/ dynomias v the society governed by the rule of law

A. *The senseless order*

A 'senseless order' is a society in which those with power issue contradictory, impossible and arbitrary rules from moment to moment. **In the senseless order, it is impossible for subjects to exercise any real agency.**

B. *The robber or slave state*

After posing his rhetorical question, Augustine continues:

‘The band itself is made up of men; it is ruled by the authority of a prince, it is knit together by the pact of confederacy; the booty is divided by the law agreed on. If, by the admittance of abandoned men, this evil increases to such a degree that it holds places, fixes abodes, takes possession of cities, and subdues people, it assumes the more plainly the name of a kingdom, because the reality is now manifestly conferred on it, not by the removal of covetousness, but by the addition of impunity.’

According to Augustine, social life, even amongst a band of robbers, requires the adoption of a rule with regard to the internal division of the booty. Augustine warns, however, that all this may be pursued at the expense of those who are not part of the band.

Relations between members of the band of robbers are governed by rules; their victims are vulnerable to violence and exploitation. Precisely this situation exists where there is a regime which permits chattel-slavery. Like outlaws, they are treated as objects not subjects.

C. *The managerial order*

Law is not essential to the managerial order such as a factory or a concentration camp.

It is in the manager’s interests to impose rules with which the subjects can comply. The manager has good reasons to comply with most of Fuller’s eight principles of the rule of law.

The big difference between a managerial order and a legal system is that a manager has no obligation to follow the rules which he himself has set.

It is the fact that the rules are understood as *binding* both on the subject and on the ruler which is the distinguishing mark of the *legal* system.

D. *The legal system*

‘The thing about law is that it must apply to the king as well as the subjects. Even if ultimately the rules don't apply to everybody, everybody must act as if they do and must obey them, whether their obedience is actually built in or they are choosing to obey them.’
(Terry Pratchett)

The rule of law *binds*, because both rulers and subjects act voluntarily in accordance with the law or, when that fails, because there are effective mechanisms which enforce the law.

Because the rule of law binds:

- the rule of law protects subjects from violence by identifying the circumstances when force may be used against them by the rulers and by other subjects.
- the rule of law enables subjects to act as agents and to pursue their own purposes because they know how other subjects and the rulers are expected to behave.

Therefore, the rule of law ‘secures a certain quality of existence for those who live within it’. This security may be compatible, with many kinds of iniquity.

The rule of law exists to the extent that legal rules are binding. This extent can be measured.

The reality for half a billion people today is that they do not enjoy the benefits of the rule of law (Haugen and Boutros, *The Locust Effect*).

IV. The rule of law as the reflection of God's law-like nature

God is, in a proper and unique sense, a law unto God-self. The Christian God is not like the Greek gods, that God is not capricious but faithful and constant. At *ST I-II.93.4-6*, Aquinas presents his argument that God and the eternal law are identical in trinitarian terms.

- The Genesis accounts of a rationally ordered creation rule out the possibility of conceiving of God's rule as a senseless order devoid of discernable purposes.
- The Israelites were slaves in Egypt, exploited and without protection against violence. In contrast, the Old Testament declares the Lord is King. God has given Israel a law and has bound God-self, through a covenant with God's people, to act for their good.
- God's governance of human beings is not a managerial order in which God's laws are issued for God's benefit without regard for what is good for human beings.

Whereas for Aquinas, God is bound to act lawfully *in se*; for most Calvinists God has bound God-self by covenant to act lawfully.

Christian theology should affirm that God is a law unto God-self, that God has bound God-self to humankind through covenants, that God has exercised God's rule over creation through the revelation of God's law in creation and through the Scriptures, culminating in Jesus Christ who is both the Law and the law-giver in person.

V. The relationship between the rule of law and justice

The purpose of the rule of law is to bind rulers and subjects.

In order to secure voluntary obedience, it is in rulers' interests to give an account of why the rules are binding on their subjects. Thus the rule of law exposes rulers to the critique that the account offered is misplaced, hypocritical or just plain false.

- Because the rule of law enables us to identify the rules which govern a society, and places rulers under an imperative to claim that those rules are binding because they are just, the rule of law facilitates a conversation about whether the rules are in fact just.
- The rule of law provides at least an official statement of the circumstances in which violence and injustice will occur.
- For Christian natural law theory, the rule of law is the thick conception of adopting rules which are lawful, i.e. which are sufficiently justified to be binding on the conscience of those who are subject to them (Aquinas, *ST I-II.96.4*)

VI. Conclusions

A sober acknowledgement of the limits of law is inherent to Christianity's DNA.

The rule of law is under threat wherever there are not adequate mechanisms of law enforcement and where the will to act lawfully is lacking. Where mechanisms for holding those with power to account are lacking, the rule of law is under threat.

There is an urgent need to deliver the benefits of the rule of the law to half a billion people. An improvement of one standard deviation in the rule of law produces a three-fold increase in incomes and a two-thirds reduction in infant mortality (World Bank Institute).

It is a belief in a God of justice, who is law-like in nature, which provides the strongest resources for a critique of the injustices committed both within and without law. Moreover, knowing that we are accountable to such a God gives us the clearest incentive to regard ourselves as bound by what is morally right, whether or not there is a law against an unjust action and whether or not any such law is likely to be enforced against us.